



EMPLOYMENT TRIBUNALS

Claimant: Ms. S. Merritt

Respondent: Mr. M Bivol

**Open Preliminary Hearing
Heard via: Reading by Cloud Video Platform**

On: 7 February 2023

Before: Employment Judge Boyes (Sitting Alone)

Representation

Claimant: In Person, accompanied by Mrs. C. Merritt (the claimant's mother)

Respondent: Mr Arul, solicitor

RESERVED JUDGMENT

Upon withdrawal, the claimant's claim of discrimination on the grounds of marriage/civil partnership is dismissed.

The claimant's claim of direct discrimination/harassment on the grounds of sex cannot be said to have no reasonable prospects of success. It is therefore not struck out and may proceed.

No deposit Order is made.

Further case management orders will be sent to the parties separately and the case will now be listed for a 3 hour case management hearing.

REASONS

1. The claimant has made claims of discrimination on the grounds of the marriage/civil partnership and sex. Early conciliation took place from 11 April 2022 to 22 May 2022. The claim form (ET1) was lodged with Tribunal on the 23 May 2022. The respondent has filed a response to the claim (ET3). The respondent denies all claims. The case was listed for an open preliminary hearing to consider whether the claims should be struck out.

The Proceedings

2. Employment Judge Anstis made an order on the 1 August 2022 that the claims would stand dismissed after 21 days from when the notice and order was sent to the parties without further order, unless, before that date, the claimant had

explained in writing why the claim should not be dismissed. This was because Judge Anstis was of the view that the claim had no reasonable prospect of success for the following reasons: *“Although the claimant has ticked the relevant boxes for a claim of sex and marriage (or civil partnership) discrimination, her claim form gives no details of any complaint of discrimination and contains nothing from which the tribunal could conclude that the respondent had subjected her to unlawful discrimination”*.

3. The case was then listed for an open preliminary hearing to decide whether the claim should be struck out.
4. At the hearing, the claimant confirmed that she accepted that she could not pursue a claim on the basis of marriage/civil partnership discrimination as she is not married or in a civil partnership. She withdrew that claim.
5. I had not been provided with all of the documents sent to the Tribunal prior to the commencement of the hearing. There was therefore insufficient time on the day of the hearing to give my Judgment and Reasons orally. I therefore reserved Judgment.

Documents

6. The Tribunal had before it the ET1, ET3, the claimant’s written submissions made by email on 6 February 2023, an investigation report dated 29 May 2022 and various correspondence between the parties. Two pdf files totaling 139 pages were filed by the claimant with her email of 6 February 2023. I have considered all of the documents before me in reaching my conclusions.

Background to the claim

7. The following is the background to the claim. It is provided only for the purposes of assessing whether or not the claim has no reasonable prospects of success. It does not constitute findings of fact by this Tribunal on those matters which are in dispute between the parties

The Respondent

8. The Claimant is employed by Solo Formwork Ltd (“the employer”). The employer operates a business specialising in groundworks, formworks, reinforcement and concreting for buildings. The respondent is one of three directors of the employer. The other two directors are Richard Corcoran (the managing director) and Paul Corcoran. Richard Corcoran and Paul Corcoran are cousins. The claimant is in a relationship with Richard Corcoran. That relationship began in around October 2020.

The Claimant

9. The Claimant was engaged as a self-employed bookkeeper for the employer from 31 July 2018. She then became an employee (Accounts Manager) on 1 November 2019. She remains in that employment. The Claimant’s current salary is £36,600. Her duties include, but are not limited to, bookkeeping, accounts management, office administration and buyer. The Claimant has also trained as a quantity surveyor with the assistance of the employer.

The Claimant's case

10. The claimant claims that a conversation took place between her and the respondent on the 16 March 2021. She states that this conversation came about because, on 15 March 2021, she confided in Paul Corcoran that she was concerned about Richard Corcoran's wellbeing. She says that, later, the respondent stormed into the office shouting and swearing, demanding to know what was going on. She states that during the course of that conversation the respondent became increasingly angry and hostile towards her and made various accusations and comments mostly in relation to personal issues. She says that he accused her of cheating on her partner and having an affair. He stated that he knew that she and Richard Corcoran were having sex in office time and on business premises, as "*the blinds are pulled*" on sunny days and that she needs to be "*more careful about who she sleeps with in future*". She states that it left her feeling extremely vulnerable as a woman, that the discussion lasted nearly an hour and only ended when he told her to get out of his sight as he was fed up with her crying. She claims that on leaving the office she felt extremely traumatised and unsure if it was safe for her to return the next day.
11. The respondent accepts that he had a discussion with the claimant on that date but disputes that the contents of the conversation are as stated by the claimant.
12. Following that discussion, the claimant says that she raised an informal grievance with Richard Corcoran who she reported directly to. She says that on 18 March 2021 Richard Corcoran informed her that he had spoken to Mihai Bivol on the 17 March 2021 and asked him to apologise but she did not receive an apology.
13. On the 21 September 2021 the claimant requested a salary increase, which was agreed by the directors, including the respondent, on the 22 September 2022.
14. The claimant was off sick from 25 February 2022 to 18 March 2022. It is her case that she was off sick with Covid 19 and stress.
15. On the 9 March 2022, whilst on sick leave, the claimant received an email from the respondent. The claimant states that the email blamed her for various shortcomings with the business. She responded that she was off sick with stress and Covid 19 and that she would respond more formally when she returned to work. On the same date she received another email from the respondent which she states again blamed her for issues within the business.
16. On the 08 April 2022, the claimant raised a grievance.
17. On 12 April 2022, the claimant raised the issue with Acas. The claimant made a subject access request to the employer on the 12 April 2022 which was acknowledged on the 18 May 2022 by an external human resources company who then also sent a letter on the 23 May 2022 stating that they were investigating her grievance.
18. The investigation in relation to the grievance began on 26 May 2022. There is an investigation report dated 29 May 2022. The report concluded that relationships within the company had deteriorated since March 2021. There were some contradictions in what happened on the 16 March 2021. That despite there being the lack of apparent process/outcome to the previous informal grievance, the

claimant made no complaint or appeal at the time and waited 14 months to raise the sex discrimination claim. There was no evidence that the respondent wanted her out of the business or was putting pressure on her to leave. The minutes of the meetings in which the claimant is referred to as 'the bookkeeper' were not in general circulation or intended to be shared other than amongst the three directors and only came to the attention of the claimant because of the subject access request made by the claimant. The grievance was therefore not upheld.

19. The claimant's complaints include:
 - i. The respondent's behaviour towards the claimant on the 16 March 2021, including that he made comments of a sexual nature;
 - ii. That there had been a sustained attempt to remove her from the company;
 - iii. The tone and content of emails sent by the respondent when she was on sick leave and on other occasions;
 - iv. That after the claimant raised her concerns regarding the respondent's behaviour on 16 March 2021 he constantly tried to find fault with her work;
 - v. The way in which a request for a pay rise was dealt with;
 - vi. The respondent use of derogatory terms to describe the claimant such as 'the bookkeeper' 'she' 'her' or "our employee' failing to call her by her name. She says that he was fully aware that her job title is Accounts Manager and had previously referred to her by her correct job title;
 - vii. Disclosure of confidential information relating to pregnancy;
20. The claimant asserts that the respondent would not have treated male sub-contractors in the same way in which he treated her.

The Relevant Law

21. Under rule 37(1) of the Employment Tribunals Rules of Procedure ("ETRP") a Tribunal may strike out all or part of a claim if it has no reasonable prospects of success.
22. The power to strike out a claim or part of a claim should only be exercised in rare circumstances (*Tayside Public Transport Company Limited (t/a Travel Dundee) v Reilly* [2012] IRLR 755). Cases should not, as a general principle, be struck out where the central facts are in dispute (*Tayside and North Glamorgan NHS Trust v Ezsias* [2007] EWCA Civ 330). As a general principle, discrimination and public interest disclosure cases should not be struck out except in very clear circumstances (*Anyanwu v South Banks Student Union* [2001] UK HL14).
23. Protection against direct discrimination in relation to a protected characteristic, including sex, is provided for at section 13 of the Equality Act 2010:

13.(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
24. Protection against harassment in relation to a protected characteristic, including sex, is provided for at section 26 of the Equality Act 2010:

26. (1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected

characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. [...]

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

25. In respect of the burden of proof in discrimination cases, section 136(2) of the Equality Act 2010 states that if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred. I have borne in mind that this is the test that Tribunal would need to apply when assessing whether the claim has no reasonable prospects of success.

My Conclusions

26. The claimant is unrepresented and so it is not entirely clear what sections of the Equality Act 2010 she relies upon. For the purposes of assessing whether the claims have no reasonable prospects of success, on the face of the documents presently before the Tribunal, applying the appropriate legal labels, it would appear that the claimant's claims on the grounds of discrimination may be complaints of direct discrimination on the grounds of sex under section 13 of the Equality Act 2010 and harassment relating to sex under section 26 Equality Act 2010.
27. The respondent submits that the claimant provides no detail of alleged discrimination in the form of less favourable treatment or otherwise because of such sex. It states that it does not understand how the events complained of are said to be discriminatory and connected with any protected characteristic. Further, it submits that the events of March 2021 are not connected with any alleged recent events, nor do they form part of any series of events and are therefore out of time. Further, and in the alternative, it would not be just or equitable to extend time to include the events that occurred in or around March 2021.
28. The respondent submits that the alleged events that occurred between February and March 2022 were normal in the course of business and the respondent was entitled to raise the issues concerned. Further, or in the alternative, the substance of the correspondence is not related to any protected characteristic.
29. The earliest of the events relied upon by the claimant is the conversation between the claimant and respondent on the 16 March 2021 over fourteen months prior to the issue of the claim. If the claimant's version of events were accepted, I consider that it is arguable that some of the comments that the claimant's says were made would require consideration as to whether this constituted harassment related to the protected characteristic of sex which has the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

30. In respect of the events of March 2021, consideration of time limitations will be required as the events occurred well outside the primary 3 month time limit. However, there will need to be an assessment of whether or not there was continuing discrimination or harassment after that date such that the time limit would begin to run from a later date. This is fact sensitive and will need to be considered in the context of the Tribunal's findings of fact as a whole. The direct discrimination claim would require careful consideration alongside the claims relating to harassment.
31. I am mindful that the power to strike out a claim should only be exercised rarely, that a claim should not, as a general principle, be struck out where the central facts are in dispute and that discrimination cases should not be struck out except in very clear circumstances. Applying that low threshold, and considering the facts claimed in the round in this case, it is cannot be said that the claim has no reasonable prospects of success.
32. The claims of discrimination and harassment in reliance upon the protected characteristic of sex are therefore not struck out and may proceed.
33. I have considered whether a deposit order should be made. On the basis of the information before me, and taking into account what I have said above in relation to whether the claim has no reasonable prospects of success, I do not consider that it can be said that the claim has little reasonable prospects of success. In the circumstances, I do not make a deposit order.
34. The exact nature of the complaints and issues in dispute will need to be the subject of further case management.
35. At the hearing before me, the claimant made reference to discrimination on the grounds of pregnancy. This was not pleaded in the claim form. If the claimant wishes to pursue any such claim, then she will need to make an application to amend her existing claim.
36. I apologise to the parties for the delay in providing this Judgment and Reasons.

Employment Judge Boyes

Date: 5 May 2023

Reserved Judgment and Reasons Sent to The Parties On

9 May 2023

FOR EMPLOYMENT TRIBUNALS

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