



EMPLOYMENT TRIBUNALS

Heard by CVP on 9/12/2022

Claimant: MS CLAUDIA CONSTATIN v Respondent: AMAZON UK SERVICES LTD

Heard by CVP on 9/12/2022

Before: Employment Judge Mr J S Burns

Appearances

For the Claimant: Mr A Mustapha (Solicitor)
For the Respondent: Mr M White (Counsel)

JUDGMENT

The claims are struck out.

REASONS

1. The judgment followed an OPH.
2. The OPH documents were in a bundle of 136 pages. In addition, I was referred to a Respondent's written skeleton argument and authorities and I received oral submissions.

Legal framework

3. This being a discrimination case, it is for the Claimant to prove facts from which, in the absence of any other explanation, a Tribunal could make a finding of unlawful discrimination: section 136(2) Equality Act 2010 ("EqA"). If she were to succeed, the Respondent would have to show that it did not discriminate: section 136(3).
4. The mere facts of (i) a difference in treatment and (ii) a difference in protected characteristics, without more, will not discharge a claimant's burden under section 136(2) EqA: Royal Mail Group Ltd v Efobi [2021] UKSC 33.
5. A claim may be struck out where it has no reasonable prospects of success: rule 37(1)(a) of the Employment Tribunal Rules 2013 ("the 2013 Rules").
6. Orders striking out a claim on the basis that it lacks reasonable prospects of success are not routinely made in discrimination cases where there are major disputes of fact. However such

an order nonetheless may – and should – be made in the appropriate case: Ahir v British Airways [2017] EWCA Civ 1392; the test is not whether a claim has no prospects of success, but whether it has no reasonable prospects of success: *ibid*, ¶16.

7. The principles that govern amendment applications are well known. In Selkent Bus Company v Moore [1996] ICR 836, the EAT (Mummery P presiding) stated that Employment Tribunals should, when addressing an application to amend: "... [consider] *all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*" The following factors were identified as likely to be relevant: the nature of the amendment; the applicability of time limits; the timing and manner of the application.
8. If a new claim is to be added by way of amendment, the Tribunal must consider whether it is out of time: Galilee v Comr of Police of the Metropolis [2018] ICR 634; Reuters v Cole (UKEAT/0258/17/BA), ¶31. This does not apply where the amendment merely adds a new label to facts already pleaded: Foxtons v Ruwiel UKEAT/0056/08, ¶13. However, the ostensible merits of a claim brought by way of amendment – which may turn in part on whether it is likely to be time-barred – are a relevant consideration: Kumari, *supra*, ¶¶87-89.

Basic Facts

9. The Claimant has worked for the Respondent since 2016. She first worked in the Receive Department. In or around September/October 2019, the Respondent reallocated her to the Stow Department. She did not complain about this at the time. She says she suffered an injury at work and from 16 September 2020 onwards she claims she repeatedly requested a return to the Receive department, which the Respondent had not actioned at the time she presented her claim. The Claimant who is still employed by the Respondent, contacted ACAS on 1 February 2022, a certificate was sent on 8 February 2022 and the claim presented on 8 March 2022. On 4 April 2022 she was moved back to the Receive department.

The complaints made and the question of amendment.

10. The complaints made as they appear to have been understood by EJ Maxwell after an extended previous telephone PH are: direct race discrimination; direct sex discrimination; and direct age discrimination, the Claimant saying that she was directly discriminated against because she was a Romanian woman aged over 43 years.
11. The original claim and first set of further particulars complain about the delay in moving her back from Stow to Receive ("the move-back claim") but made no complaint in respect of her original move from Receive to Stow ("the move-claim") and made no suggestion of a continuing act from 2019 to 2022. Mr Mustapha agreed today that the suggestion that discrimination started in 2019 is a new one.
12. Today Mr Mustapha stated that the Claimant also wished to bring an indirect age and indirect sex discrimination claim. The first reference to this is brief and unparticularised in paragraph 38 of the second set of further particulars which was served on the Respondent on 17 November 2022. Today Mr Mustapha was at first unable to identify any proposed PCP but when I gave as an example an ability to lift a heavy weight as a PCP, he seized on that as a PCP for purposes of the proposed indirect sex/age claim.
13. On a fair reading of the ET1 and its first further particulars the claims brought are direct sex/age/race discrimination "move-back" claims only.

14. I accept the Respondent's submission that to bring the move-claim (as the Claimant seeks to do in her second set of further particulars) and to bring an indirect discrimination claim in relation to either the move or the delay in moving back, she would require permission to formally amend her claim.
15. No formal application has been made but, if made, I would refuse it, applying the Selkent principles. No good reason is shown for not bringing such claims earlier. The move to Stow took place over three years ago and is likely out of time. If the Claimant thought she had been subjected to continuing discrimination from 2019 onwards she would have stated so from the outset. The amendment would entail relabelling existing facts, but also require the pleading of significant new facts and bring in a requirement for new witnesses who may well have left the scene. The proposed indirect claim is still not properly particularised. I would regard the proposed new claims as having little reasonable prospect of success - and they have been proposed at a very late stage and, only in response to a previous order for a second set of further particulars.
16. The only claims properly before the Tribunal are those referred to in paragraph 13 above and I now turn to consider the merits of those claims;

The prospects of the claims

17. In support of the direct discrimination move-back-claim, the Claimant contended that "*The respondent has a lot of employees from a British White and/or Polish Background [sic] in senior and managerial positions*", that "*The claimant is originally from Romania and it is alleged that if she was from a British White and/or Polish background her requests would have been responded to earlier*", and in her further particulars she states "*Other employees who have made similar requests have had their requests granted. (Mr Abba Aparajithan made a request to be moved and he was moved within a few weeks who the claimant believe [sic] is of Asian Background). Mr Pavel Alin Dumitru asked to be moved and he was also moved quite quickly (Polish background). Further work colleagues such as Catalina Cojocar, RN Ionela Gherasim RN and Dinu Gina Rodica RN were moved from the departments after they made requests.*"
18. Viewed as an allegation of direct age discrimination, the move-back claim has no reasonable prospect of success: neither the Claimant's PoC nor her further information set out any basis for her allegation that the Respondent's actions in this regard were related to her age. The Claimant does not identify any comparator in respect of her age. No key facts have been set out from which discrimination could be inferred.
19. Viewed as an allegation of direct sex discrimination, the move-back claim has no reasonable prospect of success: one of the people (Adriana) who declined an alleged request from the Claimant to move-back was herself a woman: and several colleagues whose requests were granted were also women (Catalina and Ionela).
20. Viewed as an allegation of direct race discrimination, the move-back claim has no reasonable prospect of success: of the five comparators identified (who according to the Claimant were allowed to move to their chosen departments), four – Pavel Alin Dumitru, Catalina Cojocar, Ionela Gherasim and Dinu Gina Rodica – have names that are themselves of Romanian origin, according to the "Forebears" name origin website, of which I take judicial notice. The Claimant avers that Mr Dumitru (probably a misspelling of Dumitru) is of "Polish background", while

another employee (Abba Aparajithan) is said to be of “Asian background”, but says nothing of the race or national origins of the others. In fact Dumitru is a common Romanian but not a Polish name. At the beginning of today’s hearing Mr Mustapha confirmed that the Claimant had told him that she “*was unclear about the national background of her comparators but that “one or two” of them were indeed Romanian*”. Hence the Claimant’s own further particulars not only do not support but in fact undermine her case.

21. Mr Mustapha took me to notes of an OH meeting with the Claimant. On the face of it these show the Respondent trying to engage professionally with the Claimant over a health issue and make no reference or link to any of the protected characteristics now relied on.
22. In the course of this claim the Claimant has referred variously not only to her sex, age and race but also to possible discrimination because of disability/religion/pregnancy and height. While these latter allegations have been abandoned, the Claimant’s willingness to make claims about them indicates an unreasonable scattergun approach and a lack of genuine belief in any particular unlawful motivation for the matters complained of.
23. In each case, apart from the worthless comparators, the claims that the Respondent’s failure to move her back to Receive was because of one of the Claimant’s sex, age or race is mere assertion with nothing to support it. In my view this would remain the case at any trial if the claims proceeded that far. If there was anything else to create a prima facie case it would have appeared by now.
24. Hence the claims are struck out as having no reasonable prospect of success.

Employment Judge (VR) - J S Burns
Date 9/12/2022
For Secretary of the Tribunals
sent to parties on
6/1/2023
NG
For the Tribunal
