



EMPLOYMENT TRIBUNALS

Claimant

M Simmons Saffo

Respondent

Barnet, Enfield and Haringey Mental
Health NHS Trust

v

Heard at: Watford Employment Tribunal
Before:

On: 24 January 2023

Appearances

For the Claimant: In Person

For the Respondent: Ms Motraghi (counsel)

JUDGMENT

1. The claimant's allegation, forming part of her claim under claim no: 3300490/21, that the act by Gary Passaway of asking her to draft a business case for her budget was an act of sex discrimination is struck out.
2. All other allegations made by the claimant under her two claims and listed in the case management order dated 13 June 2022 continue and the claims will be determined at a hearing commencing on 6 November 2023.

REASONS

Background

1. The respondent made an application on 5 July 2022 to strike out five allegations made within the claimant's two claims. In the alternative the respondent requested a deposit order in respect of each of the five allegations. The claimant opposed the application and the matter was listed for a one day preliminary hearing.
2. The allegations on which strike out or a deposit order were requested are as follows:

- a. An allegation that Natalie Fox's email to the Claimant of 19 December 2020 amounted to an act of direct race discrimination.
 - b. An allegation that Natalie Fox's email to the Claimant of 19 December 2020 amounted to an act of racial harassment.
 - c. An allegation that Natalie Fox's email to the Claimant of 19 December 2020 amounted to an act of victimisation following a protected act, where the protected act was the Claimant's email to Natalie Fox alleging institutional racism dated 24 November 2020.
 - d. An allegation of direct sex discrimination relating to Gary Passaway asking the Claimant (by email dated 24 September 2020) to draft a business case for her.
 - e. An allegation of direct race discrimination in that between 29 March 2021 and 10 November 2021, Ms Kandola and Ms Anastasiou did not properly process the Claimant's second grievance. (This allegation is made in the claimant's second claim 3323198/21 and comprises the whole of that claim.)
3. The respondent was represented by Ms Motraghi of counsel. The claimant is a litigant in person and was assisted at the hearing by her friend Ms Liskie. I received a bundle of 454 pages and a skeleton argument from the respondent. Both parties made oral submissions.

Law

4. In reaching my decision I had regard to Rules 37 and 39 of the *Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Schedule 1*. Ms Motraghi drew my attention to the case of *Madarassy v Nomura International plc [2007] EWCA Civ 33* which sets out that a claimant must show more than a difference in sex and a difference in treatment to establish a prima facie case of discrimination. I also had regard to *Igen v Wong [2005] ICR 931* in which the court of appeal said that a claimant must show more than the mere possibility of discrimination before the burden of proof shifts to the respondent. Furthermore, I considered guidance on strike out against litigants in person in the case of *Cox v Adecco and Others [2021] ICR 1307 EAT*.
5. Although my decision was to refuse strike out in respect of all but one of the allegations, I granted a request for a deposit order in respect to three of the remaining four allegations. The terms of the deposit orders are set out in a separate Deposit Order. The reasons for my decisions on all five allegations are set out below and those reasons relevant to the deposit orders are also set out in identical terms in the Deposit Order.

Conclusions

6. *The allegation that Natalie Fox's email of 19 December 2020 amounted to an act of direct discrimination.* The email covers several different topics and refers to the claimant's correspondence of 8 and 17 December 2020, as well

as to 'your other recent communications with me'. The claimant's case is that the response and, what she calls 'threats of disciplinary actions' set out in that letter are there because of her race. She is a person of black African-Caribbean heritage. The claimant referred to the respondent's record on discrimination and her own activism on this issue. She also pointed to the extensive history to the correspondence to which Ms Fox was referring. The respondent notes that the claimant has offered no comparator and that to simply point out a difference in status and treatment is not enough to shift the burden of proof to the respondent in a discrimination case. In my view Ms Fox sets out reasons, which are not to do with race, for her comments, for example the claimant's choice of words in the email of 17 December 2020 to Cilla Day. I also note that even if an organisation is institutionally racist, this is not a matter for adjudication by the Employment Tribunal, and is not proof that any one particular person's actions are discriminatory. However, I cannot conclude that the claim has no reasonable prospects of success where this is a one day preliminary hearing and the claimant's case is that there is a substantial history to the email against a background of discriminatory behaviour, which are matters I cannot go into in depth today, and would require oral evidence to be heard. I do though conclude that the allegation has little prospect of success. In relation to Ms Fox reprimanding the claimant for her use of language, there is a clear cause and effect which is not to do with race. Cause and effect for non-discriminatory reasons is discernible in the rest of the email but not quite so clear cut as in that example, and I grant the respondent's application for a deposit order in respect of this allegation.

7. *The allegation that Natalie Fox's email of 19 December 2020 is an act of harassment related to the claimant's race where Ms Fox continued to contact the claimant after she had asked her not to.* As with the reasons set out above in relation to the first allegation, there is little clear information from the claimant as to why this act, even if it could be objectively construed as harassment, was related to the protected characteristic of race. And again, for the same reasons, I find that the allegation has little prospect of success, but I am unable to say it has none without hearing the full evidence. I grant the respondent's application for a deposit order.
8. *The allegation that the Natalie Fox's email of 19 December 2020 is an act of victimisation resulting from the claimant's protected act of referring to racial discrimination in her email of 24 November 2020.* The respondent states that the email is clearly a response to the claimant's email to Cilla Day of 17 December 2020. The claimant states that it references the email of 24 November 2020 too. I agree that it is a reference to a range of correspondence which would encompass the email of 24 November 2020. While it is my view that the claimant will have some difficulty in proving that the email amounts to victimisation, I do not find that it could be determined without a full hearing that the allegation has so low a prospect of success

that strike out or a deposit order is warranted and I therefore I refuse the application of the respondent in relation to this allegation.

9. *The allegation that the request by Gary Passaway asking the claimant to draft a business case was an act of direct sex discrimination.* This allegation is also put by way of an allegation of race discrimination against Mr Passaway. The respondent pointed out that the claimant relies on a female comparator in her claim of race discrimination. In her submissions today the claimant said, in support of the allegation, that Ms Kandola and Ms Fox had been surprised that he had requested a business case. There are no grounds set out in the documents provided to me today or the submissions made by the claimant on which an assertion could rest that this individual acted in a way that was discriminatory on the grounds of sex. The fact that two managers who were women were surprised at his actions is not a basis for such a claim. In reaching my conclusion that this allegation has no prospect of success I also take into account that the claimant put forward a female comparator in relation to her claim that his same act by Mr Passaway was an act of race discrimination. This allegation is struck out.
10. *The allegation that between 29 March 2021 and 10 November 2021 Ms Kandola and Ms Anastasiou did not properly process the claimant's second grievance.* The respondent noted in relation to Ms Kandola that she handed the process over to HR in the early stages and that also the claimant stated at a previous hearing, after being given the opportunity to consider the matter, that she did not bring a claim of direct race discrimination against Ms Kandola. The claimant states that she has since considered her response on 13 June 2022 and felt pressured by the court process into making a decision that she does not now agree with. I accept that and note that the claim against Ms Kandola is included in the order of 13 June 2022. Litigants in person can find it difficult to make quick decisions in this environment and fully understand the implications. The claimant also states that Ms Kandola may have handed over the claim to HR but was a senior manager and was in the background. That is not something that I could make a finding of fact on without more evidence. What we return to in this allegation is that the claimant has the hurdle of showing on the balance of probabilities there are facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination. The respondent has given reasons for the alleged delay, in that the claimant said she would reflect before setting out her preferred ways forward and that she would provide dates for a further meeting, in both of which actions the claimant took some time. Further delays were occasioned by the claimant entering into early conciliation. The claimant denies that any delay was on her part. Or that in seeking to bring a claim in the tribunal the process should have been stayed. There could have been unnecessary delay, there may not have been and whether there was, would require full consideration of all of the evidence by a tribunal.

What seems in doubt is that the delays were the result of a deliberate act of racism by either of the two women named, one of whom has some professional responsibility in relation to the respondent's equality agenda and was clearly well thought of by the claimant before 29 March 2021. The allegation appears to be very weak in terms of evidence that any delay was due to race discrimination and while I refuse the respondent's application to strike out the allegation, which would amount to a strike out of the entire claim, I agree that on the face of it the allegation stands little prospect of success and I grant the application for a deposit order.

Employment Judge Anderson

Date: 25 January 2023

Sent to the parties on: 24/2/2023

NG

For the Tribunal Office