Case No: 2600051/2022 (Claim 1)
2203812/2022 (Claim 2)
2602094/2022 (Claim 3)
3311589/2022 (Claim 4)

EMPLOYMENT TRIBUNALS

Claimant: **Mrs H Angus**

Respondent: **Academies Enterprise Trust**

Heard at: **Nottingham** **On:** **25 January 2023**

Before: **Employment Judge M Butler (sitting alone)**

Appearances

Claimant: **Mr D Ibekwe, Volunteer Casework Co-ordinator**
Respondent: **Mr T Gillie, Counsel**

JUDGMENT

The Judgment of the Tribunal is:

1. The claims under claim number 3311589/2022 are dismissed on withdrawal by the Claimant as this is a duplicate of claim number 2602094/2022;

2. Claim number 2602094/2022 is struck out as having no reasonable prospects of success;

3. In claim number 2600051/2022, the claims of less favourable treatment at clause 2.1.2 (i), (ii), (iii) and (iv) of the particulars of claim are struck out and those at (viii) and (x) are dismissed on withdrawal by the Claimant.

REASONS

Background

1. These claims have a convoluted and confusing history. The Claimant has issues 5 claims in all in 2 different Employment Tribunal Regions. The first claim (3300391/2021) she issued in the Watford Tribunal was struck out for failure to comply with the Tribunal's orders. Claim 1 above repeats some of the claims in

that claim. Claims 3 and 4 above were issued in both the Midlands East and Watford Tribunals and are identical. Claim 2 above was first issued in London Central and then transferred to Midlands East. There are various reasons for this confusion which I need not rehearse now that the claims are all consolidated in the Midlands East Region. There has been further confusion in the fact that the Claimant has sought to amend some of her claims without applying to do so and the Respondent is not yet formally a party to Claim 3, as no response has been submitted, although they have responded to the identical Claim 4 which has been dismissed on withdrawal.

2. The reason for this open preliminary hearing was to consider the Respondent's applications for:

(i) strike out or deposit order and costs in claim 1;

(ii) strike out or deposit with costs reserved in claim 3; and

(iii) The claim against Mr J Harris to be rejected in claim 4 and strike out or deposit order and costs on the basis that it is a duplicate of claim 3.

Mr Gillies confirmed that the Respondent would not be pursuing costs at this hearing but reserved the right to do so at a later date.

3. At the conclusion of the hearing, I made orders for the future conduct of the claims.

The evidence

4. There was before me a bundle of 513 pages of documents. Mr Ibekwe did not call the Claimant to give substantive oral evidence although she did give evidence as to her means.

Submissions

5. Both representatives made submissions and referred to case law. I carefully considered the submissions although I do not rehearse them if full here. As I deemed them to be relevant, they are referred to in my discussion of the individual applications.

Consideration of the applications

6. I deal firstly with the Claim 1 application for strike out of parts of the claim or for a deposit order. This claim, in certain matters of less favourable treatment alleged, is identical to the claim which has already been struck out by Watford Employment Tribunal. This is the case in clause 2.1.2 at (i)-(iv). As Mr Gillies submitted, in effect, these allegations have already been litigated and struck out after Early Conciliation under reference no. R103362/21/63 (page 49 of the bundle). Following the decision in **The Commissioners for H M Revenue & Customs v Garau UKEAT/0348/16/LA** they cannot be litigated again in a

subsequent claim under a later E C Certificate reference no. Consequently, these 4 matters relied on cannot be re-litigated and are struck out.

7. But Claim 1 then goes on to list a further 12 matters which are alleged to constitute less favourable treatment. Mr Gillie concedes that the dismissal element is just within the time limit and also concedes that items (xiii) – (xvi) could potentially be found to be continuing acts at the final hearing. I do not agree that the items at (v)-(xii) are not capable of being continuing acts and this should also be determined by the Tribunal.

8. Matters are further complicated, however, by the Claimant's purported amendment to the claim form wherein the matters at (viii) and (x) have been deleted. I interpret this as a withdrawal of those allegations.

9. The application in Claim 3 is to strike out all of the claims as having no reasonable prospect of success. They are claims for suffering a detriment as a result of making a protected disclosure and for "disability victimisation". It is unfortunate that these claims are pleaded in a very confused manner.

10. Mr Ibekwe argued that the Claimant's protected disclosure was made by the Claimant to Dr Adrian Massey, Consultant Occupational Physician, of Duradiamond Healthcare in a consultation which was reported on 8 March 2021 (page 261). Although, when pressed, Mr Ibekwe could not identify any disclosure to Dr Massey, I assume he was referring to the comments at page 262 where the Claimant talked about how she felt she was under pressure in her job and was not supported by the Respondent. Mr Ibekwe submitted that this amounted to a protected disclosure as Dr Massey referred to it in his report sent to the Respondent.

11. This is not an argument with any merit. Firstly, Dr Massey is not a prescribed person for whistleblowing purposes and, secondly, the disclosure must be made by the person who relies on it. S.43A of the Employment Rights Act 1996 makes clear that the disclosure must be made by a worker. Dr Massey's report, after a private medical consultation with the Claimant cannot make the disclosure. Since the disclosure must also be made in the public interest, I do not accept that a confidential medical consultation is likely to lead to a disclosure in the public interest. Accordingly, I do not find the alleged disclosure is a qualifying disclosure.

12. Moreover, even if it was a qualifying disclosure, consideration of the alleged detriments reveals that they are not detriments covered by the ERA. The Claimant states that they are (i) failure to recognise that the Claimant is a disabled person from the date of Dr Massey's report until "a material date in the future" when the Respondent concedes she is disabled and (ii) the consequential stress and anxiety the Claimant is required to endure before "the Respondent eventually capitulates and treats her as a person with a disability whom deserves respect and decorum".

13. Both of these alleged detriments are based on the Respondent's failure to acknowledge in its responses that the Claimant's autism spectrum disorder is

serious enough to amount to a disability. Mr Gillie referred me to the judgment in **BMA v Chaudhary [2007] EWCA Civ 788** which at paragraph 177 says, **"a person does not discriminate if he takes the impugned decision in order to protect himself in litigation".** This is, of course, exactly what the Respondent has done. Mr Ibekwe considered this amounted to a detriment because it was inevitable that the Claimant would be found to be disabled. He said the Tribunal cannot allow the Respondent to play with people's lives but, in my view, the Respondent is doing nothing more than in a perfectly understandable way merely protecting its interests. Whether the Claimant is disabled is a matter to be determined by the Tribunal and not by the Claimant or her representatives and to suggest otherwise is an unsustainable argument. Indeed, the Respondent has made the point that they are not saying the Claimant is not disabled but needs further information before making a decision.

14. For the same reason, the claim of disability victimisation cannot succeed as it relies on the same detriments which are not capable of being detriments in law.

15. Accordingly, Claim 3 (2602094/2022) is struck out as having no reasonable prospect of success.

16. During the hearing, Mr Ibekwe rightly pointed out that the Respondent was not yet a party to Claim 3 as no response has been filed. I took this on board and made my decision within the rules on my own motion.

ORDER

Made pursuant to the Tribunals Rules of Procedure 2013

1. The Respondent is to file a response to Claim 2 by **28 February 2023** and will make representations on the Claimant's various proposed amendments to her claims by the same date. Assuming there is no objection to the amendments, the response shall be in relation to the claim incorporating those amendments.

2. By **23 March 2023,**the Claimant shall send to the Respondent up to date medical evidence of her ASD to include her GP records from 1 January 2019 onwards. She must also send to the Respondent a detailed impact statement giving information as to how her alleged disability adversely affects her ability to carry out normal day-to-day activities.

3. By **6 April 2023,** the Respondent must notify the Claimant and the Tribunal as to whether it concedes or denies the Claimant's ASD is a disability.

4. The final hearing is extended to 7 days on **22, 23, 24, 25, 26, 29 and 30 April 2024** at the Tribunal's Leicester Hearing Centre.

Employment Judge M Butler

Date: 6 February 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE