EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110316/2021

Preliminary Hearing Held at Glasgow on 26 January 2022

Employment Judge M Robison

Miss S Messi	**Claimant** **Not present and Not represented**
All People Employment Ltd	**First Respondent** **Represented by** **Mr A Maxwell** **Solicitor**
FedEx Express UK Transportation Limited	**Second Respondent** **Represented by** **Mr C Adjei** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The respondents' applications for strike on the grounds that the claims have no reasonable prospects of success are granted. The claims are therefore dismissed.

REASONS

1. This preliminary hearing was set down to consider the following:

    1. whether any of the claims should be struck out on the basis that they have no reasonable prospect of success (rule 37(1)(a)), or

alternatively whether a deposit should be ordered as a condition of continuing with them on the basis that they have little reasonable prospect of success (rule 39); and

2. carry out further case management.

2. The first respondent had intimated an application by e-mail on 24 January 2022 to extend the scope of the preliminary hearing to determine whether the claim should be struck out on the basis of rule 37(1)(c). The second respondent supported that application. The claimant responded stating that "any strike out applications will be robustly defended", that she had already complied with orders and asserted it was "another tactic" to have claim struck out because of her disclosures.

3. This matter was deferred to be considered at the outset of the hearing. I decided to grant the application to extend the scope of the argument at this hearing. That was because the legal arguments related to the same factual background and rationale as the application under 37(1)(a) and the substantial overlap between the arguments made in support of the separate provisions.

Decision to proceed in the claimant's absence

4. This preliminary hearing was listed to take place in person following a Preliminary Hearing held by telephone on 17 November 2021. That preliminary hearing took place following (first) an aborted hearing on interim relief by CVP on 3 August 2021 which required to be postponed due to the absence of an interpreter, but at which case management directions were made by Employment Judge O'Dempsey; and (second) a subsequent unsuccessful interim relief hearing by CVP on 6 September 2021 following which a decision was issued by Employment Judge Eccles.

5. At the preliminary hearing on 17 November, the first respondent was represented by Mr Maxwell and the second respondent by Mr Davies, the solicitor who has instructed Mr Adjei. The claimant did not attend that hearing, having intimated by e-mail on 17 November 2021 that she was not physically and mentally well enough to attend due to Covid 19 symptoms

and asking the Tribunal to take into account certain representations in the event that her application for a postponement was refused.

6. By e-mail dated 22 November 2021, the claimant asked for a variation of the order for this preliminary hearing to take place by telephone or video because she lives in London and could not afford to travel to Glasgow. She also requested an "unless order" for disclosure of all relevant documents by the respondents.

7. The respondents objected to the application to vary the order, and on 25 November 2021 EJ Whitcombe refused the claimant's application for the hearing to be by telephone for the reasons already given, in short that an interpreter was required. He stated that consideration outweighed the cost and inconvenience of having to travel to Glasgow, which the claimant must have anticipated. In response to the claimant's response that this would be a miscarriage of justice, he asserted that the balance of justice favoured a hearing in person, and that many affordable travel options are available.

8. The preliminary hearing was further intimated to parties by letter dated 25 November 2021. The claimant reasserted her position that she could not afford to travel to Glasgow; that commencing proceedings in Glasgow should not be a factor to refuse to make alternative arrangements to make sure she could participate; and advised of her intention to appeal. The claimant repeated her request for the hearing to take place by video or telephone by e-mail dated 9 December, citing plan B covid guidelines due to take effect from 13 December 2021. The first respondent set out objections to her application by e-mail dated 17 December 2021, and the second respondent advised their views were shared by e-mail dated 22 December 2021.

9. The claimant was advised by e-mail dated 23 December 2021 that her request to have a remote hearing by video was refused. She was advised that the position in Scotland was unchanged and that extensive precautions were in place to mitigate risks and that it was in the interests of justice for the hearing to take place in person in Glasgow mainly because of the claimant's request for an interpreter and to avoid any technology difficulties.

10. The claimant again requested on 29 December 2021 for the hearing to be conducted by CVP because she lives in London and could not afford to travel to Glasgow. By e-mail dated 11 January 2022, this was dealt with as another application to vary an existing order for essentially the same reasons, that application having already been refused on 23 December and 25 November 2021, and there being no relevant change of circumstances which would justify varying the order.

11. The claimant replied by e-mail dated 11 January 2022 advising that she was not able to attend the hearing in Glasgow which she claimed denied her human right to give oral evidence. She advised that she had appealed to the EAT. No correspondence in regard to an appeal was received by the Tribunal. The claimant was asked to confirm whether or not she was attending. The claimant indicated in another e-mail of 11 January 2022 that she would not attend and the interpreter was therefore cancelled.

12. The claimant e-mailed the Tribunal on 21 January 2022 confirming that she would not be attending and asking permission to make submissions in writing and to produce her own bundle of documents “that to date both respondents [omitted] to include in the bundle that are relevant to the claims”. She again requested an unless order for the disclosure of all documents relevant to the claims.

13. In response, the Tribunal advised that the claimant was encouraged to attend the hearing in person in order to give oral evidence and make submissions. Alternatively, she was advised that any submissions should be in writing and lodged before the hearing on 26 January 2022. She was advised that the request for an unless order would be included in the context of further case management.

14. The claimant responded by e-mail dated 24 January 2022 asking the judge to examine all the evidence and advised that she was making written submissions that her claims should not be struck out without establishing full facts of all the claims and without hearing her evidence which supports her claims fully. She said she would call witnesses to support her claims. She made reference to recordings which she said support her claims. She confirmed that she would not be attending.

15. Given that background, at the outset of the hearing, I advised parties that I was intending to proceed in the absence of the claimant and asked for their views on that.

16. Mr Maxwell advised that he was content to proceed in the absence of the claimant. Given that this hearing is to discuss the respondents' strike out application, there is a presumption in favour of the claimant because the claimant's case is to be taken "at its best"; the burden is on the respondent to show that the claim should be struck out.

17. Likewise Mr Adjei was content to proceed. He noted that the claimant had contributed to the bundle of documents which was to be relied on and that that she had every opportunity to supply any further documents or further information but she had not done so; so he asserted that the balance of justice favoured proceeding.

18. I therefore decided to proceed in the claimant's absence for the following reasons:

    1. there was no change in circumstances following case management decisions that this hearing should be in person and not by telephone or CVP;

    2. it was not expected that the claimant would attend;

    3. although she objected she apparently understood that the hearing would proceed in her absence;

    4. the focus is on the question of strike out and that the burden of persuading the Tribunal falls on the respondents;

    5. the claimant has supplied documents which were included in the bundle lodged;

    6. the claimant has supplied certain further information in response to requests and orders for further particulars of her claim;

    7. the claimant has set out her position in a large number of e-mails;

8. the claimant has had many opportunities to supply further particulars in response to orders; and

9. the claimant has had an opportunity to supply written submissions and to lodge her own bundle.

19. I had asked the clerks at the outset of the hearing if the claimant had supplied any further written submissions or documents and was advised that none had been received.

Documents relied upon

20. A file of documents had been provided which were referred to during this hearing. I understood that the claimant had contributed to that volume.

21. Mr Maxwell explained that, on 7 January 2021, the first respondent advised the claimant and the second respondent that he was taking responsibility for the production of a joint set of documents. He advised that he was including the documents used at the interim relief hearing; attached those he had added; and requested copies of any additional documents to be relied on. The claimant indicated in response that she would again send documents which she alleged had been concealed. The first respondent not having received any further documents wrote again to the claimant on 19 January 2022 asking her to provide any additional documents she sought to rely on; and wrote again on 20 January 2022. The claimant responded by email on 20 January stating “pls include in the bundle email that was sent by FedEx internal legal threatening me to stop exposing appalling conduct in which colleagues fabricated false evidence; all transcripts I sent not edited by yourself; letter from ICO who confirmed I made protected disclosures of data breach and confidentiality breach; every email I sent to you and Nick in which I disclosed evidence”.

22. Mr Maxwell responded to that e-mail dealing with her requests, to which the claimant replied by e-mail dated 20 January 2021 that “In the event that any documents are again omitted, I will revert to the ET and seek permission to produce my own bundle of documents along with my written submissions ahead of the hearing next week”.

23. By e-mail dated 21 January 2022, the claimant advised of the names of her comparators and the respondent was able to research their second names and included copies of their pay slips in the bundle. The Tribunal was then copied into to-ing and fro-ing of e-mails between parties on 20 and 21 January 2022.regarding the documents to be included in the bundle

24. Mr Maxwell confirmed that the electronic bundle had been forwarded to the claimant. He also noted that prior to the interim relief hearing EJ O'Dempsey had required the claimant to provide further specification of the protected disclosure claims (page 166) and that EJ Whitcombe had also set out additional information to be provided in respect of the other claims and in so far as the claimant had responded these had been provided by the claimant and were included in the bundle at pages 227 and 228 and 236.

25. The documents listed in that e-mail have been provided: number 1 at page 194, number 3 from the ICO at pages 222-224 and with regard to number 4, although the e-mails have not been included the documents have. This matter was addressed during a discussion at the interim relief hearing when the claimant alleged that information was not in the bundle. It was then confirmed it had been included and Mr Maxwell was comfortable that every relevant e-mail he had received was in the bundle.

26. With regard to the transcripts, this had been the subject of much correspondence to which the Tribunal had been copied. I noted that this matter had been addressed by EJ O'Dempsey. While written transcripts had been provided, I understood that the claimant was not happy with the wording of what was transcribed. I did not consider that this impacted on my decision in any way.

27. With regard to her request for an unless order, the respondents' position was that what she had requested was provided or included in the bundle, and I accepted that position was accurate. I was satisfied that the claimant had lodged or had had every opportunity to lodge any documents which were relevant to her claims.

28. I advised parties that I intended to rely not only on the narrative in the ET1 but also all of the additional information which the claimant had supplied in response to orders to provide further particulars.

29. I took account of all of these documents which had been lodged for the hearing. The documents are referred to by page number.

30. In regard to the claimant's position, I took account of the narrative information set out in the ET1, all further particulars supplied by the Tribunal in response to orders by EJ O'Dempsey and EJ Whitcombe and to all of which were included in the volume of documents relied upon for this hearing.

31. I also had regard to the decision of Judge Eccles in respect of the interim relief hearing. While I did not accept that that included findings of fact which bound me, I accepted Mr Adjei's submissions that these were relevant and of probative value and that I could have regard to the conclusions reached at that hearing.

32. Mr Adjei during submissions pointed out that that the claimant's ET1 narrative was limited; that she had been advised by EJ O'Dempsey that she should make an application to amend if she were to add to that narrative. I point out for completeness that I have taken into account the additional further particulars provided by the claimant notwithstanding there has been no formal application to amend.

First Respondent's submissions

33. I first heard from Mr Maxwell who made oral submissions on the respondent's applications. Before considering each of the nine claims which Judge Whitcombe has said out at page 76 para 27 (a) to (i), he referenced the relevant legal tests.

34. In particular, relying on *Ezsias v North Glamorgan NHS Trust* 2007 ICR 1126, he said that the test is "whether the application has a realistic as opposed to mere fanciful prospect of success" (per Maurice Kay LJ at [26]; whether the arguments were prima facie implausible or there were undisputed facts incapable of giving rise to a breach; but even where the facts were in dispute, Tribunals should not be deterred from striking out claims if there was no reasonable prospect of establishing the facts necessary to prove the claim (per Underhill LJ in *Ahir v BA* 2017 EWCA Civ 1392 at [16]).

35. With regard to the first claim of automatic unfair dismissal, the issues to be determined were considered by EJ O'Dempsey prior to the interim relief hearing, namely whether the claimant was an employee; whether she had made protected disclosures; and whether the reason for dismissal was the protected disclosure.

36. Mr Maxwell submitted that the claimant was not an employee of either the first or second respondent, relying on the agency workers agreement between the claimant and first respondent. Its terms make it clear that it is not a contract of employment and that the claimant was an agency worker. Mr Maxwell referenced the decision of EJ Eccles at the interim relief hearing (page 65) that the claimant believed herself to be an agency worker. The contract clearly demonstrates that and this accords with the claimant's belief so there can be no prospect of the claimant establishing that she is an employee, he argued. All the facts are consistent with an agency relationship and as it will be difficult for the claimant to dispute that documentary evidence.

37. Mr Maxwell went on to argue that even if the claimant could show that she was an employee, she has no reasonable prospects of showing that she made protected disclosures as she has not given a clear or coherent explanation regarding the disclosures which she set out (at page 162) in response to the order by EJ O'Dempsey. In particular:

    1. The first two are subject access requests so since they are requests for information they cannot be the disclosure of information;

    2. The next two related to an alleged breach of confidentiality by the respondent contacting a previous employer for a reference. This does not engage the public interest because it is a private dispute between the claimant and her employer so it cannot be said to be a protected disclosure.

    3. There is no evidence to support her claim that the disclosure to HMRC was ever made. The claimant has not produced any evidence to support this assertion having been required to do so as part of the interim relief hearing (see page 57 of the note of

EJ O'Dempsey). This is despite the fact that she produced other documents in relation to other disclosures.

4. With regard to the disclosure to HSE, the decision to terminate the assignment was on 1 July 2021 but the disclosure to the HSE was on 2 July after the decision had been taken. There is undisputed documentary evidence that the decision was taken on 1 July which is not capable of being disputed, given that it is recorded (page 66) by EJ Eccles, that the claimant does not dispute the email is genuine.

38. Mr Maxwell then considered the claims for race discrimination and equal pay together because the claimant relies on the same facts to support them, specifically that the claimant says she was paid less than colleagues who are white and male. She eventually supplied names of comparators by e-mail on 21 January 2022. They are agency workers engaged to do the same work as the claimant at Fedex and on the same agency contract which shows that (page 85-87) the rate of pay started at £11 per hour and went up to £13.98 after thirteen weeks in line with the Agency Workers Regulations. On pages 88-92 the claimant's pay slips are produced but she did not work for 13 weeks so her hourly pay remained at £11.The pay slips of the white comparator show that she was paid £11 per hour (over the same period that the claimant was employed) (page 104 on) and the pay slips of the male comparator that show he was paid the same, with his wage increasing after 13 weeks (page 110 onwards).

39. This is undisputed evidence that they were paid the same, in accordance with the terms and conditions agreed. Any difference in pay was because of length of service not race/gender.

40. With regard to the disability discrimination, Mr Maxwell's submission is that this has not been sufficiently specified. The only detail is in the ET1 which merely mentions reasonable adjustments. EJ Whitcombe set out in his note the further information needed to clarify the claim (page 72).

41. The claimant in an e-mail to the Tribunal copied to both respondents has produced a disability impact statement (page 227). This does not however deal with the specific requirements of EJ Whitcombe's order. It is not for the

respondent to guess what her claim is but it is for the claimant to specify it. Absent sufficient information from the claimant the respondent cannot sensibly respond.

42. With regard to the claimant's reference in her schedule of loss to a failure to undertake a risk assessment or to make a referral to occupational health (page 266), Mr Maxwell argued that the claimant has provided no evidence that she disclosed her disability to the respondent. He suggested that a referral to occupational health is not an adjustment but rather might inform whether an adjustment should be made, although the position with a risk assessment may be different. In any event the claimant has failed to supply sufficient information to set out her claim despite being afforded the opportunity; the respondent would require her to further specify her claim and then respond to any further specification before an assessment could be made on her prospects of success.

43. With regard to the claims for harassment and victimisation, the claimant was also asked to clarify these claims (see at para 27(k), (l) and (i) page 73), but she has failed to do so.

44. In particular, with regard to her claim for victimisation, the protected act is not specified. The only acts referenced taking place prior to 2 July are the disclosures; there is no reference to any claims under the Equality Act or of discrimination generally.

45. The only reference then is in the ET1, where she references the act complained of as "suspension from work" but nothing else. While the claimant may describe what happened as a "suspension", what happened was that she was told not to come in to work. Mr Maxwell submitted that this is not capable of being an act of harassment or victimisation. While the claimant is aggrieved about the way the assignment ended and may believe that amounts to harassment or victimisation, it is not capable of amounting to that in law.

46. With regard to notice pay, the claimant was engaged on a contract for services. The contract states that the engagement can be terminated without prior notice or liability (page 82, paragraph 9). Thus the claimant is

not entitled to contractual notice pay. Nor does she have any statutory right to notice under section 86 ERA, given that she is not an employee.

47. With regard to holiday pay, the claimant worked from 27 April until 2 July 2021 and was entitled to holidays over that period in line with clause 7 of the agreement (page 82) which is equivalent to statutory. She was therefore entitled to 1.03 weeks of holiday pay, having worked 314.6 hours including holidays. She was thus entitled to 32.4 hours holiday pay for the assignment. From the pay slips lodged, she was paid 18.6 hours holiday pay (page 90) in May 2021 and 16 hours (in June 2021, page 92). This is a total of 34.6 hours of holiday which is more than the statutory/contractual entitlement. There is thus undisputed evidence that she was paid holiday pay and in any event she does not give any alternative figures.

48. With regard to arrears of pay, she has failed to specify these in the schedule of loss. However the pay slips lodged cover the whole period of her assignment and these show no arrears of pay, so there can be no dispute this has been paid. With regard to unspecified other payments; the contract does not include any other payments such as bonus or the like; and she has not specified which other payments she seeks. In such circumstances she has no reasonable prospects of success in regard to these claims.

49. If the Tribunal is not with him on his primary submission, Mr Maxwell sought a deposit order, specifically £1,000 for each head of claim.

50. Although the claimant was required to provide information regarding her ability to pay (para 23 of EJ Whitcombe's note) she has failed to do so. The first respondent believes that she had other jobs since, in light of other ET judgments of which the respondent is aware. She has had every opportunity to provide information about her means but she has failed to do so. Without that information, the sum sought is reasonable.

Second respondent's submissions

51. Mr Adjei adopted the submissions made by Mr Maxwell in so far as relevant to the second respondent, and he set out additional arguments.

52. He submitted that there is no evidence that the claimant was an employee of the second respondent. He relied on the findings in the interim relief

hearing where it was stated (para 7) that the claimant's position was that she was an employee of both but that she had not disclosed a contract of employment (page 65, para 7).

53. No contract of employment has yet been produced by the claimant because none exists. The documents before the Tribunal at the interim relief hearing were stated to be inconsistent with the claimant being an employee of either respondent.

54. The second respondent has produced screen shots of records which record the claimant's status and working hours (page 127). These link with the pay slips which show the number of units matches the number of hours worked at the appropriate rate. Although the claimant had not seen these internal documents during the currency of her engagement, she had seen them since because they were lodged with the documents for the interim relief hearing.

55. Furthermore, it would be unusual for the claimant to be employed by the second respondent but be paid by the first; and this arrangement is obviously consistent with an agency agreement.

56. Mr Adjei submitted that the claimant's claim that she was an employee is therefore hopeless. In any event, only two of the alleged the protected disclosures are potentially relevant to the second respondent (page 162). However these cannot be said to be the disclosure of information because this is a request for information. She produces no documents to support her assertions but in any event if that information on page 162 is compared to page 163 there she refers to these protected disclosures having been made to the ICO, so there is a conflict in what she says on one part of the table and on the other. This apparent discrepancy was however clarified in the interim relief hearing where the EJ recorded that she said these were made to ICO not the second respondent (page 65 para 9 line 20). The only protected disclosure referenced in the ET1 is after the termination of the claimant's assignment.

57. With regard to the race discrimination and equal pay claims, the second respondent is not liable in respect of the claimant's pay because they did not pay the claimant. She can not pursue a claim for equal pay

because she is not employed by the second respondent, as defined by the Equality Act, since there being is no contract between the claimant and the second respondent. The pay arrangements are dealt with by the first respondent, including deductions. This is supported by documents lodged (page 87) which despite the use of loose language saying the claimant would be "employed directly" by the first respondent, otherwise state that it is the first respondent who is responsible for pay, holiday pay etc. and this is confirmed in the agreement at para 6.1 page 82.

58. With regard to the claim for disability; the second respondent adopts the first respondent's submissions but makes alternative and additional submissions.

59. Mr Adjei submitted that the claimant has failed to provide sufficient specification in response to the order for information, so that the respondent does not know the PCP, the nature of the disadvantage or the adjustments contended for. The second respondent has no knowledge that the claimant is disabled (as asserted in the ET3, page 35), despite what the claimant stated in the e-mail dated 2 July about complaints about reasonable adjustments.

60. Although the claimant makes reference in the schedule of loss to failures in regard to risk assessment and occupational health referrals, it is not clear what she is asserting here. In any event, Mr Adjei argued that neither a risk assessment nor a referral to occupational health are reasonable adjustments. Relying on *Tarbuck v Sainsburys* 2006 IRLR 664, these are not practical steps to assist in maintaining the working relationship, but preliminary steps with no practical effect.

61. Even if these are reasonable adjustments the claim cannot be pursued because of the lack detail. It is not even clear which respondent the claims are directed at. While the inference is the second respondent that is a matter of speculation. In any event, the impact statement provided is deficient because there is no reference to the impact on day to day activities; the information relates to the impact which the termination had on her health. There is no clear expression of what she cannot do because of disability. She was invited to provide medical evidence but she has chosen

not to and although she references her GP, she does not provide a medical report which is very telling.

62. With regard to the harassment/victimisation claims, if that is a reference to the suspension, then it was the first respondent who suspended her, not the second. This is shown in text messages to the claimant from the first respondent and a further text when she tried to make contact with the second respondent (page 156 and 121). She confirms this in the schedule of loss. Her claim is doomed to fail even if it had referenced the fundamental detail of the protected characteristic.

63. With regard to the pay claims for notice and holiday pay, she has no contractual relationship with the second respondent so she was not entitled to be paid by the second respondent.

64. Mr Adjei also submits that the claim should be struck out because of a failure to comply with orders. While the claimant is a party litigant the claimant's excuse for not relying on orders is that she has "no experience in legal proceedings" (page 231). However the respondent references (page 234) various other ET claims she has made which show that the claimant has been involved in various proceedings in the ET over two to three years. The claimant does not deny that this is her. Rather she has been involved in more claims than most party litigants but has succeeded in none. He submitted that instead of being ignorant she is deliberately seeking to frustrate procedures.

65. The second respondent also relies on the alternative argument that a deposit order should be issued as a condition of proceeding. The claimant has advised that she did not have new employment when filled in the ET1. While there is no evidence of ability to pay the second respondent seeks a £250 deposit in relation to each allegation.

Tribunal deliberations and decision

66. I deal first with the applications of both respondents for strike out, which failing a deposit order. I considered whether the claims have little or no reasonable prospects of success.

67. There is a long line of authority to support the proposition that the threshold that must be reached to support a strike out on the basis of no reasonable prospects of success is a high one and that it would be particularly unusual to strike out a discrimination case on this basis without having heard evidence. That same approach applies in public interest disclosure cases.

68. That said, it appears that the facts are not in dispute in this case, and even if they were, the documentary evidence which the claimant does not or cannot contest appears to set out the position clearly. The claimant has not or has chosen not to lodge documents which counter the respondents' position.

69. My starting point therefore was that this claim should not be struck out at this stage unless I was persuaded that, taking the claimant's case at its highest, and accepting that she could prove everything she offers to prove, that still she has no reasonable prospects of succeeding with her claim.

70. I deal with each of the claims listed by EJ Whitcombe, set out at paragraph 27 of his note, in turn.

Automatic unfair dismissal

71. This claim relates to the claimant's claim that she was automatically unfairly dismissed for having made protected disclosures.

72. It is generally known that only employees can make claims for unfair dismissal. The claimant asserts that she was an employee, but she had not set out in any narrative facts she offers to prove to support that, nor lodged any documents.

73. In contrast the first respondent states that the claimant is an agency worker and relies on the contract between the first respondent and the claimant to confirm that.

74. That contract is lodged; and a signed copy was passed up which had been included in the document bundle for the interim relief hearing.

75. While employment status can often only be established through oral evidence, the documentary evidence in this case clearly supports the

respondent's assertion that the claimant is an agency worker. Indeed that is the claimant's belief , as confirmed by EJ Eccles.

76. Given that background, I accept that the claimant has no reasonable prospects of establishing that she is an employee of the first respondent, which means she cannot claim unfair dismissal.

77. I accept too, given the factual background and the documents to show the relationship between the first respondent and the second respondent, that the evidence supports the conclusion that the claimant is not an employee of the second respondent.

78. Given that clear conclusion, there is no requirement to consider the other elements of a claim of automatic unfair dismissal for making protected disclosures. Both respondents however advanced arguments to suggest that any attempt by the claimant to establish that she had made protected disclosures would in any event be likely to fail.

79. In fact the claimant only referenced one disclosure in the ET1 which it is clear was made after the engagement was terminated. As discussed above, I was prepared to accept the further information she provided of further alleged protected disclosures, but I agreed with the respondents that the claimant would have difficulty establishing that these were the disclosure of information and they were protected disclosures. I did not however require to come to any conclusion on that matter in respect of either respondent. As the claimant is not an employee, no claim for unfair dismissal can succeed, so that claim is struck out in respect of both claimants.

Race discrimination and equal pay

80. I consider these claims together as it is understood that the same facts are relied on in respect of each claim.

81. The claimant claims that she was paid less than a male comparator and less than a white female to support her claims for equal pay and race discrimination respectively. The first respondent has however lodged the pay slips for the comparators identified and these show that any difference in pay relates to length of service, justified by objective criterion set out in

the contract and not gender or race. Given the documents lodged and the inability of the claimant to dispute the figures, I agreed with Mr Maxwell that the claimant has put forward this claim based on a misunderstanding. I agreed with Mr Maxwell that this claim has no reasonable prospects of success and therefore is should be struck out relative to the first respondent.

82. With regard to the claim against the second respondent, I accepted Mr Adjei's submissions by reference to the documents lodged and on the standards principles of these types of agency arrangements, that they were not responsible for paying the claimant. The second respondent cannot therefore be liable for any pay discrimination and thus the claim has no reasonable prospects of success and is also struck out against the second respondent.

Disability discrimination

83. This claim relates to the claimant's claim relating to the failure to make reasonable adjustments.

84. Both respondents argue that the claims have no reasonable prospects of success. Both respondents asserts that they do not have sufficient information to allow them to defend the claim.

85. EJ Whitcombe issued orders about the details which the claimant needed to provide. In regard to the disability claim, these were

    1. The name or nature of the disability relied on;

    2. A concise statement of the impact of that disability on the claimant's normal day to day activities, giving clear examples;

    3. Any medical evidence on which the claimant intends to rely to prove that she is disabled;

    4. The relevant "provision, criterion or practice" or if relevant physical feature of premises which the claimant says puts her at a substantial disadvantage for the purposes of the reasonable adjustments claim;

5. The nature of that disadvantage;

6. The adjustments which the claimant says would have been reasonable for the respondents to avoid that disadvantage.

86. As asserted by the respondents, the claimant has not answered these requests, and certainly not in clear terms.

87. I considered what information the claimant has supplied in support of her claim.

88. In the ET1, she states that "I raised concerns of disability discrimination to the HSE that I was never provided with reasonable adjustments to my disability since disclosing it in April 2021". Although the focus would appear to be the whistleblowing claim, it was accepted that a failure to make reasonable adjustments claim was being made.

89. In response to EJ Whitcombe's request, the claimant lodged a disability impact statement (page 227). The claimant states there that she has had a disability since 2016 and suffered from the physical impairment of back pain, and the mental impairment of depression, depressive disorder, anxiety and panic attacks. She asserts that she provided this information in her application form to both respondents dated 28 April 2021. She advised of the medication she is on (and sent photographs of the packaging). She referenced the effect on her of these impairments in 2017 and 2018, specifically referring to sleepless nights.

90. However, this is the only effect which she mentions prior to the termination of her engagement. As Mr Adjei pointed out, the claimant goes on to detail the impact of the termination on her mental health in particular but does not focus on the impact of the conditions on her day to day activities prior to that. While the claimant has asserted the disabilities which she relies on, she has provided little or no evidence which might allow a Tribunal to accept that the disabilities she relies on had a more than trivial impact on day to day activities. Although both respondent say they did not know about the disability, the claimant asserts, and therefore offers to prove, that they did.

91. On the basis of the information provided, it appears that it will be difficult for the claimant to establish that she is a disabled person for the purposes of the Equality Act, even leaving aside the question of knowledge.

92. The claimant also referenced disability discrimination in the schedule of loss which she lodged in response to orders from EJ Whitcombe. In particular she states that "No risk assessments were carried out by the respondents when I informed them I suffered from back impairment and depression. I was not referred to occupational health. No reasonable adjustments were made to my disability. No duty of care".

93. Although the second respondent apparently accepts that the claimant raised the issue of back pain, the respondent's position on the matter being noted in the ET3 that that "Early in her assignment the claimant requested a back support and foot stool which were commonly used on site. These were provided to her immediately as the site had a stock of them available".

94. This is the only information the claimant provides in regard to her disability claim. It is thus clear that the claimant has failed to provide the further information sought. This should be the minimum required to establish a failure, if it could be proved.

95. In particular, the claimant has failed to set out the PCP and the nature of the disadvantage. Perhaps most significantly for this application, she has not identified the reasonable adjustments that might alleviate any disadvantage. Giving the claimant the benefit of the doubt, I accept that she had identified two failures, namely in regard to the failure to undertake a risk assessment or to refer her to occupational health.

96. However I agreed with Mr Adjei (following *Tarbuck*) that a risk assessment would not be a reasonable adjustment, where no practical step was suggested. The same must be said of an occupational health referral, absent the claimant specifying what step might highlight as being a reasonable one for an employer to make to alleviate any disadvantage. The claimant has failed to provide sufficient detail, such that even if she proves all that she offers to prove, she has no realistic prospect of succeeding in a disability claim against either of the respondents.

97. While I take account of the fact that the claimant is a party litigant, and notwithstanding her previous experience engaging with the Employment Tribunal, I thought that at the very least the claimant should have been able to set out the adjustments which she had asked for or which self evidently should have been considered (beyond the foot stool which was provided). It is that failure in particular which leads me to conclude that her claim against both respondents has no reasonable prospects of success.

Harassment and victimisation

98. Again I deal with these claims together because they appear to be based on the same facts.

99. I noted that the claimant had been required to specify which protected characteristic she relied on in regard to the alleged harassment, to specify the conduct which allegedly had the purpose of violating her dignity or creating a hostile environment; and in regard to the victimisation claim the date and nature of the protected act and the detriment which she says she suffered.

100. As far as I was aware, the claimant has failed to provide any of this required information. In particular she has failed to specify which protected characteristic she relies on in support of her harassment claim.

101. As far as I could see, the claimant only makes brief reference to harassment and victimisation in her ET1 claim form, to the effect that, “I was also suspended with pay with no reasons and was told not to go to work and it wasn’t only affecting me, but this was not the case. This is harassment and victimisation”.

102. The respondents make two particular points about this. The first respondent states that the only act of harassment referenced is “suspension” and that this is not capable of amounting to harassment. I agreed that the surrounding circumstances so far as I was made aware point to the “suspension” simply being told not to attend work that evening. I took the view that objectively speaking that could not be categorised as harassment if proved. Even if that was the claimant’s view it would not have been reasonable to have classed the text message as an act of harassment and

the claimant has not provided any further specification to suggest that it was something more or there were other instances of harassment.

103. In such circumstances, absent reference to a protected characteristic, and where the act relied upon is not objectively capable of being an act of harassment, or indeed subjectively capable without more, I considered that the claimant's claims against the first respondent had no reasonable prospects of success.

104. The second respondent also relied on the fact that no reference was made to the protected characteristic relied upon. Given that the only reference to conduct which might amount to harassment was the reference to "suspension", it was clear from the paperwork that any suspension, or indeed request not to return to work, was made by the first respondent and not the second respondent. I accepted that is clear from the documents which have been lodged and which will be relied on by the second respondent but which were included in the bundle by the claimant as I understood it. I therefore agreed that the claimant has no reasonable prospects of success in a claim against the second respondent.

105. With regard to the victimisation claim, there is even less clarity about what claim the claimant is making here. This is particularly because the claimant has failed to comply with the order and failed even to identify the protected act. But given that the claimant relies only on protected disclosures some allegedly made prior to the termination of her engagement, there is no reference there or in any of the paperwork to the claimant having made claims under the Equality Act or indeed any act of discrimination prior to the termination of her engagement.

106. On the basis of the information supplied, I agreed that there were no reasonable prospects of such a claim succeeding against either respondent. The claims for harassment and victimisation are therefore stuck out against both

Pay claims against the second respondent

107. In regard to this, and indeed other pay claims against the second respondent, given that there is no contractual relationship between the

second respondent and the claimant; and given that the claimant's pay arrangements are matters for the first respondent, there can be no valid pay claims against the second respondent. The pay claims for that reason are struck out against the second respondent.

Notice pay against the first respondent

108. This relates to the claimant's claim that she is due to be paid one week's notice which she states in her schedule of loss is £466.

109. The first respondent relies on the contract between the claimant and the first respondent which states that notice is not due on termination. Nor is there any statutory entitlement to notice because the claimant is not an employee.

110. I have already concluded that there is no reasonable prospect of the claimant establishing that she is an employee, so she cannot succeed in a claim for statutory notice pay. Equally, notice pay would otherwise be a claim for breach of contract but the contract between the claimant and the respondent, lodged for this and the interim relief hearing, indicates that no notice pay is payable. There being no other document setting out the claimant's terms, there being no term allowing for notice pay, that claim too has no reasonable prospects of success against the first respondent and is struck out.

Holiday pay

111. The claimant claims holiday pay but gives no specification of the amount which she seeks.

112. The first respondent set out in submissions their assertion that the claimant had actually received more holiday pay than was due. The first respondent relied on the pay slips which have been lodged. There is no suggestion that the pay slips lodged are disputed. While the claimant has indicated in her schedule of loss that she due holiday pay, what she actually says is "holiday pay accrued, not taken and owed from 01.07.2021". If that is accurate, given her reference to future losses, she would appear to be looking for holiday pay in relation to an extension of her contract from the date of termination to the date of the final hearing. She has not otherwise specified any holiday

pay due for the period from end April to the termination of the agreement on the first day of July.

113. Clearly whatever the outcome of this claim, it could not be that the claimant should be reinstated or that she should be paid holiday pay for future periods which she did not work.

114. In light of the information furnished to the Tribunal, and the documents which will be relied on, I agreed with Mr Maxwell that the claimant's holiday pay claim has no reasonable prospects of success and therefore is struck out.

Arrears of pay and other unspecified payments

115. These claims are listed in the preliminary hearing note by EJ Whitcombe but it would appear that there are no pleadings or written case at all to support them, and indeed they are not even referenced in the schedule of loss.

116. In the absence of any specification, or any offer to prove sums due, it has to be concluded that these claims have no reasonable prospects of success against the first respondent and are struck out.

Conclusion

117. I have concluded in relation to each claim asserted and in respect of each respondent that there are no reasonable prospects of success, and therefore the respondents' applications for strike out are granted. This means that this claim is dismissed.

Employment Judge: M Robison
Date of Judgment: 11 February 2022
Entered in register: 11 February 2022
and copied to parties