



EMPLOYMENT TRIBUNALS

Claimant: Mr B Walker

Respondent: North Bristol NHS Trust

Heard by Cloud video

On: 30 November 2021

Before: Employment Judge Reed

Representation

Claimant: Mr P Stroilov, trainee solicitor

Respondent: Mr C Milsom, counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that

1. The claimant's contention that his grievance dated 1 August 2018 was a protected act is struck out as is his claim of victimisation based thereon
2. The claimant's contention that his grievance dated 1 August 2018 was a protected disclosure is struck out as is his claim of automatically unfair dismissal based thereon
3. The claimant's claims of indirect discrimination are struck out insofar as they rely upon the following alleged provisions, criteria or practices:
 - a) Accepting the opinion of a witness uncritically in assessing whether a comment was improper (eg discriminatory).
 - b) Treating the fact that offence was generally taken by an interlocutor as strong and/or conclusive evidence that the comments were improper

REASONS

Case Number: 1405991/2020

1. In this case the claimant Mr Walker made a number of complaints against his former employer, North Bristol NHS Trust (“the Trust”), namely discrimination on the ground of religion or belief (harassment, direct discrimination, indirect discrimination and victimisation) and unfair dismissal (both “ordinary” and automatically unfair).
2. On 11 August 2021, the Tribunal gave directions to take the claims forward to a final hearing in October 2022. In addition, this hearing was listed to address an application on the part of the Trust for strike out or deposit orders. The precise scope of that application was set out in a letter from the Trust’s solicitors dated 6 October 2021.
3. In advance of the hearing I was provided with witness statements from Mr Walker himself and from Dr Parsons, who was described as an expert witness. Although I read those documents, they did not particularly assist me. Mr Walker simply explains how he has come by the beliefs that are at the core of the issues between the parties. Dr Parsons, in essence, indicates that those beliefs are shared by a large number of people, an assumption I would in any event have made for the purpose of this hearing.
4. I therefore heard no “live” evidence and simply heard representations on behalf of each party. The following is a hopefully neutral and non-controversial summary of the factual background to the claims.
5. Mr Walker was employed by the Trust from January 2016. He was a maintenance craftsperson.
6. In May 2018 Mr Walker had an argument with a healthcare assistant following which she reported to Mr Walker’s manager that Mr Walker had been aggressive. She added that he had made certain comments to her several months earlier relating to same sex relationships, mixed race relationships and Muslims. She claimed that similar comments had been made to a colleague.
7. In June 2018, Mr Walker was spoken to about these matters and appears to have agreed to keep his own counsel in the future but on 1 August 2018 he lodged a grievance with the Trust. He expresses the view in that document that the comments made by him to the healthcare assistant were not intended as racist or offensive but that he was exercising his freedom of speech by sharing that he held traditional biblical values, particularly regarding marriage.
8. On 10 December 2018 the Trust wrote to Mr Walker to inform him that his grievance was rejected.
9. In the meantime, on 9 September Mr Walker during a period of sickness absence attended work and left certain documents. They included a newspaper report of litigation he had taken against the Scouting Association.
10. In the light of further complaints made about Mr Walker’s behaviour, on 8 November 2018 he was suspended. On 12 November he was sent a letter alleging that he had acted inappropriately in various ways and in particular that he had made “inappropriate comments of a discriminatory nature”.

11. The allegations against Mr Walker were investigated and he was called to a disciplinary hearing on 4 and 8 October 2019. By letter dated 9 October the Trust indicated that the allegations against Mr Walker were upheld and that he had been involved in three episodes where he had made unsolicited comments of a discriminatory nature. He was given a final written warning and told he had to undergo equality and diversity training.
12. Mr Walker appealed against the warning and that appeal was rejected on 15 July 2020. On 22 July he resigned.
13. Under rule 37 of the Employment Tribunals Rules of Procedure 2013, the Tribunal may strike out all or any part of a claim on the ground that it has no reasonable prospect of success.
14. Rule 39 provides that if a Tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
15. I turn to the letter of 6 October 2021 from the Trust's solicitors and the specific grounds upon which it was suggested that strike out or deposit orders should be made.

Time limits

16. Mr Walker commenced early conciliation on 10 October 2020 such that, on the face of it, any claim arising before 11 July 2020 is "out of time". The bulk of Mr Walker's claims of unlawful discrimination (see below) predate July 2020. However, he says there was an act extending over a period, including events occurring after 11 July 2020, such that, in effect, all those claims are "in time"; alternatively that it is just and equitable that the Tribunal should determine those claims.
17. At the case management hearing on 11 August 2021, the Judge observed "that in relation to time limits that it would not be appropriate to make a determination on whether aspects of the claim were presented out of time and whether time should be extended, on the basis that it was alleged that there was continuing conduct and the last allegation was in time". The implication would appear to be that a preliminary hearing to address late presentation would not be appropriate and that the possibility of a strike out or deposit order on that basis was not one the Tribunal would entertain.
18. Perhaps the first observation to make in this context is that if late presentation is to be addressed, the sensible place to do it is at a preliminary hearing addressing that question specifically, rather than a strike out or deposit application. In any event, the standard approach of the tribunal in a case of this sort, where the claimant is claiming unfair constructive dismissal and prays in aid (effectively) all the respects in which he alleges he has been mistreated, whether occurring within 3 months before presentation or not, is to direct that determination of late presentation will be addressed at the final hearing. The rationale is that the Tribunal will in any event hear all the evidence in the case, simply to address the unfair dismissal claim (which is

in time), so there is no saving in time in having a preliminary hearing to address late presentation.

19. That observation is subject to one caveat. If certain aspects of Mr Walker's claims were no longer going forward (whether by strike out or otherwise), the Trust might be able to make a convincing case for a preliminary hearing to address that subject (for example, on the basis that there was no longer any cause of action arising within three months before the commencement of early conciliation).
20. The difficulty in addressing the issue at a hearing of this sort was fairly apparent. In order to determine whether claims that were on the face of it out of time should go forward, the Tribunal would ordinarily hear evidence as to whether it was just and equitable for them to do so. How, sensibly, could I take a view on the likelihood of Mr Walker establishing such a case without hearing his explanation for "late" presentation?
21. As I have said, there is nothing to prevent the Trust making an application for a discrete preliminary hearing to address late presentation, at which no doubt appropriate evidence can be given but I did not consider it appropriate to direct that any claim should be subject to a strike out or deposit direction on that basis.

Mr Walker's religious/philosophical beliefs

22. It was submitted on behalf of the Trust that there was little or no reasonable prospect of Mr Walker persuading a Tribunal that his religious/philosophical beliefs (assuming they could be so described) fell to be protected under the Equality Act 2010.
23. Under Section 10 of the 2010 Act, religion means any religion and a reference to religion includes a reference to a lack of religion. Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
24. In his claim document, Mr Matthews says he holds the following religious and/or philosophical beliefs.
 - a. The Claimant believes in conservative Christian social values.
 - b. The Claimant does not believe in the idea of "multicultural society".
 - c. The Claimant believes that the attention and priority given in many sections of modern society to inclusivity and positive action in favour of non-Christian faiths, minority sexual orientations, and transgenderism, is excessive and unhealthy.
 - d. The Claimant is opposed to the growing influence of Islam in Britain and other countries.
 - e. The Claimant believes in Christian sexual ethics based on the Bible. The Claimant believes in marriage as a divinely instituted union

between one man and one woman for life and is opposed to same sex unions and homosexual acts.

25. The leading case on the question of whether a belief might be protected under the 2010 Act is *Grainger v Nicholson*. Essentially, a five-step test is set out in that case and the Trust suggested that it was very unlikely that Mr Walker would be able to satisfy it.
26. It was suggested that the beliefs in question amounted to no more than opinions based on a perceived set of circumstances rather than those held as a philosophical touchstone to life. Certainly, there is nothing to prevent the Trust cross-examining Mr Walker and suggesting to him that these were not really “articles of faith”. There was, on the face of it, no reason for me to assume they were not.
27. It was suggested in the Trust’s solicitors’ letter of 6 October that the beliefs were not worthy of respect in a democratic society and were incompatible with human dignity and conflicted with the fundamental rights of others. Therefore, it was submitted, they fell foul of the fifth rule in the *Grainger* case. All that really need be said at this stage is that, in the light of the case of *Forstater v CDG Europe*, it does not appear that that is a submission that is likely to meet with much success. Certainly, at this stage, I could not say there was little or no reasonable prospect of success. It followed that in relation to whether the claimant could establish that he had the protected characteristic in question, I was not minded to strike out or make a deposit order.

Victimisation

28. Under Section 27 of the 2010 Act, a person, (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, such as bringing proceedings under the Act, doing any other thing for the purpose of or in connection with the Act or making an allegation that A or another person has contravened the Act.
29. Mr Walker relied upon two protected acts, namely the bringing of a claim against the Scout Association and the submission and pursuit of a grievance.
30. The grievance certainly records Mr Walker stating that he had merely expressed his freedom of speech. He also complains about the fact that he had been given an informal warning. He said that this amounted to an allegation that there had been contravention of the 2010 Act.
31. It is not necessary that he should in express terms have made an allegation that the Trust (or an individual) was in breach of the 2010 Act but in order for the grievance to amount to a protected act, it must be possible to derive the existence of such an allegation from it.
32. In my view, it simply is not. There is no sensible reading of that document that would lead anyone to conclude that such an allegation was being made. In those circumstances I took the view that he had no reasonable prospect of establishing that this was a protected act and therefore the victimisation claim (based upon that document) is struck out.

33. The second alleged protected act was the legal claim taken by Mr Walker against the Scout Association.
34. It was apparent that Mr Walker had indeed brought proceedings under the 2010 Act against the Scout Association. That amounted to a protected act.
35. It was pointed out that the Trust never saw the claim itself but the Trust was aware of it because Mr Walker disclosed its existence via newspaper reports. It was suggested in the alternative that it was highly unlikely that Mr Walker would be able to establish some sort of connection between that information being received by the Trust and the various ways in which he contended he was subsequently mistreated.
36. This feeds into a wider issue, which is examined in more detail below, relating to causation. Mr Walker will no doubt wish to contend that the broad thrust of his religious views were not ones that met with the approval of the Trust and its management. On the face of it, he had taken legal action in order to enforce those very views (and had achieved a settlement against the Scout Association).
37. The essence of Mr Walker's case is that although the Trust claimed to have disciplined him on the basis of statements made by him that would not attract the protection of the 2010 Act, at the root of his treatment was a distaste for the protected religious views he actually held. The real reason for his treatment was not that alleged by the Trust. It did not seem to me so unarguable that that might be the case that he ought to be driven from the seat of justice. The Tribunal will have to take a view, in due course, and upon hearing evidence in particular from the Trust's witnesses as to whether they were motivated by some sort of underlying distaste for Mr Walker's genuine religious beliefs (should the tribunal conclude that they amounted to a protected characteristic). I declined to make a strike out order deposit order in relation to that claim.
38. I should add that the if evidence that was accepted by Mr Walker at the time indicated that he had made statements such that he richly deserved the administration of a final written warning (and indeed the other actions taken by the Trust), then clearly his position would be a difficult one. However, it is not clear that he accepted in terms what was alleged against him (so that in that respect it can be alleged against the Trust's managers that they "chose" to prefer evidence that contradicted him because of their underlying prejudice) and nor is it unarguable that a final written warning would be appropriate even if the Trust genuinely took the view on the facts that they alleged.

Protected Disclosure

39. Under ss 43A and 43B of the Employment Rights Act 1996, a protected disclosure means any disclosure of information which in the reasonable belief of the worker making that disclosure is made in the public interest and tends to show that a person has failed or is failing to comply with any legal obligation to which he is subject.

40. S103A of the 1996 Act provides that an employee will have been unfairly dismissed if the reason or principal reason for dismissal was that he made a protected disclosure.
41. Mr Walker contended that his grievance was a protected disclosure. He claimed that he resigned as a consequence of a fundamental breach by the Trust of the implied term in his contract relating to trust and confidence (see below), caused by the various ways he says he was mistreated by the Trust such that he was “constructively” dismissed. He said that the disclosure was the sole or principal reason for that treatment, such that he was “automatically” unfairly dismissed.
42. It was suggested on behalf of Mr Walker that the grievance amounted to an allegation that the Trust had illegitimately interfered with his freedom of speech and freedom of religion. It did not seem to me that was a particularly natural reading of the document. Nor was it likely he would be able to establish that he reasonably believed the “disclosure” was made in the public interest.
43. He was also likely to have difficulty in establishing a link between the grievance and his subsequent treatment. It was suggested on behalf of Mr Walker that upon receipt of the grievance the Trust had decided to reopen the issue involving the healthcare assistant that apparently had been put to bed much earlier. What that analysis overlooks is that in September 2018 Mr Walker had attended work leaving a note for a colleague which that colleague had taken to be threatening. It was that complaint that led the Trust to revisit the earlier events.
44. In those circumstances I took the view that he had no reasonable prospect of establishing his claim of automatically unfair dismissal. That claim is struck out.

Harassment

45. Under Section 26 of the 2010 Act, a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
46. The fundamental conflict between the parties that was the essence of the bulk of the discrimination claims was this. The Trust was aware of the religious beliefs of Mr Walker ie (at least in broad terms) the religious beliefs referred to above, which he said were protected. Mr Walker said that these did not chime with the values of the Trust and its managers and accordingly he was singled out for punishment. In order, however, for the Trust to cover its tracks, it purported to punish him on the basis of statements allegedly made by him that went beyond those protected beliefs. He invites the Tribunal to conclude firstly that the Trust accepted evidence against him (for example, hearsay evidence when the witness in question would not give a statement himself) that it would not have accepted except for its distaste for his fundamental beliefs and furthermore that the actions taken against him

(ie the various respects in which he contended he was mistreated) were on account of those beliefs rather than the statements he allegedly made.

47. One can certainly imagine a situation where such a contention would be wholly untenable. The Tribunal might conclude that the Trust managers genuinely believed Mr Walker had made certain statements and those statements were virulently racist, sexist etc. The question for me was whether I could make a summary determination that Mr Walker's claims were weak or largely unarguable on the basis of matters that were not in dispute. I found that difficult to do. The reliance on hearsay evidence is only one of the grounds upon which Mr Walker contends that the Trust "bent over backwards" to make findings adverse to him and he will invite the Tribunal to conclude that the reason for that state of affairs was a determination to punish him because of the views they knew he actually held. How, sensibly, could I take a view on that subject without hearing evidence?
48. Mr Walker was also entitled to point this out. Various employees of the Trust who gave evidence in the course of the disciplinary proceedings etc were clear that one of the matters he raised with them was his distaste for same sex marriages. Mr Walker will no doubt contend that that must have played a significant role in his treatment. As far as any claims of discrimination are concerned, it is not necessary for him to establish that a protected belief was the sole reason for the steps taken against him. It seems very likely that the relevant belief was one that he will be able to persuade a Tribunal was protected within the 2010 Act and I could see no reason why he should be prevented from exploring the extent to which the widely canvassed views that he had on same sex relationships were not a motivating force upon the Trust.
49. In short, it did not appear to me that I could sensibly say Mr Walker had little or no reasonable prospect of successfully establishing that the various respects in which he said he was subjected to detriments by the Trust was not in some way "related to" his religious beliefs.
50. It was further contended on the part of the Trust that he would be unable to establish the proscribed purpose or effect. I propose to say no more about that than that if the Trust did indeed subject him to an unwarranted campaign of criticism (culminating in the administration of a final written warning), it is not difficult to see a Tribunal accepting that he has met the relevant test.

Direct Discrimination

51. Under Section 13 of the 2010 Act, 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.
52. I will not repeat what I have said in relation to the causal connection between Mr Walker's beliefs and his treatment by the Trust. There is a fundamental dispute between the parties as to the actual reason for the various steps taken against him.
53. The Trust points out that there is a distinction between the beliefs themselves and the manner in which they are manifested. Certainly, if the Tribunal accepts the evidence of the Trust, then it will not be difficult to conclude that

the treatment in question was not because of Mr Walker's religious beliefs. However, Mr Walker invites the Tribunal to conclude that there was subterfuge on the part of the Trust: that the real reason for its behaviour was unhappiness with his genuine beliefs. It cannot, in my view, be said that that case is so unarguable that he should be prevented or dissuaded from taking it forward.

54. It was suggested that Mr Walker had a problem in establishing a comparator. I respectfully disagreed. His case is that he was mistreated because of the beliefs that he had. Someone without those beliefs would not have been mistreated in that way. He goes on to say that either the Trust made findings of fact adverse to him by reason of his beliefs or alternatively that genuinely having made those findings, they punished him more severely than he would have been punished had he not held those beliefs. Again, it is an issue that turns on the credibility of the Trust's witnesses and is not so unarguable that he should be prevented from making it at a full hearing.

Indirect Discrimination

55. Under Section 19 of the 2010 Act, a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision, criterion or practice (PCP) is discriminatory if:

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic;
- (b) it puts, or would persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;
- (c) it puts, or would put B at that disadvantage;
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

56. Mr Walker suggested there were three PCPs, namely:

- (1) Treating any criticism of Islam, Muslim immigration, same sex marriage, homosexual acts and multiculturalism as "discriminatory comments" and misconduct.
- (2) Accepting the opinion of a witness uncritically in assessing whether a comment was improper (eg discriminatory).
- (3) Treating the fact that offence was generally taken by an interlocutor as strong and/or conclusive evidence that the comments were improper.

57. I accepted the submissions made on the part of the Trust that in respect of PCPs 2 and 3 it was highly unlikely that Mr Walker would establish his case. These were things he said had happened to him but there was no suggestion he had evidence that they had happened to anyone else and no obvious reason to believe they might have. In essence, these were claims of direct

discrimination made up as claims of indirect discrimination. Nor was it likely Mr Walker would be able to demonstrate “group disadvantage” in relation to those matters. There was no obvious reason why someone of his religion should be able to regard himself as significantly disadvantaged by the application of any such criteria. It would be difficult for him to establish individual disadvantage for the same reason. In those circumstances I struck out the claims the claims of indirect discrimination related to PCPs 2 and 3.

58. The situation was slightly different in relation to PCP 1. This was not so obviously a claim of direct discrimination expressed as one of indirect discrimination. It was at least more likely that such an approach might be taken by the Trust in cases that did not involve Mr Walker. If there was evidence of such an approach, then Mr Walker could reasonably contend that it would disadvantage someone who held his beliefs and so disadvantaged him. That claim will not be subject to a strike out or deposit order.

Constructive Dismissal

59. Mr Walker said that the Trust had fundamentally breached the implied term within his contract to the effect that the parties will not, without good cause, act in such a way as to destroy or seriously damage the relationship of trust and confidence between them. He said that the breach was evidenced by the various ways in which he was mistreated by the Trust culminating in his final written warning and the rejection of his appeal against it.
60. Again, this turned on the fundamental dispute between the parties as to the bona fides of the Trust. Mr Walker says that the Trust, acting in bad faith, and by reason of his religious beliefs, subjected him to various detriments, including the warning. Unless it could be sensibly said that, even without hearing evidence on the subject, it was clear that there could reasonably be no sensible explanation for the behaviour of the Trust other than the one they themselves gave, then it would be inappropriate for him to be headed off at this stage of proceedings.
61. I could not say, upon a simple analysis of the documents, that his prospects of establishing misbehaviour and bad faith on the part of the Trust were so remote that he should be prevented or discouraged from taking that claim forward and accordingly no strike out or deposit order was made in that respect.

Employment Judge Reed
Date: 1 January 2022

Judgment & reasons sent to parties: 13 January 2022

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