



EMPLOYMENT TRIBUNALS

Claimant: Mr Carlton McDonald

Respondent: University of Derby

Heard at: Nottingham

On: 20-23 April 2022

Before: Employment Judge Victoria Butler (sitting alone)

Representation

Claimant: In person

Respondent: Ms G Cawthray, Solicitor

JUDGMENT

The claim is struck out because it has no reasonable prospect of success

REASONS

Background

1. The Claimant was employed by the Respondent from 23 April 1990, latterly as a Senior Academic Counsellor, until his summary dismissal on 23 July 2021. The claim is one of six against the Respondent and was issued on 6 January 2022.
2. The claim is for equal pay and there is no doubt about that. Whilst the Claimant did not tick the box for 'equal pay' in section 8 of the ET1, he explains in 'another

type of claim that it is an *'equal pay claim'*. The attached particulars are also headed *'Equal Pay Claim'* and the Claimant confirmed the same at a preliminary hearing ("PH") before me on 12 January 2022.

3. The Claimant advances the claim on the basis that he has not received equality of pay because of his race and refers predominantly to male comparators (albeit some female ones are named).
4. At the PH before me on 12 January 2022, I noted the following in my Case Management Summary:

"The Claimant has submitted a new claim alleging equal pay. Within the details of his complaint, he refers to both male and female comparators and relies on allegations dating back to the early part of his employment.

I explained to him that the equal pay provisions are in place to ensure equality of pay between men and woman and his claim as drafted appears to be a race discrimination claim. The Claimant refused to accept this despite my attempting to explain it to him on several occasions. Accordingly, the legal basis of the claim will most likely be subject to a strike out application at the upcoming preliminary hearing (details below).

If the claim is permitted to proceed, it is further likely that the Respondent will raise the estoppel point again.

The Respondent must respond to the claim in accordance with the deadline generated by the Tribunal, even if it simply to the extent that it wishes to make any of the applications referred to above. If the claim survives, the Respondent will be granted leave to respond to it in full.

If I am wrong in my initial view about the claim and there is a legal basis on which it can be pursued, the Respondent should respond to it in the usual way."

5. The Respondent submitted its Response on 3 March 2022 and submitted that the claim should be struck out because there is no legal basis on which it can be pursued and, therefore, it has no reasonable prospect of success.
6. In addition, and alternatively, it submitted that the claim should be struck out because it is scandalous and vexatious and the manner in which he has conducted the claim in the context of multiple proceedings is scandalous and/or vexatious and unreasonable.

The hearing

7. The hearing was listed to determine a number of matters including whether this claim should be subject to a deposit order or struck out because it has no reasonable prospect of success.
8. The bundle ran to 1886 pages but the focus for the purposes of this judgment was the claim form and the Equal Pay Code of Practice (“the Code”).

Submissions

The Claimant’s submissions

9. The Claimant agreed that section 64 of the Equality Act 2010 (“EQA”) requires a comparator of the opposite sex. However, he referred me to the following paragraphs in the Code, namely:
 10. Paragraph 11 which reads;

“Although this code relates to equal pay between women and men pay systems may be open to challenge on grounds of race, age or other protected characteristics under the Equality Act 2010.”
 11. Paragraph 107 which reads:

“the pay discussions that are protected in this way are those aimed at establishing whether or not there is pay discrimination, this provision is not confined to the protected characteristic of sex.”
 12. Paragraph 135 which reads:

“A complaint to an Employment Tribunal about equal pay must be made within 6 months of the end of what is known as the qualifying period. In a standard case this is 6 months from the last day of employment. This is different from sex discrimination claims for which the time limit is ordinarily 3 months from the last act of discrimination.”
13. Firstly, the Claimant submitted that although the Code is written in terms of gender it applies to all protected characteristics.
14. Secondly, he submitted that I told him at an earlier hearing that he could not bring an equal pay claim whilst still employed which is why he did not present it earlier. However, this submission appeared to be made in the context of him taking advantage of the six-month limitation period for equal pay claims, rather than the three-month limitation period for discrimination claims

15. Thirdly, the Claimant submitted that he had removed previous references to equal pay from his first claim (2603097/2020) because I had told him he could not bring such a claim whilst employed and further, given that he was estopped from pursuing the first twenty allegations in that claim, he asked, *“how can I bring a claim if I am estopped from doing it?”*
16. Finally, the Claimant said there was no provision to bring an inequality of pay claim based on other protected characteristics within the EQA, so any such claim had to be pursued under the equal pay provisions.

The Respondent’s submissions

17. The Respondent submitted that the Claimant has misunderstood the provisions of equal pay law which are clear and require a comparator of the opposite sex.
18. It further submitted that the claim was an attempt to bring in matters that are estopped and to introduce more and more claims against it.
19. There was nothing stopping the Claimant from bringing the claim in another way i.e. as a race discrimination claim.

The law

Equal pay

20. The relevant law is contained in Part 5 Chapter 3 of the EQA headed ‘*Equality of Terms*’ ‘*Sex Equality*’.
21. Section 64 relates to relevant types of work and provides sections 66 to 70 apply where:

“A person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does. Person (A) holding a personal public office does work that is equal that a comparator of the opposite sex (B) does.”

Striking out a claim or part of it – Rule 37 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

22. Rule 37 provides:

“At any stage of the proceedings, either on its own initiative or on the application of a party, the 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.*
- (b) *That the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
- (c)

- 23. In dealing with an application to strike out all or part of a claim the Tribunal must be satisfied that there is “*no reasonable prospect*” of success in respect of that claim or complaint.
- 24. It is insufficient to determine that the chances of success are remote or that the claim or part of it is likely, or even highly likely to fail.
- 25. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal will rarely, if ever, be appropriate to be struck out as having no reasonable prospect of success before the evidence has been deliberated.
- 26. When consideration is being given to striking out discrimination claims particular care must be exercised and it will rarely, if ever, be appropriate to do so in cases where the evidence is in dispute. The Claimant’s case should be taken at its highest, unless it can legitimately be said as enjoying no reasonable prospect of succeeding at a substantive hearing.

Conclusions

- 27. My determination in this application is not one that is subject to evidence. It is a matter of law.
- 28. The Claimant agreed that the relevant law refers to the protected characteristic of sex and requires a comparator of the opposite sex.
- 29. However, he relied on isolated extracts from the Code to argue that he could bring a claim for inequality of pay based on the protected characteristic of race under the sex equality provisions.
- 30. He referred to those paragraphs in isolation yet ignored the overall purpose of the Code.

31. The Forward of the Code reads:

“This document is the Statutory Code of Practice on equal pay. This is the authoritative, comprehensive and technical guide to the acts provisions intended to ensure that women and men receive the same pay and other contractual benefits when they are doing equal work.”

32. The Forward also explains why the Code is separate to the Code of Practice on the Equality Act more generally as follows:

“We have produced this Code separately rather than incorporating its contents into the Employment Code of Practice, because this is what a range of different organisations told us during consultation that they would find most helpful”.

33. The Code explains the purpose of the equal pay provisions of the Act. Paragraph 7 opens:

“The full-time gender pay gap has narrowed since 1975 when equal pay legislation first came into force but there remains a gap of over 16% between women’s and men’s pay. Historically women have often been paid less than men for doing the same or equivalent work and this inequality has persisted in some areas. The act provisions of pay and sex discrimination are intended to ensure that pay and other employment terms are determined without sex discrimination or bias.”

34. The law on equal pay is clear and relates to inequality of pay between the sexes, as agreed by the Claimant. The Code accompanies the relevant law.

35. Accordingly, there is no basis in law on which the Claimant can pursue an equal pay claim under those provisions given he alleges inequality of pay because of his race and the bulk of the comparators relied on are men.

36. The Claimant has tried to re-interpret the Code to suit despite acknowledging the law it accompanies. I can only assume this it to take advantage of the sixmonth limitation period for equal pay claims. The same can be said in seeking to understand why the Claimant failed to present this claim as one of race discrimination, which he is entitled to do under the provisions of Part 5 Chapter 1 of the EQA, but which has a three-month limitation period. Had he presented it as such, it would have been out of time.

37. Dealing with the Claimant’s submission that I told him he was precluded from presenting an equal pay claim whilst still employed, he is simply wrong on that. I can only conclude he misunderstood comments I made about the Tribunal’s

jurisdiction to hear a breach of contract claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

38. Regardless, this has no bearing on the legal basis on which he has chosen to pursue this claim. It is only relevant in the context of why the claim was not submitted until over five months after his dismissal.
39. The Claimant's submission in respect of estoppel also has no bearing on the legal premise of the claim either but, in any event, the Claimant cannot use a further claim to seek to introduce matters that he is estopped from relying on in another claim.
40. Given that there is no basis in law on which to pursue the claim as pleaded it is struck out because it has no reasonable prospect of success in accordance with Rule 37(1)(a) of the Employment Tribunal Rules 2013.
41. For completeness, I also agree with the Respondent's submission that this claim is both scandalous and vexatious within the meaning of those words as defined in the case law and the manner in which he has conducted the claim in the context of multiple proceedings is scandalous and/or vexatious and unreasonable.
42. To assist the Claimant, I referred him to the EQA Employment Statutory Code of Practice as follows:

“What the Act says about employers' obligations to employees

Employers must not discriminate against or victimise an employee:

- *as to the terms of employment;*
- *in the way they make access to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
- *by dismissing the employee; or*
- *subjecting them to any other detriment.*

Terms of employment

The terms of employment include such things as pay, working hours, bonuses, occupational pensions, sickness or maternity and paternity leave and pay. The Act has specific provisions on equality of contractual terms between women and men, which are explained in the Code of Practice on Equal Pay.”

Employment Judge Victoria Butler

Date: 26 May 2022

JUDGMENT SENT TO THE PARTIES ON

..7 June 2022.....
S.Cresswell

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FOR THE TRIBUNAL OFFICE

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