EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Bush	**v**	**Cordant Recruitment Ltd**

JUDGMENT ON STRIKE OUT APPLICATION

1. The claims for sex discrimination, gender reassignment discrimination, age discrimination and for detriment by reason of protected disclosures under s47 1 B ERA 1996 are struck out under Rule 37 of the ET Rules of Procedure as having no reasonable prospect of success.

2. The claimant sought to add a claim for race discrimination and/or to amend his claim to substantially widen any such claims. Permission was not granted to allow him to amend his claim to add further particulars of these claims as he requested and/or such claims were struck out as having no reasonable prospect of success.

REASONS FOR STRIKE OUT ORDER

Relevant legal provisions Striking out contentions/deposit orders

1. The Respondent applies for the Claimant's claims to be struck out on the basis that they have no reasonable prospects of success pursuant to rule 37 Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013.

2. Alternatively, the Respondent applies for a deposit to be ordered in respect of each claim as each claim as little reasonable prospect of success pursuant to Rule 39 Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013.

3. In relation to strike out, it is appreciated that Tribunals should be cautious to strike out a fact sensitive discrimination claim (**Anyanwu v South Bank Student Union [2001] ICR 391**) and that if the Claimant has more than a fanciful prospect of succeeding then the claim should be allowed to proceed

(**A v B [2011] ICR D9).** However, this is not to rule out the power, but rather to appreciate that it should be used with care.

4. In relation to a deposit order, the threshold is significantly lower. The test of "little reasonable prospect of success" is not as rigorous as the strike out test of "no reasonable prospect of success" and the Tribunal has a greater leeway to consider whether or not to order a deposit. However, there must be a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response (**Jansen Van Rensburg v Royal London Borough of Kingston upon Thames UKEAT/0096/07).**

Harassment

5. Harassment related to (for example) sex is defined by s.26 EqA which materially provides as follows:

(1) 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.

…

(5) In deciding whether conduct has the effect referred to in subsection (1)(b), 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.

(6) The relevant protected characteristics are—

…

Sex

...

6. Harassment related to race has a similar meaning. Harassment is rendered unlawful by s.40 EqA.

7. Unwanted conduct means conduct unwanted by *the employee*: see **Thomas Sanderson Blinds Ltd v English** UKEAT/0316/10.

8. There is no requirement that harassment be 'on the ground of' or 'because of' the protected characteristic: see **R (EOC) v Secretary of State for Trade and Industry** [2007] ICR 1234.

9. I also note the *EHRC Code of Practice of Employment (2011)* at paras 7.9 to 7.13. The expression 'related to' in s.26 (1) has a broad meaning (para

7.9) and includes cases where there is 'any connection with a protected characteristic' (para 7.10(b) – 7.11).

10. The Employment Tribunal must consider both whether the putative victim of the harassment perceives themselves to have suffered the effect in question *and* whether it was reasonable for the conduct to be regarded as having had that effect. The Tribunal should also consider all the circumstances of the case: see **Pemberton v Inwood** [2018] IRLR 542, CA.

11. It is clear that the objective element of the test requires the Tribunal to determine whether it was reasonable for the conduct to have that effect *on that particular Claimant*. In **Reed and anor v Stedman** [1999] IRLR 299 the EAT stated at [28]:

> *"…it is for each individual to determine what they find unwelcome or offensive, there may be cases where there is a gap between what the tribunal would regard as acceptable and what the individual in question was prepared to tolerate. It does not follow that because the tribunal would not have regarded the acts complained of as unacceptable, the complaint must be dismissed.*

Direct Discrimination (sex and/or race)

12. Section 13 EqA 2010 defines direct discrimination in the following terms:

> *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

13. Direct discrimination in employment is rendered unlawful by s.39 EqA, which states as follows:

> *"(2) An employer (A) must not discriminate against an employee of A's (B)—*
>
> *(a) as to B's terms of employment;*
>
> *(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
>
> *(c) by dismissing B;*
>
> *(d) by subjecting B to any other detriment."*

14. An actual or hypothetical comparator will be required in discrimination claims. The comparator must not share the protected characteristic, but the circumstances of the comparator must be the same as or not materially different from the Claimant.

15. The test to determine whether less favourable treatment is "because of" the protected characteristic(s) (in this case sex and race/nationality) is not a simple "but for test". The House of Lords said, in **Nagarajan v London Regional Transport** [1999] ICR 877 that the protected characteristic must only have a "significant influence on the outcome" for discrimination to be

made out. Similarly, in **O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor** [1997] ICR 33, the EAT held that the protected characteristic need not be the main reason for treatment, provided it is an "effective cause".

16. The word "detriment" has been construed broadly by Courts and Tribunals. In the leading case of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337, the House of Lords held that it is only necessary for the Claimant to show some disadvantage. He or she need not show any material physical or economic consequence that was materially to his or her detriment.

17. It is for the Tribunal to objectively determine, having considered the evidence whether treatment is "less favourable". While the Claimant's perception is, strictly speaking, irrelevant, the Claimant's subjective perception of her treatment is likely to inform the Tribunal's conclusion as to whether, objectively, the impugned treatment was less favourable.

Burden of proof in discrimination claims

18. Burden of proof provisions in EqA Claims are set out in s.136(1)-(3) EqA:

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

19. In **Igen v Wong** [2005] ICR 931 the Court of Appeal provided the following guidance which, although it refers to the Sex Discrimination Act 1975, applies equally to the EqA:

> *"(1) Pursuant to section 63A of the 1975 Act, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These are referred to below as "such facts".*
>
> *(2) If the claimant does not prove such facts he or she will fail.*
>
> *(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the*

discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) *In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*

(5) *It is important to note the word "could" in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*

(6) *In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*

(7) *These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.*

(8) *Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*

(9) *Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.*

(10) *It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.*

(11) *To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.*

(12) *That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.*

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

20. In **Madarassy v Nomura International plc** [2007] IRLR 246 Mummery LJ held at [57] that "could conclude" [The EqA uses the words "could decide", but the meaning is the same] meant:

> *[…] that "a reasonable tribunal could properly conclude" from all the evidence before it.*

21. Mummery LJ went on to say:

> *"This would include evidence adduced by the complainant in support of the allegations of [in that case] sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment."*

22. A mere difference of treatment is not enough to shift the burden of proof, **something more is required**: **Madarassy** per Mummery LJ at para [56]:

> *"The bare facts of a difference in status and a difference in treatment only indicate 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.*

23. However, as Sedley LJ observed in **Deman v Commission for Equality and Human Rights** [2010] EWCA Civ 1279 at para [19],

> *"the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by nonresponse, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

24. The claimant is not required to adduce *positive* evidence that a difference in treatment was on the ground of disability in order to establish a *prima facie* case of discrimination and shift the burden of proof. **See Network Rail**

Infrastructure Limited v Griffiths-Henry [2006] IRLR 865 at §18 per Elias P:

> *"Ms Cunningham says that in order to establish a prima facie case there must always be some positive evidence that the difference in treatment is race or sex, as the case may be. That seems to us to put the hurdle too high. … Provided tribunals adopt a realistic and fair analysis of the employer's explanation at the second stage, we see no justification for requiring positive evidence of discrimination at the first stage."*

25. The Court of Appeal in **Anya v University of Oxford** [2001] ICR 847 (at §§ 2, 9 and 11) held that the tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

26. Those primary facts may include not only the acts which form the subject matter of the complaint, but also other acts alleged by the applicant to constitute evidence pointing to a prohibited ground for the alleged discriminatory act or decision. The function of the tribunal is twofold: first, to establish what the facts were on the various incidents alleged by the Claimant; and, secondly, to decide whether the tribunal might legitimately infer from all those facts, as well as from all the other circumstances of the case, that there was a prohibited ground for the acts of discrimination complained of. In order to give effect to the legislation, the Tribunal should consider indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by unlawful factors.

Victimisation

27. Victimisation is defined in s.27 EqA in the following terms:

> *"(1) 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.*
>
> *(2) Each of the following is a protected act—*
>
> *(a) bringing proceedings under this Act;*
>
> *(b) giving evidence or information in connection with proceedings under this Act;*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;"*

28. Victimisation in employment rendered unlawful by s.39(4) EqA.

29. There are, in essence, three questions for a Tribunal to determine in a victimisation claim:

    a. Did the alleged victimisation arise in any of the prohibited circumstances covered by the Equality Act 2010.

b. If so, did the employer subject the Claimant to a detriment?
c. If so, was the claimant subjected to that detriment because he or she had done a protected act, or because the employer believed that he or she had done, or might do, a protected act?

30. In determining whether the detriment was "because" of the protected act, the question for the Tribunal is not one of "but for" causation. The Tribunal must have regard to what, consciously or subconsciously motivated the employer (see eg. **Peninsula Business Service Ltd v Baker** [2017] ICR 714, EAT).

S471B ERA 1996

What is a qualifying disclosure?

31. A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the types of wrongdoing or failure listed in section 43B(1)(a)-(f) of the ERA 1996.

32. Demonstrating that the employee has made a qualifying disclosure is the first step in establishing protection under the whistleblowing legislation.

Has there been a disclosure of information?

33. A disclosure of information will amount to a "disclosure" whether it is made in writing or verbally.

34. A disclosure may concern new information, in the sense that it involves telling a person something of which they were previously unaware, or it can involve drawing a person's attention to a matter of which they are already aware (section 43L(3), *ERA 1996*).

35. There must be a disclosure of information. In ***Cavendish Munro Professional Risks Management Ltd v Geduld UKEAT/0195/09*,** the EAT held that to be protected a disclosure must involve information, and not simply voice a concern or raise an allegation.

36. In **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436**, the Court of Appeal rejected the suggestion that, in *Cavendish*, the EAT had identified the categories of "information" and "allegation" as mutually exclusive. Sometimes a statement that could be characterised as an allegation would also constitute information and amount to a qualifying disclosure. However, not every statement involving an allegation would do so. It would depend on whether it had sufficient factual content and was sufficiently specific.

Subject matter of disclosure

37. A qualifying disclosure must be a disclosure of information which, in the reasonable belief of the worker making it, tends to show that one or more of the six specified types of malpractice or failure has taken place, is taking place or is likely to take place (section 43B(1), ERA 1996).

    (a) that a criminal offence has been committed, is being committed or is likely to be committed,

    (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

    (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

    (d) that the health or safety of any individual has been, is being or is likely to be endangered,

    (e) that the environment has been, is being or is likely to be damaged, or

    (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

Reasonable belief about wrongdoing

38. For a disclosure to be a qualifying disclosure, the worker must have a reasonable belief that the information disclosed tends to show one of the relevant failures (*section 43B(1), ERA 1996*).

39. A worker does not have to prove that the facts or allegations disclosed are true, or that they are capable in law of amounting to one of the categories of wrongdoing listed in the legislation.

40. As long as the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is, in the tribunal's view, objectively reasonable, it does not matter that the belief subsequently turns out to be wrong, or that the facts alleged would not amount in law to the relevant failure (***Babula v Waltham Forest College [2007] IRLR 346 (CA)*).**

Reasonable belief in the public interest

41. A disclosure can only be a qualifying disclosure if the worker reasonably believes that the disclosure is "in the public interest" (section 43B(1), ERA 1996).

42. The public interest test was considered by the Court of Appeal in ***Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979*.** The case concerned disclosures by a senior manager at Chestertons, an estate agent, about manipulation of the company's accounts, which he believed had had an adverse effect on commission income for over 100 senior managers, including himself. Upholding an

employment tribunal's decision that the disclosure was a qualifying disclosure, the Court gave the following guidance:

43. Following the logic set out in *Babula*, the tribunal has to determine:

- whether the worker subjectively believed at the time that the disclosure was in the public interest; and
- if so, whether that belief was objectively reasonable.
- There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the tribunal should not substitute its own view.
- In assessing the reasonableness of the worker's belief, the tribunal is not restricted to the reasons that were in the mind of the worker at the time, although the lack of any credible reason might cast doubt on whether the belief was genuine. Since reasonableness is judged objectively, it is open to a tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.
- Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "in the belief…" which is not same as "motivated by the belief…".
- There are no "absolute rules" about what it is reasonable to view as being in the public interest.

44. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter in which the worker has a personal interest), there may be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.

45. The question is one to be answered on a consideration of all the circumstances of the particular case, but the four factors below may be a useful tool:

- The numbers in the group whose interests the disclosure served. Tribunals should be cautious about finding the public interest test satisfied purely based on the number of affected employees, because of the "broad intent" of the legislators was that private workplace disputes should not attract whistleblowing protection.
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. Disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people.

- The nature of the alleged wrongdoing disclosed. Disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people.
- The identity of the alleged wrongdoer. The larger or more prominent the wrongdoer (in terms of the size of its relevant community, that is, its staff, suppliers and clients), the more obviously a disclosure about its activities should engage the public interest.

The claims in this case

46. It was difficult for me to understand the precise nature of the legal claims being pursued from the vague and unclear Particulars of Claim in the ET1 Form. But I have sought to do so as best I could.

47. By letter dated 30th May 2020 Employment Judge Heal suggested a number of potential headings for claims which were used as the basis for a Request for Information.

48. Such a Request was sent by email on the 4th June 2020. The Claimant replied on the 7th June 2020, but the response provided little additional clarification.

49. As a result of the lack of clarity of the case put, the claimant was given numerous opportunities at the hearing to explain and further particularise each of his claims, with specific questions on each part of the possible claim.

50. The claimant having provided some very limited further information said he had nothing further to add on follow up questioning.

51. I therefore must decide the application on the basis of how the claimant had put his case either in the pleadings or orally.

52. I took into account a bundle and a skeleton argument by the respondent which had been sent on three separate occasions to the claimant and which was also read out orally at the hearing.

Facts

53. The following appear to be facts that are not in dispute.

54. The Respondent is an employment agency employing people on a “Flex Colleague” contract of Employment whereby a minimum of 336 hours of work per year are guaranteed. The demand for work is dependent on the needs of its clients. Amazon, a key client, routinely increases its headcount in the run up to Black Friday and Christmas with reduced demand immediately thereafter.

55. On the 20th December 2019 Amazon emailed the Respondent instructions to reduce headcount across the UK. The number released from the Respondent

and another agency used by Amazon totalled 1,393. The Claimant was number 831 on that list.

56. At the end of December 2019, the Respondent had 719 employees working at work location EUK5.

57. The Claimant's assignment ended on the 2nd January 2021.

58. By the end of January 2021 the number had reduced to 90 and by the end of February 2021 only 23 employees were working at EUK5. This was a reduction of 97%.

Conclusions on the claims-reasons for strike out orders

Claim regarding the contention that some co-workers could not speak English properly.

The claimant was unable to explain how this claim related or possibly related to any protected characteristic or any indirect discrimination claim. The ability of a person to speak English or otherwise is not a protected characteristic.

59. A cogent claim for discrimination must be based on less favourable treatment to the claimant and/or the application of a PCP which causes particular disadvantage to the claimant.

60. Mr Bush was repeatedly unable to explain or particularise how his perception of the quality of English spoken by his co-workers could form the basis of a claim by him.

61. I note that in the email dated 4th June 2020 the Claimant was asked questions at Paragraph 2 in relation to this allegation, one of which was, "Please explain why the co-workers not speaking English 'properly' caused you any distress or detriment?'". The reply from the Claimant was, "Please check your language and present to the Court of the law what kind of paperwork do you have to stay in a Court of the law with your less attitude (sic)". This did not advance the matter any further.

62. It appeared to be the case that the claimant wished to be more favourably treated because he could speak better English than some other staff. There was no less favourable treatment relied upon or any treatment relating to a protected characteristic. He does not identify a relevant comparator. He does not explain how a protected characteristic was relevant. He did nothing to show a difference in treatment and "something more" or indeed anything to support a claim for discrimination here.

63. I reminded myself of the care needed when striking out claims at this stage. (Indeed, I did so with regard to each claim).

64. However, for all of these reasons it is clear to me that this claim has no reasonable prospect of success and should be struck out.

Failure to train the Claimant.

65. The Respondent denies that the Claimant did not receive training to which he was entitled and says there was no detrimental treatment. In fact, the claimant appeared to be saying he was trained too much not too little.

66. He was unable to say how this was detrimental treatment "because of" any protected characteristic.

67. It appears to be accepted that the Claimant completed on day one a Health and Safety Training and thereafter received process training and module training. He also undertook 12 process training courses and 56 module training courses.

68. The Claimant declined to undertake other training offered to him because it was his opinion that the trainer did not speak a good enough standard of English and that he found the training 'humiliating'.

69. In the email of 4th June 2020, the Claimant was asked, "What training do you believe you should have received from the Respondent?". The Claimant replied, "In my opinion [it] is not necessary [for] any training to [w]ork in that Warehouse, this trainnigs is only to justify the presen[c]e of that phathetics trainners girl from that warehouse". (sic)

70. This reply did not advance the discrimination claim any further.

71. It is difficult to see how the claimant can complain about being treated in a discriminatory way in relation to training when he was provided with the same training as everyone else and thereafter refused to participate in the training as he objected to the person delivering the said training and/or he believed that he did not require the training.

72. For all of these reasons this claim has no reasonable prospect of success and should be struck out.

Co-Workers Conducted Obscene Conversations in Romanian

73. The Claimant made a complaint about this issue on, or around, the 20th November 2019. It appeared to relate to two Romanian females speaking about having noisy sex with a male. A Shift Manager, Filipa Alvaro, accompanied the Claimant onto the shopfloor so he could identify the persons alleged to have made the comments. Other than saying that the person who had made the comments was "a Picker", he appeared to be unable to identify any person.

74. Subsequently the Claimant identified one individual (Doinita Cheriou) and the Respondent interviewed her. The employee was shocked by the allegation and denied it. Further, Ms Cheriou works as a stower and not a

picker. The Respondent was unable to proceed further without any positive identification by the Claimant.

75. In the email of 4th June 2020, the Claimant was asked to identify who the workers were, to summarise the content of the conversation and explain why it caused him distress. The Claimant was, it seems to be accepted, unable to provide any such information.

76. The Tribunal has to be satisfied that it was reasonable for the claimant to have felt that his dignity was violated or that he felt that it created an intimidating, hostile, degrading, humiliating or offensive environment for him. It has to be objectively reasonable for the alleged conduct to have the effect (**Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT**). The claimant was unable to explain any such effect.

77. Indeed, during the hearing he made no mention of sex discrimination but instead argued it was an act of race discrimination by two Romanian employees against him as a person of Romanian origin or nationality. This race discrimination claim had not been pleaded, appeared to be out of time and was in direct conflict with the original case that he suffered sex discrimination or harassment in this respect.

78. There was no less favourable treatment relied upon or any treatment referred to relating to the protected characteristic of sex or any cogent harassment claim. He did not identify a relevant comparator. He did not explain how any protected characteristic was relevant save his comment about race discrimination.

79. He did nothing to show a difference in treatment on ground of race or “something more” to support a claim or indeed anything to support a claim for discrimination here. He also did not provide any basis to support an application to amend his claim to change this claim from gender discrimination to race or nationality or how he would address the time limit problems from any such late application.

80. The claimant abandoned and withdrew any gender discrimination or harassment case at the hearing (and those claims would have been struck out had they not been withdrawn as having no reasonable prospect of success).

81. Further, there is no reasonable prospect of the Claimant establishing a claim for race discrimination or under s. 26 of the Act or of succeeding with an application to amend.

82. Any claim in respect of this matter has no reasonable prospect of success and/or an application to amend is not granted and therefore any such claim that is pursued is struck out.

83. The claimant alleges that the Respondent provided a 'prostitution network' to Amazon employees and the women then received promotion opportunities (i.e. the 'blue badge') and this was direct sex discrimination.

84. In the request for Additional Information dated 4th June 2021 the Claimant was asked to provide details to substantiate this allegation which, if true, could involve unlawful and/or criminal activity.

85. The Claimant replied, "I talking about a head office PMP Recruitment, who choose very carefull the girls, only very good looking and enough houngry to accept to make sex with team leaders…". (sic)

86. The respondent asserted out that the breakdown of Male: Female hires via the Respondent into Amazon (excluding those for whom there is no record of gender) for the period 2017 - 2020 was: Male 64% - Female 36%.

87. The breakdown of Male Female hires via the Respondent into Amazon for the period 1/10/2019 to 1/3/2020 was: Male 66% - Female 33%.

88. The total number of hires from the Respondent to Amazon at EUK5 ("the blue badge"), for both sexes, in the years 2018, 2019 and 2020 is zero.

89. There was also compelling evidence of a major contraction in the number of persons hired with numbers dropping by 97%. That was a huge drop and was consistent with the fact that no blue badges (promotions) had been provided in the relevant period.

90. The Claimant has not disputed this evidence or identified any comparators and the respondent made the unchallenged submission that there are none as no-one was promoted during his period.

91. There was no less favourable treatment relied upon or any treatment relating to a protected characteristic of gender.

92. The claimant did nothing to show a difference in treatment and "something more" or indeed anything to support a claim for discrimination here.

93. This allegation has no reasonable prospect of success and is struck out.

Gender reassignment discrimination claim

94. The Claimant accepted at the hearing that he had not undergone, was not undergoing, or was not proposing to undergo a process (or part of one) of reassigning his sex to be protected from discrimination under s. 7 Equality Act 2010.

95. The Claimant is not within the ambit of establishing that he has the protected characteristic of gender reassignment and so he withdrew this claim at the hearing.

96. This is unsurprising as that claim had no reasonable prospect of success and would have been struck out had it not been withdrawn.

S47 1B ERA 1996 claim

97. The Claimant says he made complaints about some, or all, of the above to the Respondent as a result of which he was 'fired'

98. As the claimant remains an employee, and it was his assignment that was terminated, this is a claim under s. 47B (1) Employment Rights Act 1996.

99. It is denied that the Claimant made such disclosures to the Respondent and the Claimant has not provided any particulars as to when he made such disclosures and what words he used. This is despite repeated opportunities to do so, including at the hearing.

100. It appears clear to me that the claim simply does not get off the ground at all. There is no claim available without the claimant pointing to the making of some potential protected disclosures.

101. Mr Bush was repeatedly asked to address this but was unable to explain how he might persuade the Tribunal that he had made any protected disclosures or at the time of making the disclosures he had a reasonable belief that making a protected disclosure was in the public interest.

102. It is still possible for disclosures relating to the whistleblowers own contract to be in the public interest, but only if the nature, numbers and identity of the wrongdoer affect a sufficient number of the public (**Chesterton Global v Nurmohamed [2015] ICR 920).** In this case, in addition to the above, the matters complained solely appeared to relate to the claimant and did not appear to engage the public interest.

103. Finally, the respondent says that any such alleged protected disclosures quite plainly did not cause any detriment by way of the ending of his assignment. Noting that there was a 97% reduction in employees it appeared likely to be shown that the sole or operative cause of the ending of the assignment was the huge and admitted reduction in demand from the client.

104. In these circumstances, this claim has no reasonable prospect of success and is struck out.

Discrimination on the Grounds of Race

105. The Claimant ticked the box "race" in the ET1 Form but has not provided any particulars in support of that allegation and has not specified any detriment.

106. If the Claimant is saying that his race was a factor in the decision to end his Assignment, or in him not being offered a 'blue badge', the Respondent argues it has already provided a wholly non-discriminatory explanation.

107. Nothing more was put forward by the Claimant to support this allegation.

108. In so far as the claimant sought to amend his claim about offensive comments by two Romanian staff to a race claim against him (as a Romanian national), permission is not granted to amend the claim in this way (and in any event this claim has no reasonable prospect of success for the reasons explained above).

Discrimination on the Grounds of Age

109. Section 5 of the Equality Act 2010 protects workers of a particular age or age group from discrimination. It is, firstly, unclear which age group the claimant was complaining about. Eventually, he commented that he was older than many of the staff and he was in his 40's.

110. The claimant did not explain how any of the treatment complained of was alleged to be because of his age/age group.

111. There was no less favourable treatment relied upon or any treatment relating to a protected characteristic. He does not identify a relevant comparator. He does not explain how a protected characteristic of age was relevant.

112. The claimant repeatedly said that this was "his opinion" and this was sufficient and this was what he relied upon to found his claim.

113. However, he did nothing to show a difference in treatment or "something more" or indeed anything to support a claim for discrimination here. In the absence of 'something more' linking any less favourable treatment complained of (there appears to be no cogent basis for establishing less favourable treatment) to this protected characteristic, his claim has no prospects of success.

114. For these reasons, the claim in regard to age discrimination has no reasonable prospect of success and is struck out.

Dismissal

115. Finally, the claimant appears to seek to argue discrimination in the ending of his assignment.

116. Noting that there was a 97% reduction in employees it appeared the sole or operative cause of the ending of the assignment was the huge and admitted reduction in demand from the client. There therefore appeared to be compelling non-discriminatory reasons for the end of the assignment.

117. The Claimant has not disputed this evidence or identified any comparators.

118. There was no less favourable treatment relied upon or any treatment relating to a protected characteristic. The claimant did nothing to show a difference in treatment and “something more” or indeed anything to support a claim for discrimination here.

119. In these circumstances, this claim has no reasonable prospect of success and is also struck out.

NOTE: The tribunal apologises for the delay in the promulgation of these reasons due to significant typing delays.

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Employment Judge Daniels

27 September 2021

ORDER SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE