



EMPLOYMENT TRIBUNALS

Claimant: YZ
Respondent: UPS Ltd
On: 3 November 2021
Before: Employment Judge Ahmed (sitting alone)
At: Leicester (via CVP)

Representation

Claimant: In person
Respondent: Ms Martina Murphy of Counsel, instructed by Clyde & Co.

JUDGMENT AT A PRELIMINARY HEARING

1. The Respondent's application to strike out the complaint of sexual harassment is dismissed.
2. The Respondent's application for a deposit order in connection with the same complaint is also dismissed.

REASONS

1. In these proceedings Claimant brings a claim for constructive dismissal and sexual harassment.
2. This Preliminary Hearing was listed to determine whether the complaint of sexual harassment should be struck out or alternatively the subject of a deposit order as a condition of permitting the Claimant to continue with that complaint. The Respondent does not seek to strike out or a deposit order in relation to the constructive unfair dismissal complaint.

3. For this hearing the Respondent has helpfully produced a short bundle of the relevant documents and a draft list of issues. In addition, Ms Murphy has produced skeleton arguments which I have taken into account in coming to my decision.

4. The Claimant was employed by the Respondent as a Loader from 20 January 2018 until 15 October 2020. She alleges that she has been sexually harassed on several occasions by a colleague who is the subject of an anonymity order and is to be referred to a 'C'. The Claimant raised a grievance which the Respondent investigated. It found no evidence to substantiate the allegation that C had acted inappropriately. The Claimant resigned on 12 October 2020 stating that the Respondent had "failed with my safety".

5. Earlier in these proceedings the Claimant was ordered to provide further and better particulars of her claim. In doing so she has produced a document which she refers to as a 'Timeline of Incidents'. I therefore read the Claimant's ET1 and the Timeline as setting out the allegations in these proceedings.

6. In the self-drafted ET1 Claim Form in the very first line of the particulars, the Claimant refers to a very serious allegation which I will simply refer to it as 'a serious sexual incident' The Claimant says this occurred in June 2019.

7. At an earlier preliminary hearing on 5 February 2021 before my colleague Employment Judge Victoria Butler, the Claimant confirmed that the reference to the serious sexual incident was by way of background only and not as an act of sexual harassment. Upon being asked for clarification of this today, the Claimant confirmed that the incident is *not* part of her complaint of sexual harassment but she does wish to rely upon it for the purposes of the constructive unfair dismissal complaint. On the face of it that appears rather odd but I am satisfied that that is the Claimant's clear intention.

8. The Respondent's understanding of the allegations of constructive dismissal (which is based on a breach of the implied term of trust and confidence) is that they are confined to the following two allegations only:

8.1 That on 2 August 2019 the Respondent made a decision that it was unable to facilitate removing/moving C within the Company and offering the Claimant to move shifts so that she was not in close contact with C;

8.2 That following the Claimant's grievance the Respondent decided to take no action against C.

9. The Respondent understands the allegations of sexual harassment to be as follows:

9.1 That on 10 September 2019 C and X (another employee of the Respondent) parked their vehicle at the top of the Claimant's mother's drive in an attempt to scare the Claimant;

9.2 That on 18 September 2019, X sent messages to the Claimant asking if she was going to move shifts and what she was doing in a management group chat;

9.3 That on 14 December 2019 the Claimant received a call advising her that C had found out she was in town and that C was on his way. The Claimant says she received a number of phone calls on her personal mobile from an unknown number trying to confirm the Claimant's identity;

9.4 That on 23 December 2019 C called the Claimant asking her how she and her family were. The Claimant also says she received a text message from C saying that he had paid someone to get her contact number and that we are 'surrounded by snakes.'

9.5 That on 4 February C waited around the warehouse after finishing work and bumped into the Claimant before her shift;

9.6 That in April 2020 C was seen outside security at work intoxicated. The Claimant says she had to be escorted off the premises by her partner.

9.7 That in April 2020 C messaged the Claimant continuously asking to meet up and saying he knew what hours she worked.

9.8 That during April to October 2020 on various unspecified dates and on a number of occasions, C watched the Claimant come into work and in one particular

incident she attended for her grievance reply he waited at the bottom of the stairs for her.

10. At this hearing the Claimant said that the allegations set out in the preceding paragraph were also part of her constructive dismissal complaint. The Respondent says that is not how the case has been pleaded and the Claimant will need to apply for an amendment if she intends to pursue them for that complaint. Such an application is likely to be contested.

11. The Respondent seeks to strike out the complaint of sexual harassment (or seeks an order of a deposit) for the following reasons:

11.1 that the alleged acts of sexual harassment did not take place “in the course of employment”;

11.2 that the allegations have been brought out of time, and

11.3 the Respondent took all reasonable steps to prevent alleged acts of harassment.

THE LAW

12. Rule 37 of the Employment Tribunal Rules of Procedure 2013 (“the Rules”) deals with striking out claims and (so far as is relevant) states:

“(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

13. Rule 39(1) deals with deposits and, so far as is relevant, states:

“Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.”

14. In the case of **Anyanwu v South Bank Students' Union** [2001] IRLR 305, Lord Steyn in the Court of Appeal (at paragraph 24) said the following about striking out discrimination complaints:

“... For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. ...”

15. In the same case, Lord Hope (at paragraph 37) made the following observations:

“... I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the Claimant may be able to establish if given an opportunity to lead evidence.”

16. In **Ezsias v North Glamorgan NHS Trust** (2007) ICR 1126 (CA), Maurice Kay LJ (at paragraph 29) said:

“It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the Claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.”

17. In **Van Rensburg v Royal Borough of Kingston-upon-Thames & others** (UKEAT/0095/07) the Employment Appeal Tribunal made it clear that whilst the threshold for making a deposit order is lower than that for striking out a claim the Tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the essential facts.

CONCLUSIONS

18. The primary basis for the application to strike out is that the alleged acts, or at any rate the majority of them, occurred outside the workplace and have no connection with the Claimant's employment. Incident (a) is said to be outside the Claimant's mother's house. Incident (b) relates to messages on the Claimant's phone as do allegations (d) and (g).

19. It seems to me that it is not altogether easy to distinguish – and it is certainly not plain and obvious - which acts can definitively be said to have occurred in the

course of employment and those which did not. That is only likely to become clear after hearing all of the evidence.

20. The phrase “in the course of employment” must be given a wide meaning as the Equality Act Code of Practice suggests. Some of the allegations clearly relate to incidents at work. It would be wrong and artificial to try and see where the line is to be drawn without hearing oral evidence.

21. I am also satisfied that there is a central core of disputed facts, the determination of which will fundamentally affect the outcome. This is not one of those exceptional case where it would be proper to strike out in the light of disputed facts. The fact that the Claimant may need an amendment is not a reason to strike out, particularly as on the face of it the categorisation of incidents as to whether they relate to the constructive dismissal complaint or the sexual harassment complaint is arguably a re-labelling exercise.

22. I would not consider it appropriate to strike out the claim on the grounds that the allegations appear to be out of time. There may well be a valid argument that there was an act extending over a period or that the Tribunal should use its wide powers to extend time on just and equitable grounds. Those issues should only be determined after hearing all of the evidence.

23. In relation to the issue that the Respondent took all reasonable steps to prevent any harassment, that is clearly a fact-sensitive matter and can only be determined after hearing all the evidence. Incidentally, the Claimant may need to give consideration to joining C and (and possibly X) as a named individual Respondent. I make that observation in the light of the fact that the Claimant is a litigant in person. It is not however something which is being considered today.

24. I have considered whether a deposit order should be made if the complaint of sexual harassment is not to be struck out. As **Van Rensburg** makes clear the threshold for making a deposit order is lower than striking out but a deposit order should not be made where there is a core of disputed fact, as is the case here. Furthermore there is no basis for doubting the likelihood of the Claimant to be able to establish the essential facts to succeed.

25. For those reasons the application to strike out the complaint of sexual harassment or for an order of a deposit are both dismissed.

26. The full merits hearing listed for 13 – 15 December 2021 shall be vacated as the case is clearly not ready for trial in a month's time. There shall be a case management hearing on the first of those dates, namely on **Monday 13 December 2021 at 11.00am** with a time estimate of 90 minutes to deal with any amendment applications and to make case management orders. A completed agenda should be returned both parties in good time for the hearing on 13 December 2021.

Employment Judge Ahmed

Date: 4 November 2021

JUDGMENT SENT TO THE PARTIES ON

14 December 2021

.....
.....
FOR THE TRIBUNAL OFFICE

Covid-19 statement: This was a remote hearing which was not objected to by the parties. The form of remote hearing was by video (CVP). It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877568/t426-eng.pdf