



EMPLOYMENT TRIBUNALS

Claimant

Ms R Killeen

Respondents

GuidepostsTrust Limited

v

Heard at: Watford (by CVP)

On: 20 October 2022

Before: Employment Judge S Moore

Appearances

For the Claimant:

Dr Gibson, McKenzie friend

For the Respondent:

Mr Hignett, Counsel

JUDGMENT ON PRELIMINARY ISSUES

- (1) The application that the claims under sections 44 and 100 of the Employment Rights Act 1996 be struck out or that the Claimant pay a deposit as a condition of continuing to advance them, is dismissed.
- (2) The application that the claim for breach of contract should be struck out or a deposit order made as a condition of continuing to advance it, is dismissed.
- (3) The application that the claim under section 38 Employment Act 2002 should be struck out or a deposit order made as a condition of continuing to advance it, is dismissed.
- (4) The application that the claim under section 104(4) Employment Rights Act 1996 has no reasonable prospect of success is allowed and the claim is struck out.
- (5) The application that a deposit order be paid as a condition of continuing to advance the claims for failure to make reasonable adjustments based on PCPs 5, 6 and 11 of the List of Issues is dismissed.
- (6) The application that a deposit order be paid as a condition of continuing to advance the claims for failure to make reasonable adjustments based on PCPs 1-4, and 7-10 of the List of Issues is allowed. The Claimant must pay £125 as a

condition of continuing to advance each claim (£125 per claim).

- (7) The application that a deposit order be paid as a condition of continuing to advance the claims for indirect disability discrimination based on PCPs a, b, d, and g of the List of Issues is dismissed.
- (8) The application that a deposit order be paid as a condition of continuing to advance the claims for indirect disability discrimination based on PCPs c, e, and f of the List of Issues is allowed. The Claimant must pay £125 as a condition of continuing to advance each claim (£125 per claim).

REASONS

Introduction

1. This hearing was listed to determine the Respondent's application that certain of the claims should be struck out as having no reasonable prospect of success or the Claimant ordered to pay a deposit as a condition of having to advance them on the grounds they have little reasonable prospect of success.
2. The Claimant was employed as a Manager in Learning Disability Services by the Respondent, a charity supporting people with long term conditions, disability or caring responsibilities, to improve their mental health and well-being, from 21 April 2015 to 22 December 2020 when she was dismissed on grounds of redundancy.
3. She presented her first claim to the Tribunal on 14 December 2020 and her second on 12 April 2021.
4. Initially, across the two claims, there were 19 separate causes of action. Fifteen of them still remain.
5. On 31 August 2021 there was a Preliminary Hearing before Judge Welch at which an order for this Open Preliminary Hearing was made (although the hearing was not listed). At that hearing the Claimant was ordered to provide particulars of her claims for disability discrimination, of her claims for sex discrimination (since withdrawn) and of her protected disclosures.
6. On 12 October 2021 the Claimant filed approximately 33 close-spaced pages of further information.
7. On 8 November 2021 the Respondent wrote to the Tribunal setting out which claims from the first and second claim it was seeking to strike out or in respect of which it was requesting a deposit order.

8. By this date an issue had also arisen as to whether a particular conversation on 13 October 2020 was a protected conversation and should not be considered in evidence at the final hearing.
9. On 22 November 2021 the Claimant made an amendment application running to 20 pages.
10. On 29 November 2021 the Respondent informed the Tribunal that it objected to the amendment application and that it was still awaiting a date for the Preliminary Hearing.
11. On 12 July 2022 there was a Preliminary Hearing before Judge Mason. Since that hearing only had time to deal with the question of whether the protected conversation was admissible in evidence, at the conclusion of that hearing this Preliminary Hearing was listed to determine the Respondent's strike out application/application for a deposit order and whether either party needed leave to amend their claim or response. In the meantime, the Claimant was encouraged to review her list of complaints and advise the Respondent if any further claims were to be withdrawn.
12. The parties were also ordered to use all reasonable endeavours to agree a list of issues by 14 October 2022. The Respondent says that until the subsequent discussions regarding the List of Issues, it remained unclear – despite the voluminous information provided - how the Claimant put her case on direct discrimination under s.13 Equality Act 2010.
13. A list of issues was (broadly) agreed and it formed the basis of the Respondent's applications for strike out and deposit orders today.

The applications for strike out or deposit orders.

14. Mr Hignett submitted that all the following claims should be either struck out or be subject to a deposit order:
 - (i) The claims of detriment and automatic unfair dismissal under sections 44 and 100 Employment Rights Act 1996 (ERA)
 - (ii) The claim for breach of contract
 - (iii) The claim for failure to provide a statement of employment particulars under section 38 Employment Act 2002
 - (iv) The claim of automatic dismissal under section 104 ERA for asserting a statutory right
 - (v) The claim for reasonable adjustments (all 11 PCPs)
 - (vi) The claim for indirect disability discrimination (all 7 PCPs)
 - (vii) The claim of direct disability discrimination.

15. After hearing Dr Gibson's response to Mr Hignett's application I heard evidence from the Claimant as regards her means. She said she is not a homeowner but lives with Dr Gibson in his home. She is currently working 18 & ½ hrs per week under a contract that had initially been for 12 months but had been extended for a few months. The contract is due to expire next week and the Claimant said she didn't feel well enough to seek further work. She does not own a car but she has approximately £12,000 in an ISA. Her evidence as to whether or not she also has other savings was vague.

The claims of detriment and automatic unfair dismissal under sections 44 and 100 Employment Rights Act 1996 (ERA);

16. These provisions confer the right on an employee not to be subjected to any detriment or to be dismissed on the ground that:
- (a) Having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities;
 - (b) ...
 - (c) Being an employee at a place where-
 - (i) There was no representative or safety committee, or
 - (ii) There was a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.
17. Mr Hignett submitted the Claimant had no standing under either of these provisions because, first, she was not a designated employee and, secondly, there was a safety committee within the Respondent's leadership team to whom it would have been reasonably practicable to raise the matters in question.
18. Further, the circumstances connected with the Claimant's work, which she said she reasonably believed were harmful or potentially harmful to health and safety, as set out in the List of Issues, were too general. At paragraph 5f of the List of Issues these are listed as follows:
- i. Failure to follow rules for safe Covid access and precedent created by failure to deal with this.
 - ii. Aggressive environment (affecting mental health safety) and precedent created by failure to deal with this.
 - iii. Risk assessments - concerns over the quality and consistent application of risk assessments for Covid working.

- iv. Concerns regarding insurance for staff working with vulnerable adults in their own homes.
 - v. Safe staffing levels (including insufficient staff to meet the safe care rations agreed with HCC).
19. Dr Gibson replied that the Claimant had responsibility for health and safety matters and believed she was designated for the purposes of section 44(1)(a). Further she did not accept there was a safety committee within the Respondent's leadership team to whom it would have been reasonably practicable for her to raise the matters in question for the purposes of section 44(1)(c). He therefore submitted the Claimant did have standing to bring the claim.
20. While there's no evidence in the bundle to suggest the Claimant was a designated employee, neither is there any evidence of the existence of a safety committee within the Respondent's leadership team to which it would have been reasonably practicable for her to raise the matters in question. On the evidence before me I therefore cannot say the Claimant has no chance, or little reasonable chance, of establishing she has standing for the purposes of sections 44 and 100 ERA. Further, I cannot say she has no chance, or little reasonable chance, of establishing her claims simply because the circumstances which she says she believed were harmful or potentially harmful to health and safety still lack precision. There's no reason to think more precise details can't be given before the hearing, particularly since it appears at least some of these matters formed part of a grievance raised by the Claimant while she was employed.
21. Accordingly, the application that the claim under sections 44 and 100 of the Employment Rights Act 1996 be struck out or that the Claimant pay a deposit as a condition of continuing to advance them, is dismissed.

The claim for breach of contract and the claim for failure to provide a statement of employment particulars under section 38 Employment Act 2002

22. The claim for breach of contract is that the Claimant was put on garden leave in breach of contract.
23. Mr Hignett submitted there was a provision in the Claimant's contract that entitled the Respondent to put her on garden leave, referring to a term in the Statement of Particulars of Employment that "The Trust reserves the right to make payment in lieu of notice". The same Statement of Particulars of Employment was the basis of his submission that the claim under section 38 of the Employment Act 2002 should also be struck out.
24. Dr Gibson said the Claimant had never been given that Statement of Particulars of Employment and pointed out that, unlike the document headed "Agreement for Services", the Statement of Particulars was unsigned.

25. Accordingly, without the benefit of oral evidence, it is impossible to form a view on whether or not the Claimant received the Statement of Particulars of Employment and/or whether it formed part of her contract of employment.
26. It follows the applications that the claims for breach of contract and/or under section 38 Employment Act 2002 should be struck out or a deposit order made in respect of them are dismissed.

The claim of automatic dismissal under section 104 ERA for asserting a statutory right.

27. In the List of Issues the following statutory rights are identified:
- i. The right not to be discriminated against by a failure to comply with a duty to make reasonable adjustments pursuant to s. 21 of the Equality Act 2010;
 - ii. The statutory right to protection from discrimination;
 - iii. The right to a safe system of work; and
 - iv. The right to protection from unfair dismissal.
28. Mr Hignett submitted that none of the statutory rights relied upon were “relevant statutory rights” within the meaning of section 104(4) ERA, with the exception of the right to protection from unfair dismissal.
29. I accept that submission. Notably the right not to be discriminated against derives from the Equality Act 2010 and not the ERA. Similarly, the right to a safe system of work is not a right under the ERA. Further, while the right to protection from unfair dismissal falls within the ERA, the claim that the Claimant was dismissed because she asserted her right not to be unfairly dismissed is non-sensical and has no reasonable prospect of success.
30. I therefore find the claim under section 104(4) ERA has no reasonable prospect of success and strike it out.

The claim for reasonable adjustments

31. In the List of Issues there are eleven PCPs for the purposes of the reasonable adjustments claim which are listed as follows:
- (i) PCP1: Failing to complete grievance actions;
 - (ii) PCP2: Failing to arrange occupational health visits and failure to discuss mental health;
 - (iii) PCP3: Failure to follow ACAS guidelines related to settlement agreements;
 - (iv) PCP4: Failure to complete a mediation meeting;
 - (v) PCP5: Blocking communication, which may include email, during garden leave, including preventing communication with colleagues, service users and their carers;
 - (vi) PCP6: The use of compulsory garden leave;

- (vii) PCP7: The practice of not consistently completing back to work interviews or when completed, not completing them straight after an absence;
 - (viii) PCP8: The practice of long time scales for actions to take place;
 - (ix) PCP9: The practice of not placing importance on health and safety concerns when they are raised;
 - (x) PCP10: The practice of accepting, condoning or allowing verbal aggression within a work context;
 - (xi) PCP11: Scheduling meetings without accounting for illness or health.
32. Mr Hignett submitted that none of the alleged PCPs were neutral PCPs that when applied to the Claimant put her at a substantial disadvantage because of her disability, but rather were complaints about how she had been treated, and that she should pay a deposit order of £200 per claim as a condition of continuing to advance each of them.
33. Dr Gibson submitted the Claimant had, had difficulty formulating the PCPs and that PCPs could be one-off decisions or actions where hypothetically the same thing would happen to others. Further the Claimant's amendment application sought to better articulate some of the PCPs.
34. Essentially, the function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee compared to employees who are not disabled.
35. In particular, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words 'provision, criterion or practice' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again.
36. While I bear in mind the potential for the wording of the PCPs as set out in the List of Issues to be re-drafted or amended, nothing said by Dr Gibson undermined Mr Hignett's essential point that many of the claims were about how the Claimant had been treated.
37. In particular, while PCPs (1)-(4), and (7)-(10) are expressed generally, it is clear they are about alleged failings particular to the Claimant. In this respect, for example, when I asked Dr Gibson about PCP (10), Dr Gibson told me how the Claimant had complained of aggression towards her in her grievance but "she had been ignored for months". Accordingly, while I cannot say these claims have no reasonable prospect of success, I consider they have little reasonable prospect of success and that the Claimant should be required to pay a deposit as a condition of continuing to advance them. In the light of the Claimant's means I have assessed that amount as £125 per claim. I consider it fairer to the Claimant to make the deposit order by way of a smaller amount per claim, rather than as an

overall lump sum, so that she has more flexibility as to how she wishes to proceed.

38. As regards PCPs (5), (6) and (11), I take the view that their wording could be amended and they could properly be formulated as PCPs which potentially put the Claimant at a substantial disadvantage because of her disability. PCP (5) is essentially not being allowed to communicate with colleagues, service-users and carers while on garden leave, PCP (6) is requiring employees who are leaving to take garden leave, and PCP (11) is the way meetings were scheduled (such as back-to-back or first thing in the morning). I therefore decline to make deposit orders in respect of these claims.

The claim for indirect discrimination

39. In the List of Issues there are seven PCPs for the purposes of the indirect discrimination claim which are listed as follows:

- a. The use of compulsory garden leave;
- b. Removing access to email during garden leave;
- c. Preventing the Claimant accessing her final pay slip;
- d. Preventing contact with colleagues, clients and carers while on garden leave;
- e. Failure to deal with grievances in a timely manner;
- f. Failure to follow ACAS guidelines concerning settlement agreements;
- g. Scheduling of meeting without allowing for mental health needs.

40. Mr Hignett made the same submissions in respect of these PCPs as he did with respect to the reasonable adjustments claim.

41. Applying the same reasoning as above, I consider claims (c), (e) & (f) have little reasonable prospect of success and that the Claimant should be required to pay a £125 deposit as a condition of continuing to advance each of them (that is £125 per claim).

42. As regards claims (a), (b), (d) and (g), again for the same reasons as above, I take the view these could be properly formulated as PCPs which potentially put the Claimant at a particular disadvantage because of her disability and the application the Claimant be required to pay a deposit order as a condition of continuing to advance them is dismissed.

Employment Judge S Moore

Date: 25 October 2022

**Case Number: 3314898/2020
3305766/2021**

Sent to the parties on: 26 October 2022

For the Tribunal Office