Case Number: 2303646/2019

EMPLOYMENT TRIBUNALS

Claimant: **Ms C Lobongo Alum**

Respondent: **Thames Reach Charity**

Heard at: **Via CVP London South (Croydon)** **On: 28/9/2022**

Before: **Employment Judge Wright**

Representation:

Claimant: **In person assisted by Mr P Tomlinson and Ms R Aol-Labongo**

Respondent: **Mr T Sheppard - counsel**

JUDGMENT ON PRELIMINARY HEARING

The respondent's strike out application was successful and six allegations of disability discrimination contrary to the Equality Act 2010 (EQA) remain, which are subject to a deposit Order (detailed on a separate Order).

REASONS

1. Oral Judgment was given at the hearing and the claimant requested written reasons.

2. The respondent made an application that the claims be struck out as they have no reasonable prospect of success. In the alternative, the

respondent seeks a deposit Order. For the reasons given by the respondent, the application was successful.

3. The power to strike out a claim or response is found in Rule 37. The grounds for a strike out are set out in Rule 37 (1) and the one which is relevant is Rule 37 (1) (a) that (in this case) a claim is scandalous or vexatious or had no reasonable prospect of success. The respondent quite rightly focused on the no reasonable prospect of success element.

4. In Anyanwu v South Bank Students' Union 2001 ICR 391 the House of Lords highlighted the importance of not striking out discrimination claims expect in the most obvious cases as they are generally fact-sensitive and requite full examination to make a proper determination.

5. The time-limits for bringing claims under the Equality Act 2010 (EQA) are set out in section 123:

> *(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*
>
> > *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> >
> > *(b) such other period as the employment tribunal thinks just and equitable.*

6. After the claim was remitted to the Employment Tribunal, it was decided that it was just and equitable in the circumstances to extend the time limit to present the claim and the claims of discrimination based upon the protected characteristics of age and disability were accepted.

7. The time-limits in the Tribunal are deliberately short. That is to ensure claims are presented while the facts are still fresh in the minds of the witnesses and so that there is a finality to the litigation. In the employment environment, witnesses/employees move on and it is then more difficult for them to be recalled to give evidence.

8. In light of that, the Tribunal considered the historic nature of the claims, focusing upon whether they had no reasonable prospect of success.

9. In respect of a deposit Order, the Tribunal also considered the authorities, including Hemdan v Ishmail and anor 2017 ICR 486 where the EAT said the purpose of a deposit Order is 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 a costs if the claim failed. That is a legitimate policy as claims (or defences) with little

reasonable prospect of success cause unnecessary costs to be incurred and time to be spent by the other side. They also occupy the limited time and resources of the Tribunal, that would otherwise be available to other litigants. The purpose is not however to make it difficult to access justice or to effect a strike-out by the back door. A deposit Order has to be one that was capable of being complied with.

10. The Tribunal decided to strike out the age discrimination claim in its entirety. It accepts the respondent's submission that the ages of the claimant's actual comparators do not put them in the age bracket which the claimant suggested of 'approximately age 40'. Their dates of birth demonstrate they are in fact older and nearer in age to the claimant.

11. In respect of a hypothetical comparator, there is nothing in the allegations of direct discrimination, which remain, which show there is any less favourable treatment by reference to an age group which is different to that of the claimant or related to a kitchen assistant aged under 50. A chef aged under 50 would not be a comparator as it was be contrary to s. 23 EQA as there would be a material difference between the claimant's role and that of a chef (notwithstanding the fact the claimant has claimed she was demoted from or should have been promoted to a Chef's position).

12. The allegations of direct discrimination therefore remain in respect of the protected characteristic of disability only. The following are found to have no reasonable prospects of success and are therefore struck out.

13. 4(a)(i) and (ii) relate to the occupational health referral and report. They are historic and self-contained allegations. They are not a continuing act. They are therefore significantly out of time and there is prejudice to the respondent in now defending those allegations. These allegations relate to events in 2010, which by the time of the final hearing (listed for January 2023) will be more than 12 years ago.

14. The same rationale applies to 4(a)(iii), (iv), (vii) and (viii) in respect of promotion or training. It is too prejudicial for the respondent to have to answer these allegations in 2022. Furthermore that also applies to the later 2013/2014 allegation at 4(a)(ix) and (xi).

15. Allegation 4 (a)(x) is also struck out as it is out of time. It relates to a one-off decision taken in September 2018. Acas conciliation did not commence until 26/3/2019. There is nothing to link this action, even if it did occur, to the claimant's disability. It falls into the territory of Madarassy v Nomura International plc [2007] IRLR 246, where the Court of Appeal made clear that:

> *'The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference of status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'*

16. There is no prospect here of 'something more'. If it occurred, it is a management decision taken to relocate. That would not just affect the claimant, it would affect other staff as well. It is not just and equitable to extend time. That reasoning also applies to allegation 4 (a)(xii) in respect of the safety shoes which is dated by the claimant as 13/3/2018.

17. Allegations 4(a)(xiii) and (xiv) are struck out as they are vague and insufficiently particularised and so have no reasonable prospect of success.

18. The allegations which remain are 4 (a) (v) (vi) (xv). They will be subject to a deposit order.

19. Of the s.15 EQA claim at paragraph 5, the allegations are repeated and the reasons for striking them out are also repeated. Paragraph 5 (b) (i) (ii) (iii) (vi) (vii) (viii) (ix) (x) are struck out.

20. The allegations which remain are 5 (b) (iv) (v) (xv) and they are subject to a deposit order.

21. The indirect discrimination claim at paragraph 6 is struck out. The disadvantages claimed at paragraph 6 (v) (1) and (2) are too historic for the same reasons given above. The disadvantage at paragraph 6 (v)(3) has been pleaded as a direct discrimination claim. The allegation cannot be both direct discrimination and in the alternative be indirect.

22. In respect of the reasonable adjustments claim at paragraph 7, the respondent refers to knowledge of the claimant's disability following the car accident in 2005 and it is noted that the respondent referred the claimant to occupational health in September 2010 and involved Access to Work in 2011. Even if there was a PCP of requiring the claimant to lift heavy objects with both arms, there are no particulars of when the claimant suffered the substantial disadvantage. It is observed that from May 2020 the information which the claimant needed to provide to particularise her claims and her allegations was set out. What was required was set out in the annex to the Order of 19/5/2020 in respect of

this claim. The claimant was told she needed to specify when did the PCP place her at a disadvantage and what was the disadvantage suffered. Those particulars have not been provided.

23. This is the fourth preliminary hearing (discounting the two conducted by EJ Truscott KC dealing with strike out and when the case was remitted). The claimant has been afforded time to give her particulars and has had advice. It is not considered proportionate to allow her any more attempts to set out the basic detail of her case. As is often said, no one can know the claimant's case better then she does and there comes a point when it becomes unjust for a respondent to have to continue to defend unparticularised claims. The reasonable adjustments claim is struck out as it has no reasonable prospect of success.

24. The Tribunal orders that a deposit of £10 per remaining allegation be paid. The details of the deposit Order are contained in a separate Order. The allegations which remain are those which relate to the redundancy process and are, in respect of the protected characteristic of disability only:

4 (a) (v) (vi) (xv)

5 (b) (iv) (v) (xi)

4. Direct discrimination (s13 Equality Act 2010)

(a) Did the Respondent treat the Claimant less favourably in relation to the following alleged treatment on the grounds of her age and/ or disability:

(i) ~~The claimant suffered a shoulder injury in 2006. The only reference to Occupational Health was made~~ **in 2010**~~. No reasonable adjustments were made before or after this date.~~

(ii) ~~The claimant was never provided with a copy of the report produced by Occupational Health~~ **in September 2010**~~.~~

(iii) ~~The claimant believes that~~ **by 2010**~~, she should already been promoted to the role of chef.~~

(iv) ~~The respondent constantly believed the claimant was not capable of doing anything and failed to consider her for any promotion or training. Even when she was seemingly successful~~ **in December 2010** ~~in applying for a job at Robertson Street, the respondent never actually proceeded with the promotion and instead left the claimant in her old job without any explanation.~~

(v) The claimant requested alternatives to dismissal as part of the consultation process **in November 2018** but the respondent did not offer any. The claimant was not provided with access to the intranet to look for alternative positions.

(vi) The claimant was not notified of the formal redundancy consultation meeting **on 6 November 2018**. The individual consultation meeting **on 20 November 2018** was not a consultation because it was extremely brief (5 minutes) and there was no explanation of redundancy process etc. The respondent had already decided that dismissal was the only outcome it was willing to consider. Martha Kelly (Area Manager) said to the claimant at the individual consultation meeting **on 20 November 2018** that she could not wait to see her name off the respondent's books.

(vii) ~~The claimant undertook relief shifts as a chef from 2002 to 2010 (a period of 8 years), suggesting that she was clearly qualified for this role as no employer would have utilised her in this role for so long unless her work was to a very high standard. This is supported by the TRB proposal (as part of the management proposal for new pay & conditions for TRB hourly domestic staff) which shows that between October 2002 and September 2003, the claimant worked 442 hours as a chef (i.e. 70% of her working hours in that year). She did not have negative reviews about the standard of her work. The letter dated 25 August 2010 from the respondent acknowledges that~~ **in January 2010**~~, a new full time chef was recruited (with this position having been vacant for a considerable time). Whilst the claimant applied for that position, she was unsuccessful.~~

(viii) ~~The respondent in practice demoted the claimant~~ **in 2010** ~~from a qualified sous Chef to a lower part-time Kitchen Assistant after years of keeping her in a chef role.~~

(ix) ~~The claimant was left without a line manager when Peter Hall left~~ **on 19 September 2013** ~~until Louisa Queen took over with effect from~~ **10 June 2014**~~, as if she was not really an employee of the respondent.~~

(x) ~~The claimant was left without a line manager after the service being offered by the Respondent relocated to Martha Jones House~~ **in September 2018**~~, as if she was not really an employee of the respondent.~~

(xi) ~~When the claimant took holiday in accordance with the established practice, there was an attempt to accuse her of having been absent from work without notice and she was summarily dismissed~~ **in October 2014** ~~(a decision which the respondent subsequently reversed).~~

(xii) ~~The respondent did not provide the claimant with safety shoes~~ **in 2018** ~~when she requested them. Instead, the respondent neglected her requests. The claimant was forced to purchase the safety shoes with her own money and was reimbursed only months later.~~

(xiii) ~~The claimant was not allowed to have any visitors at work despite other members of staff being allowed this right.~~

(xiv) ~~The claimant was often excluded from team meetings, many of which took place from 6 to 8pm when she was not there.~~

(xv) The claimant's redundancy pay of £1000.00, which was communicated to her **on 12 December 2018** was based on the kitchen assistant and not the chef job and working only as a kitchen assistant of 4 hours a week. The figure above

does not including the number of years she worked for the organisation as chef since 2002. The other chefs who joined some years after the claimant were both paid a minimum of £24,000 each for their redundancy pay.

5. Discrimination Because of Something Arising In Consequence of Disability (s15 Equality Act 2010)

(a) Did the claimant's disability result in her having difficulty lifting heavier items?

(b) Did the respondent treat the claimant unfavourably as a result by:

(i) ~~Following the claimant's shoulder injury in 2006, instead of providing her with reasonable adjustments, and after failing to consider her for a chef role, the respondent demoted her into a more difficult role~~ **in 2010**~~, with significantly reduced hours and no opportunity for training & personal development.~~

(ii) ~~The only reference to Occupational Health was made~~ **in 2010**~~.~~

(iii) ~~The respondent constantly believed the claimant was not capable of doing anything and failed to consider her for any promotion or training. Even when she was seemingly successful~~ **in December 2010** ~~in applying for a job at Robertson Street, the respondent never actually proceeded with the promotion and instead left the claimant in her old job without any explanation.~~

(iv) The claimant was not notified of the formal consultation meeting **on 6 November 2018**. The individual consultation meeting was not a consultation **on 20 November 2018** because it was extremely brief (5 minutes) and there was no explanation of redundancy process etc. The respondent had already decided that dismissal was the only outcome it was willing to consider. Martha Kelly (area manager) said to the claimant at the individual consultation meeting **on 20 November 2018** that she could not wait to see her name off the respondent's books.

(v) The claimant requested alternatives to dismissal **in November 2018** but the respondent did not offer any. The claimant was not provided with access to the intranet to look for alternative positions.

(vi) ~~The claimant was left without a line manager when Peter Hall left~~ **on 19 September 2013** ~~until Louisa Queen took over with effect from~~ **10 June 2014**~~, as if she was not really an employee of the respondent.~~

(vii) ~~The claimant was left without a line manager after the service being offered by the Respondent relocated to Martha Jones House~~ **in September 2018**~~, as if she was not really an employee of the respondent.~~

(viii) ~~When the claimant took holiday in accordance with the established practice, there was an attempt to accuse her of having been absent from work without notice and she was summarily dismissed~~ **in October 2014** ~~(a decision which the respondent subsequently reversed).~~

(ix) ~~The respondent did not provide the claimant with PPE safety shoes~~ **in 2018** ~~when she requested them. Instead, the respondent neglected her requests. The~~

~~claimant was forced to purchase the safety shoes with her own money and was reimbursed only months later.~~

(x) ~~The claimant was not allowed to have any visitors allowed, despite other members of staff being allowed this right.~~

(xi) The claimant's redundancy pay of £1000.00, which was communicated to her **on 12 December 2018** was based on the kitchen assistant and not the chef job and working only as a kitchen assistant of 4 hours a week. The figure above does not including the number of years she worked for the organisation as chef since 2002. The other chefs who joined some years after the claimant were both paid a minimum of £24,000 each for their redundancy pay.

25. It is considered that these allegations have little reasonable prospects of succeeding. There was a redundancy situation as a result of the respondent's decision to cease to offer catering services for its residents and its decision to restructure. Again, the claimant is referred to the need for 'something more' than a mere reference to what she claims is detrimental treatment and her protected characteristic of disability.

Employment Judge Wright
28 September 2022