Case Number: 2201934/2021
2200596/2021

EMPLOYMENT TRIBUNALS

Claimant: Ms X And **Respondent:**
LBHF Family Support Services Ltd (R1)
Mr P Watts (R2)
London Borough of Hammersmith & Fulham (R3)

Heard by: **CVP** **On**: 7 October 2021

Before: Employment Judge Nicolle

Representation:

Claimant: Mr I Browne of counsel
1st Respondent: Mr Tidy, solicitor but in an observing capacity only.
2nd Respondent: did not appear and was not represented.
3rd Respondent: Mr D Gray-Jones of counsel.

Judgement at an Open Preliminary Hearing

The strike out application brought by the 3rd Respondent fails.

Oral reasons were given to the parties but the 3rd Respondent requested written reasons.

Reasons

The identity of the Claimant

1. The identity of the Claimant has been anonymized in accordance with an Order of the Tribunal made at the hearing on 7 October 2021 and in respect of which written reasons were promulgated on 15 October 2021.

The Hearing and the issues to be determined

2. This is an application brought by the 3rd Respondent for the striking out of certain elements of the claim.

3. 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.

4. 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.

5. The parties were able to hear what the Tribunal heard.

6. The participants were told that it is an offence to record the proceedings.

7. From a technical perspective, there were no difficulties.

8. There was an agreed bundle comprising of 170 pages.

9. The parties both made helpful submissions on the relevant law and the well-established principles as to when a strike out may be appropriate.

The strike out application

10. it is clear from the applicable case law that a strike out in claims involving allegations of discrimination is only appropriate in exceptional cases. The most well-known guidance being provided in Anyanwu v Southbank Student Union [2001) ICR 391 and in particular the judgment of Lord Steyn at paragraph 24 and Lord Hope at paragraph 37. It is not necessary to set out these familiar principles.

11. It is relevant to refer to the main principles from Mechkarov v Citibank NA [2016) ICR 1121 as to the potential circumstances where a strike out may be appropriate. In summary only in the clearest case should a discrimination claim be struck out. In circumstances where there are core issues of fact that turn on oral evidence they should not be decided without hearing oral evidence. A Claimant's case must ordinarily be taken at its highest. If a Claimant's case was conclusively disproved by or was totally and inexplicably inconsistent with undisputed contemporaneous documents it could be struck out. A Tribunal should not conduct an impromptu mini trial of oral evidence or resolve core disputed facts.

The individual elements of the claim in respect of which the 3rd Respondent's application is brought

Sexual harassment

12. In summary the Claimant says that she was subject to a serious sexual assault committed by the 2nd Respondent. She says that this took place in the course of her employment and therefore the 1st, and pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) the 3rd Respondent are therefore potentially vicariously liable for the alleged actions of the 2nd Respondent.

13. Mr Gray-Jones says that the claim has no reasonable prospect of success. His argument is primarily predicated on the alleged assault not occurring in the course of employment. He also makes the assertion that any sexual activity was consensual. He further argues that this is accepted by the Claimant in her Grounds of Claim. This is disputed by Mr Browne. The principal issue I will address is that regarding course of employment.

Course of employment

14. Mr Gray-Jones primarily relies on the decision of the Court of Appeal in Waters v Commission of Police of the Metropolis [1997] ICR 1073 to argue that this is an analogous situation. That case involved a police officer who had been subject to a serious sexual assault by another police officer at a station house. They were both off duty at the time and had gone for a walk after work. It was held that the assault was outside the course of employment.

15. I was, however, referred to a series of other cases by Mr Browne which he says are more analogous to the situation in the current case. These included the guidance in the well-known decision of the Court of Appeal in Jones v Tower Boot Co Ltd [1997) ICR 254 that the course of employment should not be narrowly defined.

16. He took me to passages within Chief Constable of Lincolnshire Police v Stubbs [1999) ICR 547 which involved sexual harassment taking place at a leaving party and an event in a pub attended by a number of police officers. It was held that they came within the course of employment albeit that the officers may not have actually been on duty at the time the acts took place.

17. I was also referred to Livesey v Parker Merchanting Ltd [2004] 1WL UK 130 which involved an incident at a work Christmas party and a car journey home which followed. The EAT did not interfere with a decision of a majority of a Tribunal that the incidents were within the course of employment. The Tribunal had not drawn a distinction between what took place at the Christmas party and what then took place in a private car after the party. The EAT did not interfere with this.

18. He also highlights that under section 109 (3) of the Equality Act 2010 it does not matter whether that thing is done with the employer's or principal's knowledge or approval.

19. Mr Gray-Jones argued that the alleged sexual assault did not take place at the lunch which took place on a Friday afternoon during working hours or in the taxi journey back to the 2nd Respondent's home. He disputes that even if it had been initially been a work related event it retained that characterisation after other employees, to include a Ms McGrath, had left the restaurant. He says that there is no evidence that work related matters were being discussed when only the Claimant and the 2nd Respondent remained in the restaurant and thereafter. He argues that any sexual activity, to include an alleged sexual assault, in the 2nd Respondent's private dwelling house, could not possibly have been in the course of employment. It is primarily on this basis that he says that there is no reasonable prospect of success. He says that the Claimant would face an insurmountable obstacle in demonstrating that the sexual activity was non-consensual, and/or that she was subject to threats or duress to perform sexual acts in the context of a possible redundancy situation.

20. Mr Browne argues that the matters were clearly within the course of employment. The chain of events started at what was self-evidently a work-related lunch.

My conclusion

21. Having considered the respective applications I do not consider that this is an element of the claim where it is appropriate to strike it out. I reach this decision for the following reasons.

22. Whilst there may not have been an alleged act of sexual harassment at the lunch it nevertheless, at least initially, clearly constituted a work-related event. It took place on a Friday during working time when a number of Senior Managers were in attendance. Whether work related matters, were or were not discussed, and at what point in time they ceased to be is a matter which can only be determined by hearing witness evidence. I do not think it appropriate to draw a distinction at this stage between a point in time when the event may possibly have ceased to have a work-related status. Events which subsequently followed the work-related lunch or at least arguably connected to the work environment. That is not to say a claim would necessarily succeed; that is not the test I have to apply. I have to consider whether there is no reasonable prospect of success. I do not consider on the facts that that the threshold is met in respect of arguments regarding events being outside the course of employment.

23. Further, the fact that the alleged sexual assault took place in a private dwelling house is, whilst a relevant factor, not in my opinion a conclusive one. There are many potential scenarios where an act of sexual harassment could take place outside work, and is indeed in a private dwelling house. I give the hypothetical example a law firm partner drinking at a work-related social event with a trainee solicitor and inviting them back to their home where sexual activity took place when that trainee solicitor is inebriated. Those circumstances would arguably constitute an act of sexual harassment even if it was arguably a consensual act and it took place in a private dwelling house. The case is at least arguable and therefore a strike out would not be appropriate.

Victimisation

Alleged protected acts

24. The first element is in relation to the alleged protected acts. These are set out by Mr Gray-Jones. There was an issue as to what admissions had been made. The 3rd Respondent, in its Grounds of Resistance, admitted that a call between the Claimant and Ms Pearson, the 1st Respondent's HR Advisor, on 15 September 2020 and a letter from the Claimant's solicitor dated 11 December 2020 were protected acts. Mr Gray-Jones says that whatever admission was made by the 3rd Respondent, which it now seeks to withdraw, is not determinative as whether acts are protected or not is a matter statutory application.

25. The fact that there had been a previous admission by the 3rd Respondent that these matter constituted protected acts does, in my view, substantially negate an argument that there can be no or little reasonable prospect of success in the Claimant establishing the existence of protected acts. I also consider that given my earlier

findings in relation to the at least arguable merits of the claim in relation to sexual harassment that the subsequent calls and other communications made by the Claimant to Ms McGrath and others in the days afterwards, 9 and 10 September, are all arguably protected acts. Therefore I do not consider that would be appropriate to strike out this element of the claim.

Alleged detriments

26. I then need to go on to consider the position in relation to alleged detriments. I was referred to relevant case law to include the principle set out in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 that a detriment is not established simply on the basis of an unjustified sense of grievance. Mr Browne referred me to the judgment of the Court of Appeal in Deer v University of Oxford [2015) ICR 1213 as authority for the concept of detriment being determined from the point of view of the Claimant. "A detriment exists if a reasonable person would or might take the view that the employer's conduct had in all the circumstances been to her detriment." He says that the evidence needs to be heard and that the pleadings in themselves do not provide sufficient grounds.

27. It is necessary for me to consider the position in relation to 13 alleged detriments. These are summarised in Mr Gray-Jones' submissions, nevertheless I have read the detriments from the pleadings as there are some respects where I consider the summary provided does not necessarily capture the full allegation of detriment.

Alleged detriment number 1

28. This involves the partial suspension of the 2nd Respondent. The 3rd Respondent's position is that the Claimant was not at work at the time and therefore how could this have been a detriment to her. I do not consider that this has no or little reasonable prospect of success. It is at least arguable that the reason why the Claimant was off work was because she was concerned about the possibility of coming into contact with the 2nd Respondent given the alleged sexual assault. Therefore it is reasonably arguable that she would have a subjective sense of detriment on learning that he had not been fully suspended. Therefore I do not consider that would be appropriate to strike out this element of the claim.

Alleged detriment number 2

29. This involves the alleged failure to advise on timescales. Mr Gray-Jones says that this was right at the start of the process. Nevertheless, looking at paragraph 13 in the particulars of claim it goes on to say at the end that Ms McGrath had said that the HR Advisor would advise on timescales which never happened. I consider that this in itself is capable of constituting a detriment. It is not a matter on which, without hearing evidence, I can reach a finding that it has no reasonable prospect of success. Therefore I do not consider that would be appropriate to strike out this element of the claim.

Alleged detriment number 3

30. This concerns the alleged failure to send any formal correspondence to the Claimant of proposed next steps by 15 September 2020. Mr Gray-Jones says that that it is misconceived because the meeting with Ms Pearson had only taken place on 15

September. However, in paragraph 14 of the particulars of claim the Claimant goes on to say that she asked for clarity on the next steps and she was told that the 1st Respondent's Board (the Board) would make a decision based on the outcome of the investigation report (the Report). She says prior to that that she had not received any formal correspondence from the 1st Respondent nor an explanation as to the proposed next steps. I consider that this is capable of being interpreted as Claimant complaining that there had been no communication from the matter originally being reported on 10 September 2020 as to how matters were being and going to be handled. It may well arguably be a relatively de minims matter but nevertheless it is not one in my view one in respect of which it can be held to have no reasonable prospect of success. Therefore I do not consider that would be appropriate to strike out this element of the claim.

Alleged detriment number 4

31. This concerns the alleged failure to send any formal correspondence to the Claimant or to notify her of proposed next steps by 15 September. There is clearly a significant element of duplication with alleged detriment number 3. The Claimant says that she was not provided with any timescales or certainty as to what next steps would be taken, if any, which she says exacerbated her existing concerns. I consider that this is a matter which requires the hearing of evidence, to include as to the Claimant's subjective perception, to form a view as to whether this is capable of constituting a detriment. Therefore I do not consider that would be appropriate to strike out this element of the claim.

Alleged detriment number 5

32. This concerns the Claimant asking to have a call with Ms McGrath during which she says she had to proactively request information regarding the investigation and associated next steps. Again there is an element of repetition but for the reasons previously set out I do not consider it is a matter which has no reasonable prospect of success. Therefore I do not consider that would be appropriate to strike out this element of the claim.

Alleged detriment number 6

33. This concerns the Report being sent to the 2nd Respondent so that he could see the allegations against him and the Claimant being told that she would not see a copy of the Report, but the recommendations would be shared with the Board, despite her not having been told what the recommendations would be or what outcome had reached. I consider that a situation where the Claimant is arguing that she did not see the Report, which had been seen by the 2nd Respondent and the Board, is arguably capable of constituting a detriment. Therefore I do not consider that would be appropriate to strike out this element of the claim.

Alleged detriment number 7

34. This is connected to alleged detriment number 6 in terms of the Claimant not being told that the Report would be shared with the 2nd Respondent and the Board. For the same reasons as for alleged detriment number 6, I consider it is an argument which cannot be said to have no reasonable prospect of success. Therefore I do not consider that would be appropriate to strike out this element of the claim.

Alleged detriment number 8

35. This concerns the Claimant's allegation that she was asked to respond to the Report and felt pressurised and bullied by Mr Pickup asking her for review and comment on the Report and failing to consider the impact this would have on her. She sent a letter stating that she was not in a position to do so because of her health. I consider that whilst potentially weak it does not meet the threshold of having no reasonable prospect of success

Alleged detriment number 9

36. This involves the Claimant being invited to attend a grievance meeting in response to her solicitors' letter. I consider that it was reasonable for the 1st Respondent to interpret the complaints raised by the Claimant as a grievance. Indeed they could have been criticised for not doing so given the seriousness of the allegations made. I then consider that it was reasonable for the 1st Respondent to invite the Claimant to a grievance meeting given the serious concerns she had raised. I consider that whilst potentially weak it does not meet the threshold of having no reasonable prospect of success

Alleged detriment number 10

37. This concerns the 1st Respondent contacting the Claimant directly in relation to options on how she could participate in the grievance hearing. Given that I have found invoking a grievance procedure was reasonable it was entirely appropriate for the 1st Respondent to explore arrangements for the Claimant's participation. She was not compelled to attend but merely contacted to ascertain whether she would be able to and if so how. I consider that whilst potentially weak it does not meet the threshold of having no reasonable prospect of success

Alleged detriment number 11

38. This concerns holding a grievance meeting when the Claimant was unfit to attend. Given that substantial time had elapsed during which the Claimant was off sick I consider it was at least arguably reasonable for the 1st Respondent to hold a grievance in absentia. The Claimant had been given the opportunity to attend. She had given no indication as to when she would be fit to do so. I consider that whilst potentially weak it does not meet the threshold of having no reasonable prospect of success.

Alleged detriment number 12

39. This is in effect the next stage of the process involving the holding of the grievance appeal meeting. I consider that whilst potentially weak it does not meet the threshold of having no reasonable prospect of success.

Alleged detriment number 13

40. this concerns and alleged failure to respond to the Claimant's data subject access request. It is not obvious to me that that is a matter which is directly linked to earlier protected acts. It may be applying a but for test but that is the wrong way of looking at

the chain of causation. I therefore find that the allegation that failing to engage or delay in the subject access request was in itself a detriment whilst potentially weak does not meet the threshold of having no reasonable prospect of success..

Claimant been put at risk of redundancy

41. These are not pleaded as separate detriments but looked at in totality at paragraph 52 of the marked up version of the particulars of claim, I find it is least arguable that the redundancy and the steps in relation to the redundancy were detriments on account of protected acts and therefore should not be struck out. I do not consider it appropriate to break that down further between different stages of the redundancy process given that they are not pleaded as individual detriments.

Regulation 15 of TUPE

42. This involves alleged failures to carry out appropriate consolation and provide an opportunity for the Claimant to engage and be informed as to the process. I do not consider that striking out or the payment of a deposit would be appropriate. Whilst these matters may ultimately prove to have little or no merit, that is not something I can determine without having evidence before me as to exactly what trade union may have been recognised, what consultation may have taken place and so on. Therefore I do not consider that would be appropriate to strike out this element of the claim.

Final summary

43. No elements of the claim are struck out.

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Employment Judge Nicolle

15 October 2021

Sent to the parties on:

15/10/2021

For the Tribunal: