



EMPLOYMENT TRIBUNALS

Claimant: JUSTIN LA HOOD

Respondents: PRICEWATERHOUSECOOPERS LLP

Heard at: London South Employment Tribunal by video

On: 26 April 2022

Before: Employment Judge L Burge

Appearances

For the Claimant: Mr D McCarthy, representative

For the Respondents: Mr C Glyn QC, Counsel

OPEN PRELIMINARY HEARING RESERVED JUDGMENT

It is the Judgment of the Tribunal that:

1. The Claimant's claims against Matthew Thorogood, Michael Bailey and Jonathan Howe are dismissed upon withdrawal.
2. The following claims are dismissed upon the Claimant's withdrawal:
 - 2.1 Unfair dismissal;
 - 2.2 Reinstatement;
 - 2.3 Reputational damage; and
 - 2.4 Breach of contract.
3. The Respondent's application to strike out the Claimant's claim of associative direct discrimination fails.

REASONS

4. On 21 June 2020 the Claimant submitted his claim which centred around his forced retirement from the Respondent and included complaints of associative

direct discrimination and public interest disclosure detriments. He subsequently withdrew his complaints of Unfair dismissal, reinstatement, reputational damage and breach of contract and so they are dismissed.

5. The two hour Open Preliminary Hearing was listed to consider the Respondent's strike out application, brought under Schedule 1, Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the "Rules") on the basis that the Claimant's claim of associative direct discrimination had "no reasonable prospect of success". The Respondent submitted that in the case of *Lee v Ashers Baking Company Ltd and ors* 2018 IRLR 1116, the Supreme Court rejected the contention that there is associative discrimination because a person suffers less favourable treatment merely because of something he has to do with a protected characteristic of another person. In *Lee* the Claimants failed in their argument that those who supported gay marriage were indissociably associated with the protected characteristic of sexual orientation. Those from all protected characteristics support gay marriage. Of my own volition I also considered whether a deposit order under Rule 39 would be appropriate.

Law

Strike out

6. The central question is whether the claims have a realistic as opposed to a fanciful prospect of success: *Eszias v North Glamorgan NHS Trust* [2007]. Even discrimination claims can and should be struck out where the allegations are implausible and there are no facts indicative of unlawful discrimination. A case that otherwise has no reasonable prospect of success cannot be saved from being struck out on the basis that "something may turn up": *Patel v Lloyds Pharmacy Ltd* [2013] UKEAT/0418/12.
7. In *Abertawe Bro Morgannwg University Health Board v Ferguson* 2013 ICR 1108 the EAT remarked that:

"33. We would add this final note. Applications for strike-out may in a proper case succeed. In a proper case they may save time, expense and anxiety. But in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not..."

Deposit

8. Under Rule 39(1) of the Rules, the Tribunal has the power to make separate deposit orders in respect of individual allegations or arguments, up to a maximum of £1,000 per allegation or argument. Rule 39(2) obliges the Tribunal to make "reasonable enquiries into the paying party's ability to pay the deposit and to have regard to any such information when deciding the amount of the deposit." I did

make enquiries of, and obtained information in relation to the Claimant's ability to pay, should I decide to Order a deposit as a condition of continuing with his claim.

9. In considering whether to make deposit orders, the Tribunal is entitled to have regard to the likelihood of a party being able to establish facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. In *Van Rensburg v The Royal Borough of Kingston Upon Thames* [2007] UKEAT/0096/07, Elias P held:

"...the test of little prospect of success...is plainly not as rigorous as the test that the claim has no reasonable prospect of success... It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response";

10. In *Hemdan v Ishmail* [2017] IRLR 228, Simler J described the purpose of a deposit order as being:

"...to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails."

11. Simler J continued:

"Where, for example as in this case, the Preliminary Hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict it should properly be resolved at a Full Merits Hearing where evidence is heard and tested"

Associative Direct Discrimination

12. S. 13 of the Equality Act 2010 provides:

"Direct discrimination

(1) 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..."

13. Thus S.13 refers to discrimination against another "because of a protected characteristic", it does not say that the person claiming needs to have that protected characteristics themselves.

14. In *Coleman v Attridge Law C-303/06 [2008] IRLR 722, [2008] ICR 1128*, Ms Coleman was treated less favourably than other employees because she was the primary carer of a disabled child.

15. In *Lee v Ashers Baking Company Ltd and ors* 2018 IRLR 1116, SC, the Supreme Court decided that Christian bakery owners had not been guilty of associative direct discrimination on the ground of sexual orientation when they refused to provide a cake bearing the words "Support Gay Marriage". Their objection was to the message on the cake, because of their religious views concerning gay marriage, not to any particular person or persons. The Supreme Court held:

"...less favourable treatment on the grounds of the sexual orientation ... could include the situation where a person had been less favourably treated because of another person's sexual orientation; that, however, this was very far from saying that, because the reason for the less favourable treatment had something to do with the sexual orientation of some people, the less favourable treatment was "on grounds of sexual orientation", within regulation 3(1)(a), and so amounted to direct discrimination; that, in the present case, the defendants had refused to fulfil the plaintiff's order because of their religious objection to same-sex marriage, not because they perceived the plaintiff to be homosexual or because he associated with homosexuals, their objection being to the message, not the person placing the order; that, in those circumstances, the defendants had not treated the plaintiff less favourably "on grounds of sexual orientation..".

16. The Equality and Human Rights Commission Statutory Code of Practice on Employment states:

"3.20

Direct discrimination because of a protected characteristic could also occur if a worker is treated less favourably because they campaigned to help someone with a particular protected characteristic or refused to act in a way that would disadvantage a person or people who have (or whom the employer believes to have) the characteristic..."

17. The Code goes on to give an example:

"An employer does not short-list an internal applicant for a job because the applicant – who is not disabled himself – has helped to set up an informal staff network for disabled workers. This could amount to less favourable treatment because of disability."

The Claim of Associative Discrimination

18. The Claimant's claim included a section on associative discrimination, extracts are:

"I believe that the decision by the firm to force my retirement was a direct result of my association with [S], who brought a grievance against the firm for, I believe, amongst other things, discrimination..."

[S] suffered from a neuro-diversity disability. I worked closely with [S] from 2014 to until approximately March 2019. During this period, I took steps to make reasonable adjustments for [S]'s disability. My actions in doing this

were not supported by other partners and the management of the firm, some of who took steps to undermine the efforts I was making in this regard.

This ultimately culminated in [S] bringing a disability related grievance against the firm in late 2018/early 2019. I was interviewed as part of this process. I was concerned about providing information...

Despite... assurances, it is clear from the business rationale document (BRD) prepared by the firm to support their decision to force my retirement that they considered my objective and truthful evidence provided in the above process to have been 'support' for [S] and that my involvement in his grievance process was the real reason for the decision to force my retirement from the firm.

...

On several occasions between 2016 and early 2019, I raised my concerns ... with senior partners in my business area... [one partner] also understood that my desire to assist [S] with ensuring the firm made reasonable adjustments was motivated not only by my concern for [S] personally, but also because I have [personal experience of another] with a similar neuro-diversity disability. This did not, however, result in any resolution to the issues.

...

I had raised objections to the... course of conduct against [S], which appeared to fall on deaf ears. Following [S's] grievance and departure from the firm, [two partners] took steps to similarly disenfranchise me. This included taking away the business area that I had built and established.

...

For all the reasons set out above, and in contrast to the official grounds set out in the BRD and stated as part of the appeal process, I believe that the firm's discrimination against [S] and discrimination by association against me were the real reasons for their decision to force my retirement from the firm."

Submissions

19. Mr McCarthy submitted that the Claimant had filled out his claim form himself and he had never worked as a lawyer in a law firm or in an area which gave legal advice.
20. Mr Glyn QC submitted that in *Lee* the Claimants failed in their argument that those who supported gay marriage were indissociably associated with the protected characteristic of sexual orientation. Those from all protected characteristics support gay marriage. This, he said, is the same for the Claimant's claim of

associative discrimination – all types of people, whether disabled or not, support those with neurodiverse disabilities and their rights at work. Such manifestation of support is not indissociable with the protected characteristic. The Claimant must show that he was treated less favourably because of SP's protected characteristic. In *Coleman*, Ms Coleman was able to do so. She had to care for her disabled son; she needed to work flexibly. She was not allowed to do so. She was treated less favourably by her employers because of her disabled son.

21. Mr Glyn QC continued that, the manifestation of support by the Claimant fails to make the link between the treatment that he alleges with SP's disability. The reason for the Claimant's treatment is, on the Claimant's case, his manifestation of support for those with neurodiverse disabilities and not because of S's disability. As Lady Hale concludes at §34 the Claimant's case is that "In a nutshell, the objection was to the message and not to any particular person or persons."
22. Mr McCarthy submitted that the Claimant was a close friend and close working colleague with S and the Claimant sought to make reasonable adjustments for him. He continued that the factual matrix needs to be ascertained and the close association will become more clear during the course of the final hearing.

Conclusions

23. When making a decision on whether to strike out or order a deposit I must take the Claimant's claim at its highest. The Claimant was a litigant in person and set out his connection with S in his claim form and described the treatment as being because of his "*association with [S]*". The claim said that the Claimant took steps to make reasonable adjustments for [S]'s disability and that his "*actions in doing this were not supported by other partners and the management of the firm, some of who took steps to undermine the efforts [he] was making in this regard*". The Claimant then says he was treated badly in part because of the support he had given to S. I therefore do not agree with the Respondent that the Claimant's case is that he was treated badly because of his manifestation of support for those with neurodiverse disabilities. The Claimant does seem to be linking his treatment with S's disability. The Claimant seems to be saying that it was the making of adjustments of a person with a disability, supporting him in an interview about S's grievance and then, the Claimant says, being treated badly because of those actions.
24. The case is not on all fours with *Lee* or *Coleman*. However, as I have to take the Claimant's case at its highest, I cannot conclude that the claim has no, or little, prospects of successfully arguing that the Claimant was treated less favourably because of S's protected characteristic. It is not possible, nor would it be just nor equitable, for me to make a swift determination following a short Preliminary Hearing on whether the Respondent's treatment of the Claimant was because of S's protected characteristic, whether it was because of a more general support of disabled people or whether it had nothing to do with S or neurodiversity at all. This matter needs to be determined at the end of a full merits hearing and after all of the evidence gathering when it is likely to be much clearer whether there is truly a point of law in issue or not.

25. For the above reasons the Respondent's application to strike out the Claimant's claim of associative direct discrimination fails, and I conclude that a deposit Order is also not appropriate as a condition of the Claimant pursuing this complaint.

Employment Judge L Burge

Dated: 20 May 2022