EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs C Palladino	**v**	**Reed in Partnership Ltd**

Heard at: Watford **On**: 16 June 2023
Before: Employment Judge R Lewis

Appearances
For the Claimant: In person
For the Respondent: Ms A Fadipe, counsel

RESERVED JUDGMENT

1. The claimant's claims under s.13 and s.26 of the Equality Act 2010 (direct discrimination and harassment) are struck out.

2. The claimant's claims under s.27 of the Equality Act 2010 (victimisation) are not struck out.

3. The claimant's claim of age discrimination by constructive dismissal is not struck out.

REASONS

Procedural points

1. This was the hearing which I directed in March. I had today a bundle of some 400 pages, skeleton arguments prepared by both sides, and, if necessary, access to an audio file containing the covert recording of a meeting on 10 January 2022.

2. The claimant had on 18 May 2023 produced a helpful document called Further and Better Particulars. It went considerably further than that title, and on pages 4 to 5, she had set out, as items (a) to (i), her claims of discrimination. She had supplemented it with legal analysis and evidence by way of explanation.

3. The document explained that items (a) to (i) inclusive were all pleaded as claims of direct discrimination and, in the alternative, of harassment; while the last three, items (g) to (i) were also pleaded as claims of victimisation.

4. I took the first hour of the hearing to clarify the nine claims with the claimant, with occasional cross reference to the bundle. Ms Fadipe then made her application to strike out, which was detailed and meticulous. The tribunal took the lunch break at the end of Ms Fadipe's application, and the claimant replied after the break.

5. I reserved judgment, and took the precaution of listing the hearing, on the contingency that the claim survived or part survived strike out. A separate case management order deals with the respondent's applications for deposit orders and with case management.

6. This was not a straightforward hearing. The claimant had made a number of iterations of her case, not always consistently. The presence of a 400 page bundle led both sides to invite me to consider evidence, which in a strike out hearing I was cautious to do. That sense of caution was enhanced by two factors at least. One was that when Ms Fadipe invited me to read notes of what was said at grievance meetings by the claimant's colleagues (and therefore in the claimant's absence) the claimant replied that all answers given by all colleagues were lies.

7. At the March hearing I had directed a transcript to be made of the covert recording of the meeting of 10 January. The bundle contained a short version, apparently prepared by the claimant, and a second version, at greater length, which I was told had been prepared by an independent provider on the claimant's instruction and at her cost. Ms Fadipe said that neither document was agreed as an accurate transcription, and drew my attention to one specific dispute. It was whether Ms Banjo had repeatedly said to the claimant, "You're fucking up", as the transcript recorded, or were her words in fact, "You're packing up."

8. I should add that I may have inadvertently misled the parties, and if so I apologise to them. At the end of the hearing Ms Fadipe made arrangements for the audio file to be sent to me, on the understanding that I had agreed to listen to it while preparing this judgment. If I conveyed that impression, I apologise. To clarify: if there had been an agreed transcript which both parties asked me to read, I would have done so, possibly while listening to the audio file. But in the absence of agreement, I declined to listen to the recording. It seemed to me that I was asked to resolve the disagreement about transcription, and that I could and should not do that at a preliminary hearing.

Points of approach

9. The claimant was entirely courteous and co-operative in following the directions of the tribunal, but plainly struggled as a litigant in person, and reminded me more than once that her English, while fluent, is not her first language. That said, her understanding of the law and procedure of the

tribunal seemed to me to fall short of what would be required to do justice to her case. In particular, she repeatedly approached the case by pre-supposing that which had to be proved, namely causation between the matters complained of and the protected characteristic. Although she did not use the word "culture" her approach very much brought to mind the observations of Underhill J in HSBC Asia Holdinsg Ltd v Gillespie UKEAT 0417/2010:

> " It is unnecessary when one reads the word "culture" in this context to reach for one's revolver, but it is nevertheless an imprecise term, and it needs to be appreciated how an allegation of a "discriminatory culture" fits into the proper legal approach. In a case of (direct) discrimination the ultimate question will always be whether the claimant was treated in the way complained of by one or more individuals on the proscribed ground (or – as we will soon be saying – because of the protected characteristic). Where there is a dispute about whether the particular acts complained of occurred, or whether they were done with a discriminatory motivation, proving that (say) sexist behaviour or talk was common in the workplace, which is essentially what a discriminatory "culture" means, may well assist in the determination of that dispute (though it should not be allowed to distract the tribunal's ultimate focus from the particular acts complained of). In harassment cases it may also be relevant in another way, in as much as "a discriminatory culture" may be an acceptable synonym (though synonyms are best avoided so far as possible) for the statutory language of a "hostile, degrading, humiliating or offensive environment".

10. In submission, Ms Fadipe focussed heavily on causation. Her point was clear and straightforward: the claimant had repeatedly made what she called a bare assertion which linked an event which displeased her with a protected characteristic. However, there was nothing, in her submission, which linked any event with the protected characteristic of age. I agree with the broad thrust of that submission, even in the context of item (b), which specifically refers to chronological age. The claimant's reply was that as there was no other reason for disagreeing with her, or distressing her or challenging her other than her age, it must follow that items (a) to (i) were all age related. That was the recurrent fundamental flaw in the claimant's analysis of this case, and one which despite many attempts, she failed to answer satisfactorily.

11. I was also struck by a secondary submission of Ms Fadipe, which was to remind me of the objective definition of detriment. I accept the gist of her submission, which was that not every untoward or displeasing event at work, amounts to a detriment, in the sense of Shamoon. It is simply not the case that a claim is made out by the strength of a claimant's feeling, no matter how profound or sincere.

The legal framework

12. This was an application to strike out a claim under Rule 37, which provides that the tribunal may strike out all or part of a claim on grounds which include "that it has no reasonable prospect of success." The alternative application for a deposit order was made under Rule 39, which empowers

the tribunal to order a deposit where it considers "that any specific allegation or argument has little reasonable prospect of success."

13. I was referred to the considerable body of authority on strike out in cases of alleged discrimination, and with all due respect to the learning shown in both written skeletons, I understand the proposition which emerges to be that the tribunal should be very cautious indeed to strike out a claim of discrimination under Rule 37. It should have regard to the social policy in favour of discrimination legislation and against inequality in the workplace, and respect for the difficulties of proof encountered by a claimant. The test has been put as high as "fanciful" although that word does not appear in legislation.

14. The claimant's claims were brought under three separate provisions of the Equality Act 2010. Her claims of direct discrimination were brought under s.13 which provides:

> **"13 Direct discrimination**
>
> (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.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

15. Section 13 is a definition section. The claimant's claim would be read with section 39(2)(d) which provides:

> **"39 Employees and applicants**
>
> …
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> …
>
> (d) by subjecting B to any other detriment."

16. In considering what constitutes a detriment, the tribunal should have regard to the guidance in Shamoon v Royal Ulster Constabulary, 2003 UKSC 11. There is an objective test: a detriment is to be understood as that which a reasonable worker would understand to place her at a disadvantage in the workplace.

17. The claimant brought claims in the alternative under s.26, which provides:

> **"26 Harassment**
>
> (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."

18. Section 26(4) imports into the analysis of harassment a mixture of the subjective perception of the claimant, the objective analysis of the tribunal, and "the other circumstances."

19. In considering a case of harassment by use of words, it is helpful to have regard to the guidance of Underhill P in Richmond Pharmaceuticals v Dhaliwal 2009 ITLR 336, and in particular:

> ""We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

20. The claimant also brought claims under s.27 which provides that:

"27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act."

21. The definition of protected act is extremely wide.

The factual setting

22. I turn now to undisputed matters which set the scene. The claimant was aged 45 at the time in question. The relevant events took place between November 2021 and January 2022, and concluded with the claimant's resignation in March 2022.

23. The events took place at the respondent's premises in Welwyn Garden City, which the claimant joined as an experienced trainer, with what she described as successful working relationships at previous workplaces.

24. At Welwyn Garden City she worked with a team of colleagues all of whom, with one exception, were younger than she was. The particular colleagues with whom she appears to have been in dispute in this case were all in their 20s.

25. The claimant's case is, in short, a history of conflict and dispute in the workplace which was entirely and solely attributable to the claimant's age; in March, and again at this hearing, she repeatedly said there was "no other explanation" or "no other reason" for any disagreement or dispute at work. When in discussion I put to her that items in the bundle indicated that there were other reasons in the minds of her younger colleagues, her response was that any other reason given for disagreement or conflict was demonstrably lies.

The nine events

26. Within that setting, the claimant put forward the nine events which form items (a) to (i). Items (a) to (c) each refer to a single remark made by a colleague. Items (d), (e) and (f) relate to arrangements for the office Christmas outing in December 2021; Items (g) to (i) relate to exchanges on 10 and 11 January 2022; and the final matter is the claimant's resignation, which forms the basis of a claim of discrimination by constructive dismissal.

27. I now turn to each of those items. I first explain my understanding of the factual basis upon which I proceed, taking the claimant's case at its highest and not resolving any evidential dispute; and I then analyse each event as a claim of direct discrimination or harassment. That analysis leads me to strike out all claims of direct discrimination and harassment.

28. At the next stage I consider the final three items as claims of victimisation and conclude that they are weak but not susceptible to strike out. My conclusion on deposit orders is set out separately. Finally, I deal with the claim for constructive discriminatory dismissal.

Single remarks

29. Item (a) is that in a conversation about a particular work task, of which the claimant had prior knowledge, Ms Banjo said to the claimant that she had "a lot of experience." The claimant takes this as a hostile reference, perhaps even a jibe, at the claimant's age. She did not say that it was said in a tone of for example irony or sarcasm. I take the statement that the claimant had a lot of experience to be factually correct.

30. I do not consider that the claimant has any reasonable prospect of the tribunal concluding that that mere statement subjected her to detriment. It was no more than the factual truth, appropriately expressed and appropriate to the context of the conversation, as summarised by the claimant in the same document. I likewise conclude that the claimant has no reasonable prospect of making good a claim of harassment, as I can see no objective basis on which a tribunal could conclude that the remark was made with the statutory intention or that it was reasonable to have the statutory effect.

31. Item (b) referred to two separate conversations in November 2021 when two colleagues, Ms Chaudhry and Ms Banjo appear to have had similar introductory conversations with the claimant, in which the question of children came up. The claimant's case is that when she met Ms Banjo and Ms Chaudhry, each asked her if she had children and she said that she did; when she asked them the same question, the answer was from each, in separate conversations, "I am young." I understand both were in their mid-20s at that time.

32. The word "young" is a relative term in context. I accept on the claimant's behalf that the use of the phrase "I am young" may have implied that each speaker was younger than the claimant, or that each might want to wait before starting a family.

33. I do not accept that the claimant has any reasonable prospect of proving that either remark constituted a detriment, or met the definition of harassment, and in both instances my reasoning replicates what I have said above about item (a). I therefore do not repeat it.

34. Item (c) was a conversation with Ms Chaudhry. The claimant was about to climb onto a chair to put up wall decorations for a party, when Ms Chaudhry, in the claimant's words,

> "told me to let her do it, saying that it was "easier" for her to carry out the task as she was more agile."

35. With slight misgivings, I accept that this sort of remark could, depending on context and tone, appear as patronising or condescending. The claimant made no assertion about the tone of the words. The remark may engage traditions such as offering to carry a heavy objects for a person of a different sex or age. It may be a reflection of courtesy on Ms Chaudhry's part . It may also be a reflection – but it is a matter of evidence – of the claimant possibly presenting as physically clumsy.

36. I can see no reasonable prospect of the claimant showing the causation between the remark and age; or, given the limited words quoted, of her making good her complaint that it is a detriment. In claiming harassment, the claimant will, in my judgment, certainly struggle to show that the words are related to age (as opposed to any other matter of appearance or presentation) and certainly the quoted words suggest an attempt by Ms Chaudhry to express herself tactfully and with the minimum intrusion upon the claimant as possible. I can see no reasonable prospect of the claimant making good an allegation of the statutory intention or effect, broadly for reasons which repeat what I have said about item (a).

Christmas arrangements

37. In relation to items (d), (e) and (f), I was shown a number of texts, messages and emails at the time all of which suggest that a minor banal everyday issue in a workplace – ie answering the question, where shall we go out for a Christmas celebration- generated in this workplace a wholly

disproportionate volume of correspondence and emotion. All of that appears to have been at the instigation of the claimant, and, discrimination apart, such material as I saw shows a striking lack of insight on her part into the effect of her conduct at work. I comment that that lack may well form part of the explanation for poor working relationships with younger colleagues.

38. The material which I saw indicated that in the run up to Christmas 2021 attempts were made to organise a Christmas outing for a meal together by those who worked at Welwyn Garden City. It is an event replicated in countless workplaces every year. The claimant put forward Willow Farm, a local venue, which is primarily for children and families, but, I was told, also is available, particularly in the evenings, for adult groups. I do not know if at the time the claimant circulated the Peter Rabbit motifs which were in the bundle.

39. The claimant's colleagues wanted a venue which would be less family friendly, more entertaining, and possibly in London. The claimant repeatedly used the word "clubbing" to describe their wish, although I am not confident that that word was well or accurately used.

40. However, the point was this: all colleagues were asked equally to put forward a selection of venue, and express a choice or preference. Much of the correspondence was the normal good-humoured correspondence on this topic which is to be expected. No colleague supported the claimant's proposal, leaving her in a minority of one. It was clear that the claimant's younger colleagues' preferences included the possibility of going to London, which the claimant did not want to do.

41. In the event, the disagreement about choice was brought to an end by the management of the respondent, which selected a restaurant in St Albans as the venue. The claimant in the event did not join the dinner.

42. Within that setting item (d) complained of the fact that three colleagues opposed the claimant's choice because they wanted to go to a club in London; item (e) set out the responses, ranging from negative to derisive, which colleagues made about the claimant's proposed venue; and item (f) referred to the manager telling the claimant at a meeting that she should understand that her young colleagues wanted to go to London for the work party.

43. What really happened in these events? The claimant and all colleagues were asked to make a suggestion. The claimant's suggestion was supported by no one except the claimant. That may have been on grounds of age; it may also have been a legitimate exercise of choice by colleagues, who by a large majority outnumbered the claimant. In the event, neither view prevailed with the respondent.

44. I do not accept that the simple act of being disagreed with constitutes a detriment for the purposes of s.39 as read by Shamoon; and looking at

these items as claims of harassment, I repeat the general conclusions set out above about item (a).

Events on 10 and 11 January

45. Item (g) remained incoherently pleaded The complaint was that the claimant was discriminated against "in the language used and manner of speech" by three colleges in an exchange on 10 January 2022. The claimant wrote that she relied on the last six to seven minutes of the recording.

46. It appeared to be common ground that the claimant delivered training from a training room, in which she also had a desk where she carried out administrative work. The claimant accepted that it was not "her" room or her office. It was also used for what were called "kick" meetings, which I understood to be short team meetings at the start and end of each working day.

47. As I understand it, the claimant was working at her desk in the particular room when other team members conducted a kick meeting in another part of the room. It appears that for about the first 20 minutes of the team meeting there were no issues: the claimant got on with her work and the team got on with its meeting.

48. Even allowing for any dispute of the transcript, it appears that in the last minutes of the meeting the claimant raised a question about the noise generated by her colleagues, which quickly spiralled into a dispute about "whose" room it was, and ended with open conflict, in particular between the claimant and Ms Banjo. The team manager struggled and plainly failed to achieve control of her team members or of the meeting. I found no word in the transcript which referenced the claimant's age; on the contrary, Ms Banjo challenged the claimant's aggressiveness. I have referred above to the risk of a serious inaccuracy or misunderstanding in the transcript.

49. The difficulty with this part of the case is that it is perhaps most clearly evidenced of all the claimant's allegations because she made a secret recording. I considered that while I did have power to strike it out because the claimant had repeatedly failed to clarify what it was about the language and manner of speech of which she complained, it would not be fair or appropriate to do so.

50. In the transcript, there is absolutely nothing to indicate a dispute which has any relationship with anyone's age. The dispute is plainly a dispute between the claimant and another group who were trying to use the same space at the same time to work; it then spirals into a more general dispute about use of the space; and then gets out of hand and in some respects personal. There is nothing in the transcript which references the claimant's age, or uses the word age or old or anything like them in any derogatory sense.

51. The claimant's question or assertion that there was no reason other than age for conflict is sharply contradicted by this transcript. It suggests very strongly that there were other reasons for a personal clash between the claimant and colleagues. Ms Banjo is recorded as saying what it was; the fact that the claimant, in Ms Banjo's language, came to work and constantly fought with her colleagues. When the claimant's reply was that that was a lie, she added another layer of difficulty to her own case. It seems to me that this part of the claim has no reasonable prospect of success because the claimant has made a bare assertion that a squabble between colleagues was related to a protected characteristic, and she has made the assumption that that is a matter which proves itself. It does not. The best contemporaneous evidence is wholly against that proposition, and I strike out item (g) as a claim of direct discrimination and as a claim of harassment as having no reasonable prospect of success.

52. In so doing, I add one comment. It appears from the transcript (and I bear in mind the caution that it is not agreed and may not be accurate) that at least one colleague (Ms Banjo) lost her temper, and that another manager (Ms Emmings) struggled to take control of the situation. That is exactly the sort of heated situation where one might expect to find the use of language which offensively engages the protected characteristic. That language was entirely absent from the transcript which I saw.

53. Items (h) and (i) referred to an event in the same room the next day. The trigger incident was that the claimant was working in the same space at the start of the following day when her colleagues held a kick meeting at around 9am. Some of them brought some item of cooked food with them, and the claimant complained about the smell of the food, which she said made her sick, something which she attributed not to personal taste but to a medical condition, fibromyalgia. After the meeting there was a trail of emails on this topic, in which the claimant repeated her complaint and others complained about her complaining.

54. When I asked the claimant at this hearing a question which I repeated, namely "what has that got to do with age," her answer was remarkable. She said that the colleagues brought the food into the room, in the knowledge that the smell would distress her, deliberately in order to distress her, and to further their age related hostility towards her. Those answers build upon the foundation of a self-proving age-related animosity against the claimant. It follows from my approach to other similar allegations that I find that this allegation has no reasonable prospect of success, because the claimant has simply made bare assertion upon bare assertion. I strike out the claim of direct discrimination because it accordingly has no reasonable prospect of success and the claim of harassment for reasons already stated, and for the additional reason that this event cannot be shown to be related to the relevant protected characteristic.

Victimisation

55. I now turn to the claims of victimisation. I deal first with the question of chronology. The three events in the particulars of victimisation are stated to

have taken place on 10 and 11 January 2022. The particulars state clearly that the protected act was the claimant's grievance of 8 January. Ms Fadipe took me to the bundle, and to the letters in which HR sent the alleged victimisers confidential copies of the grievance, and invited them to meetings to discuss it. The earliest of those letters was dated 14 January. It followed, on Ms Fadipe's submission, that the alleged victimisers demonstrably had no knowledge of the protected act until three days after the alleged acts of victimisation. In reply, the claimant said that she had told the victimisers that she was going to complain about them on 6 January before making the complaint on 8 January. There was no reference to this in any of the claimant's iterations, and it was difficult to avoid the suspicion that she was opportunistically responding to the submission which she had just heard.

56. It stands to reason that if it is shown on evidence that the alleged victimisation took place before the victimisers knew about the protected act, that will be the end of this part of the case. However, at the stage of strike out, the chronology point is not safe to rely upon. Ms Fadipe in effect asked me to take the letters from HR as conclusive evidence that the alleged victimisers did not know about the complaint until they received the letters. I cannot make that conclusion. I say so partly because of the breadth of the language of s.27, and partly in light of experience which says that any workplace may not keep strict confidentiality. In any event, it does not seem to me safe to reach a conclusion that individuals have no knowledge of a protected act without any specific evidence or wording to that effect from any of the individuals.

57. That would leave open a case that the claimant's colleagues brought in the food spitefully, in retaliation against her for having presented grievances of discrimination. While that seems to me unlikely, it does not seem to me to meet the high threshold of Rule 37, and I therefore decline to strike out the claims of victimisation.

58. It follows therefore that items (a) to (f) inclusive are struck out in their entirety; and that in relation to items (g), (h) and (i), claims under s.13 and s.26 are struck out, but claims under s.27 are not struck out. It therefore follows that the claims which go forward to hearing are claims of victimisation under s.27, based only on items (g), (h) and (i).

Constructive dismissal

59. The claim of discrimination by constructive dismissal also proceeds. As the claimant had well under two years service, it is a claim under the Equality Act, not under the Employment Rights Act 1996. So that the point is clear to the claimant, the effect of this judgment is that the conduct upon which the claimant may rely as the reasons for resignation / dismissal, are items (g), (h) and (i) only.

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Employment Judge R Lewis

Date: 6 July 2023

Sent to the parties on: 7 July 2023

For the Tribunal Office