Case No: 3327657/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr Cavan Leed Medlock**

Respondent: **Koru Kids Ltd**

Heard at: Watford via CVP

On: 4 October 2021

Before: Employment Judge Bartlett

Appearances

For the Claimant: none
For the Respondents: Ms H Slack, of Counsel

JUDGMENT

The claim is struck out in its entirety under rule 47 of Schedule 1 the Employment Tribunal Rules (Constitution and Rules of Procedure) Regulations 2013 as amended.

REASONS

Background

1. The claimant submitted a claim form on 17 December 2019 and the respondent submitted its response on 2 March 2020.

2. The entirety of the claimant's claim arose from an application he made for a nanny job advertised on Indeed.co.uk by the respondent shortly before 9 October 2019 and a brief email exchange between the claimant and the respondent between 9 and 15 October 2019.

3. By an order dated 15 April 2020 Judge Anstis made an Unless Order dismissing the entire claim under initial consideration rule 27(1).

4. The 15 April 2020 order was not sent to the parties until 20 May 2020 which gave the claimant only two days to make his representations in response to it. The claimant responded on 29 May 2020 which was referred to Judge Anstis on 23 August 2020.

5. In an order dated 2 September 2020 Judge Anstis retrospectively varied the time limit in the order dated 15 April 2020 and set out the following:

> The essence of the claimant's response is that in the light of the terms of the advertisement the reason (or one of the reasons) he was given for the failure of his application – lack of experience – cannot be true. I accept (without commenting on whether it actually does so in this case) that in principle giving incorrect or contradictory reasons for refusing a job can in some cases give rise to an inference of discrimination and so the claimant has now made out a possible case, but the only reference he has made is to his sex. There is nothing in any of this that is to do with his age or gives rise to any claim for 'other payments'. The sex discrimination claim can proceed and will be listed for a further case management hearing but the other claims are dismissed as set out above under the terms of the rule 27 notice. The claimant should, however, carefully consider whether he wishes to continue with his sex discrimination case in the light of the points made by the respondent in their defence.

6. On 5 January 2020 respondent made an application for strikeout or deposit order in relation to the claim (now limited to sex discrimination only) and this is what led to the open preliminary hearing on 4 October 2021.

The Hearing

7. The preliminary hearing started at 10:33. This was a delay to the scheduled start time of 10am because of problems my clerk had with the CVP room. Whilst these problems were being resolved the CVP link was resent via email to the parties because there had been no attempt by either party to join the CVP hearing. The respondent connected to the CVP room shortly after the CVP link was sent to them but there was no connection by the claimant. Ms Slack said that the respondent had not received the CVP link until the communication from my clerk this morning. My clerk also tried to telephone the claimant but his telephone went straight to voicemail.

8. The respondent has been in communication with the claimant though the claimant has not been in communication with the Tribunal. The respondent provided the following information on the claimant's situation:

    a. the claimant has been charged with a number of offences which have been well publicised relating to terrorism and racially motivated offences which took place in October 2020;

    b. the claimant has not yet been tried;

    c. the claimant was transferred from prison to a secure mental hospital;

    d. the claimant's Doctor wrote a letter in which he said the claimant would attend the preliminary hearing scheduled for today.

9. In the circumstances I am not satisfied that the claimant was able to join the preliminary hearing if he had wished to do so. I am not satisfied that he received the CVP link and I am not satisfied that he was practically able to connect to the CVP hearing. My understanding is that the ability of patients at secure mental hospitals to participate in court or tribunal hearings via video link depends very much on the circumstances of that particular institution. As I have no information about the institution in which the claimant resides I cannot be satisfied that he was able to connect to the CVP hearing.

10. Due to the particular circumstances of the case which are that this is the second preliminary hearing concerning a strike out application, the claimant's claim arises from a click through Internet job advert application, the claimant's indefinite detention and that the respondent has incurred the costs of attending this hearing, I decided to hear Ms Slack's representations about how to go forward.

11. Ms Slack made two suggestions:

    a. I make an order to stay the case indefinitley because the claimant is detained indefinitely. It is unclear when he will be released and it seems unlikely that he will be released in the short to medium term. In these circumstances it could be argued that the claim could not be determined for some years. Further, given that the claimant is detained in a secure mental hospital there are serious issues about the claimant's capacity; or

    b. the respondent's application to strike out is considered and decided today. The claimant is informed of the decision in writing and he is given the opportunity to make written submissions about reconsideration or applying for a new hearing which he must attend.

12. I decided to hear the respondent's application for strike out of the claimant's only outstanding claim which is sex discrimination. I stated that I would reserve my decision and decide what orders I should make whether that was a stay or some other order.

13. Ms Slack stated that Ms Ingram, who provided the witness statement in the preliminary bundle, is now on maternity leave and unable to attend the hearing. In her place the respondent called Ms Romilly Beddows as a witness.

14. This was a preliminary hearing scheduled to decide the respondent's application for a strike out order. The basis of the respondent's application was that the issue could be determined on a small number of documents and there was no or little need for cross-examination. In the circumstances, I decided that cross-examination was not necessary or appropriate but I requested that Ms Beddows adopt the witness statement given that it was not written or signed in her name.

15. Ms Beddows adopted and confirmed the truth of the witness statement in the preliminary bundle which was in the name of Ms Ingram.

The respondent's submissions on its application for strike out

16. The respondent's application for strike out had three grounds:

    a. the respondent did not know and could not know the claimant's sex;

        i. this point alone is grounds for strike out of the claimant's claim;

        ii. the application form does not ask for an applicant's sex;

        iii. the only way of inferring the applicant's sex was through their name. The claimant's first and middle names are used for both sexes;

        iv. the claimant made two job applications to the respondent. After his first application was rejected there was a short email exchange between the claimant and Ms Beddows in which the claimant disclosed his sex. The respondent's position is that there was no material difference between the claimant's first and second applications and the reasons for rejecting both applications are the same and are wholly unconnected to sex. The individual who rejected the second application and no sight of the correspondence between the claimant and Ms Beddows.There is no reason to infer that the second application was rejected for a sexually discriminatory reason or a reason different to the first application.

    b. the respondent does work with male nannies;

        i. Ms Beddows' evidence is that 8% of the respondent's nannies are male. Witness evidence was required on this because the respondent does not have this information set out in another document which it is able to present to the tribunal as it required the respondent to search its records;

    c. it is not possible to draw an inference of sex discrimination from the alleged facts:

        i. the claimant made representations to Judge Anstis prior to his judgement on 2 September 2020 concerning the previous application for strikeout. His claim was put as follows

        "*I have many screenshots of the job advert from November 2019 to March 2020 and they clearly state 'no experience required'.* [The respondent has] *continually moved the goal post in emails making excuses for not employing me and would not give me a valid reason for denying me employment.*"

        ii. The claimant is incorrect in stating that the advert said no experience was required. The short title of the advert stated "*Jobs for older* people - *after-school childcare - no experience - no admin*". However the body of the advert stated the following:

Who should apply:

We want people in London who have experience raising their own children or grandchildren. The role is perfect if you're retired, semi-retired or just have time to spare. No professional experience needed.

We welcome applications from people aged 40 and over. Even better if you have experience working in a school, nursery or as a childminder or nanny, but this is not required.

We have families looking for nannies to start both immediately and in September, so even if you're not available to start right away we would still welcome your application.

iii. the body of the advert makes clear that no professional experience was needed but experience as parents or grandparents was required. The headline title of the advert stating "no experience" was an abbreviation of no professional experience and can only be interpreted this way after the advert as a whole is considered.

17. I asked Ms Slack what the respondent's position was in relation to the email exchange between the respondent and the claimant and in particular an email of 9 October 2019 at 10:06 which states "*Unfortunately we cannot accept your application as we are looking for after-school nannies who can make a long-term commitment to a family.*" This is different to the later reason that was given which was lack of experience. Ms Slack's response was that the claimant's two applications were extremely brief. The respondent frequently receives very detailed applications setting out how passionate people are about caring for children. The claimant's application was very different from this and there were in fact many and varied reasons why the respondent could and would have rejected the claimant's application. The first reason given was lack of long-term commitment and the later reason given which was lack of experience was a valid reason too but others could have been given. None of them are discriminatory.

Decision

18. I have decided to dismiss the claim in its entirety under rule 47 of Schedule 1 the Employment Tribunal Rules (Constitution and Rules of Procedure) Regulations 2013 as amended.

19. Rule 47 sets out the following:

"Non-attendance

47. If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."

20. I have set out the full text of rule 47 above. I consider that rule 47 requires that I consider all the circumstances of the case and application.

21. It is evident that neither the claimant nor a representative for him attended the hearing.

22. My reasons for dismissing the claim in its entirety are as follows:

    a. the claimant's claim is weak:

        i. the claimant has no connection with the respondent except that he clicked through links in an online job advert and exchanged a small number of emails with the respondent;

        ii. the claimant's sex discrimination claim was allowed to proceed by Judge Anstis on the basis that the respondent had given potentially inconsistent reasons for rejecting his application;

        iii. I find that the claimant has no prospect of establishing that the claimant's sex played any role whatsoever in the respondent's decision to reject his applications:

            1. I have never heard the claimant's first name before and I would not know if it was a male or female name. It is not a common name. The claimant's first name can be used by males or females and there is nothing inherent about it which indicates he is a man. The claimant's middle name is again used by both male and females. There is no other information in the application from which the claimant's sex could be inferred. In these circumstances I find that the claimant has no prospect of establishing that the respondent was aware of the claimant sex until he disclosed it in the email exchange on 9 October 2019 which was after his application was rejected; and

            2. the preliminary hearing bundle contained the claimant's two applications to the respondent. In the sections "anything else" and "childcare experience details" the claimant provided very little information. In two boxes he provided one sentence and the other two boxes he provided a few words. I found compelling the respondent's submission that they would expect to receive and usually do receive from applicants' considerable amounts of information about how passionate people are about working with children. The claimant's application demonstrates a lack of effort in the recruitment process and discloses very little experience of looking after children. Parents are very concerned about who looks after their children and any nanny agency what want to recruit viable candidates. I find that the claimant's application disclosed numerous reasons why the respondent would reject the application. This is why the respondent first stated the claimant's limited availability and then his lack of experience as reasons for rejection of his application. These are not discriminatory. I do not accept that they are contradictory reasons: they are both applicable reasons. I do not accept that there is anything about

the claim that discloses any influence checked of discrimination;

b. the respondent would suffer prejudice by the claim continuing in the circumstances:

   i. the claimant is detained in a secure mental hospital. He was arrested but has not been tried for serious criminal offences. It is unlikely that the claimant will be released from some sort of detention for a period of years. In these circumstances, the claim cannot be reasonably pursued by the claimant;

   ii. it is possible to order a stay of the proceedings. I have considered whether to do this and declined to do so. This is because it is unclear for how long the claimant will be detained, it is unclear if the claimant has capacity to run the claim, further the respondent has a legitimate interest in resolution of the case rather than having a case in the background for an indefinite number of years;

c. though the claimant did not attend the CVP hearing and, as I have set out above, that may not have been a matter within his control, he was able to and did make representations to Judge Anstis prior to his Judgement of 2 September 2020. I have considered these representations in coming to my judgement today. The claimant will have the further opportunity to make representations by applying for a reconsideration of this judgement. In coming to a decision I have taken the claimant's claim at its highest and there is little that evidence from the claimant would have added to the issues that I needed to consider. Therefore I do not consider that the claimant was unduly prejudiced by his non-attendance at this hearing;

d. I have considered the overriding objective and make the following conclusions:

   i. a dismissal of the claim in its entirety is proportionate to the complexity and importance of the issues;

   ii. a stay would cause delay and expense and is not proportionate in all the circumstances;

   iii. it is fair and just to dismiss the claim.

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Employment Judge Bartlett

Date 5 October 2021

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JUDGMENT SENT TO THE PARTIES ON

20 October 2021

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FOR THE TRIBUNAL OFFICE