EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms G Ahir	v	St Swithun Wells Catholic Primary School

Heard at: Reading Employment Tribunal (by CVP)
On: 23 June 2023
Before: Employment Judge George

Appearances
For the Claimant: In person
For the Respondent: Mr M Sellwood, counsel

JUDGMENT

The following claims are struck out under rule 37(1)(a) on the basis that they have no reasonable prospects of success:

a. All victimisation claims that are based on alleged acts dating from prior to 5 February 2021;

b. The claim that the respondent was in breach of the duty to make reasonable adjustments.

REASONS

1. At the preliminary hearing in public I had the benefit of the following documents:

   a. A two part electronic file: Part A ran to 999 pages (in the most recent iteration) and contained the documents set out in the index and Part B contains 4004 pages which is the claimant's disclosure on the substantive issues;

   b. The claimant's statement responding to the application for deposit orders;

   c. The claimant's application and amendment application (in total 419 pages including a 4 page statement) to strike out the respondent's applications dated 2 November 2022 – the claimant informed me that the first 4 pages probably gave me all the information I needed for today and the other pages were copies of documents she referred to;

d. Some recent correspondence between the parties and the Tribunal dated 15 June 2023;

e. An audio file and a video file which were also appear to be part of the disclosure relevant to the substantive issues rather than to the issues for this preliminary hearing. (they are described in para.36.a. and b. on Vol A: page 180)

Applicable Law

2. The Employment Tribunals (Rules of Procedure) 2013 Sch.1 include the following (so far as is relevant):

> "37.— Striking out
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> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
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> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
>
> (b) ...
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> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
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> …
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> 39.— Deposit orders
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> (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
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> (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
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> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
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> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out…..
>
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
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> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
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> (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

> (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

3. The power to strike out a claim on the ground that it has no reasonable prospect of success comes from rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013. It is a power to be exercised sparingly, particularly where there are allegations of discrimination and victimisation.

4. In the case of Anyanwu v South Bank University [2001] IRLR 305 HL, the House of Lords emphasised that in discrimination claims the power should only be used in the plainest and most obvious of cases. It is generally not appropriate to strike out a claim where the central facts are in dispute because discrimination cases are so fact sensitive. The same point was made by the Court of Appeal in the protected disclosure case of Ezsias v N Glamorgan NHS Trust [2007] I.C.R. 1126 CA where Maurice Kay LJ said this at paragraph 29

> "It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

5. Furthermore, there is a public interest in ensuring that allegations of discrimination are heard and determined after appropriate investigation of the circumstances because of the great scourge that discrimination, whether on grounds of race or other protected characteristic, represents to society. It is relevant to bear in mind that s.136 of the Equality Act 2010 provides for a shifting burden of proof. Therefore at this preliminary stage the question is whether the claimant has no reasonable prospect of establishing the essential elements of her claim, taking into account the burden of proof in respect of each of those elements and bearing in mind the danger of reaching such a conclusion where the full evidence has not been heard and explored: see Underhill LJ in Ahir v British Airways Plc [2017] EWCA Civ 1392 para.16.

6. That said, where it is plain that a discrimination claim has no reasonable prospects of success (interpreting that high hurdle in a way that is generous to the claimant), then the tribunal does have and, in a plain and obvious case, may use the power to strike out the claim so that the respondent and the tribunal system are not required to spend any more resources on a claim which is bound to fail: Anyanwu para.39 per Lord Hope. Such an example is given in the quotation from Ezsias.

Discussion and Conclusions

7. The application was originally made by the respondent on 22 November 2022 (Vol A: 96) and Mr Selwood has followed that application quite closely,

expanding upon the argument but still targeting the same specific elements of the claim.

8. The claimant took me to a number of different documents in which she had put forward explanations about her claim. Having clarified with the parties which documents in particular they wished me to read and made clear that I would only be able to take into account the pages that I was specifically directed to, I took time to read and the hearing resumed at about 11.45 am.

9. I determine the application following the arguments in the order set out in the letter dated 22 November 2022. The respondents first argued that a number of allegations were out of time and that a number of allegations (see the top of Vol A: page 98) should be struck out or made the subject of deposit orders on the basis that they are, on the face of them, out of time. They indicate that, based on the date on which the claim was presented and the dates of conciliation in this case on the face of it claims which date from before 29 April 2021, are potentially affected by this.

10. The claimant argued that it would be wrong at the present stage to strike out any of those claims or to subject them to deposit orders, make them subject to a deposit order because she argues that there was a continuing act or continuing state of affairs under which discriminatory acts took place from time to time.

11. As Mr Sellwood realistically argued, the applicable case law (analysed recently in E v X (UKEAT/0079/20)) means that the test at this preliminary stage is whether there is a reasonable prospect of the claimant establishing that the acts are so linked as to amount to an act continuing over a period such that time starts to run at the end of the period. It is not easy for a respondent to show that it is appropriate to strike out claims on the basis that there is no reasonable prospect that the Tribunal has jurisdiction because of time points. The Tribunal should be wary even before making specific allegations subject to deposit orders at this stage. Counsel argued that there was a clear break during the period that the claimant was on sick leave in around February and March 2021.

12. That argument I consider to be effectively dealt with by reference to the agreed amended list of issues (or LOI as I shall refer to it) 1.ii. which is an allegation that in February and March 2021, the Headteacher demanded that the claimant return to work and attend meetings. This on the face of it includes allegations about conduct which is said to have taken place during the sickness absence. Indeed, Ms Ahir argues that she was contacted throughout the period of absence.

13. It therefore does not seem to me to be possible to say that there is a bright line distinguishing the acts that are said to have taken place before the start of the sickness absence from those that took place after. The personnel involved throughout the alleged acts and the nature of the claimant's case means that there is the potential for the acts to be linked as alleged. I do not conclude that there are no reasonable prospects of the acts being said to amount to a continuing act.

14. I did consider separately whether the alleged links might be so weak particularly over that period, that if not no reasonable prospects, there were little reasonable prosects, of them being linked. However the claimant also argues, as is reflected in the list of issues, that it would be just and equitable to extend time. She refers in her response to particular matters which, in my view, make that a reasonable argument to run. First, she states that there was a delay in the provision of an appeal outcome; she refers to that in paragraph 7 of her response. Next, she relies upon her own health challenges at various points of time. It seems to me that it would be wrong to say at this preliminary stage that there are little reasonable prospects that if the claimant were to show that these acts were discriminatory they would not be found to be in time, taking into account not just the continuing act issue but also whether it would be just and equitable to extend time.

15. I next consider the race discrimination allegations.

16. The respondent essentially argues in respect of one particular allegation (LOI 1.g.), that the strength of the evidence in the case means that it is so unlikely that the reason for the claimant's sickness entitlement being paid in the way that it was anything to do with race that I be confident enough to strike the allegation out. They say that with reference to an exchange of documents in the preliminary hearing file at Volume A: page 767.

17. However, the claimant argues that there is a contradiction between the information she was provided by the Vice Chair of the Governors and by the Head Teacher and that this is likely to mean that the respondents have something to answer. I consider that, in those circumstances, it is not possible to say that there is no basis whatever for linking this alleged underpayment with race.

18. So then the next allegation is in respect of LOI 1.i.. The allegation by the respondent there is that the complaint that the Head Teacher caused confusion and ambiguity through poor email communication is not one that has any likelihood of being made out as a detriment because the impact on the claimant cannot amount in law to less favourable treatment by the Head. The only thing she is said to have done is have poor email communication.

19. The claimant, in her response, referred me to the emails in question which are at pages 1623 to 1631 of Volume B, and I have read those. Having done so, my view is that this is exactly the sort of area of factual dispute and nuance where, in the context of a claim which has a number of allegations that are going to go forward, it is not possible to be confident without making any evaluation of the merits of the case that there are no reasonable prospects of showing that these were detrimental matters amounting to less favourable treatment on grounds of race. When considering the rule 37 power, I have to take the claimant's case at its highest.

20. I move on then to LOI.1.m. and 1.q.. The argument there by the respondent is that in large measure the claimant there is complaining about breach of confidentiality and the link to race is not made out. It is argued that, the complaint of breach of confidentiality having been removed from the litigation

by consent on the basis that it is not something that the tribunal has jurisdiction for, this is something of an oversight.

21. The factual allegations are that the Head Teacher disclosed a private and confidential letter and another that the Assistant Head Teacher snatched the claimant's phone and began recording herself and went through personal items on the claimant's phone.

22. When the claimant responded to these allegations she commented on inconsistent and what she argues to be, untrue information provided by the respondent about responsibility for an individual in HR putting an incorrect address on the system. That does not seem to be directed to these particular incidents at all.

23. However, it is fair to say that were the claimant able to show that there had been an initial refusal on the part of the respondent to accept responsibility for a data breach despite clear evidence and then that response has shown to be inaccurate, there could well be something that calls for explanation. In a factually complex case, where there are other allegations against the same individuals, and at this early stage this is something on which I consider it right to give the claimant the benefit of the doubt and do not conclude there are no reasonable prospects of success.

24. I can also take LOI. 1.r. and s. together. In respect of neither of Rule 37 nor Rule 39 do I think the test is met here. I am not going to strike these allegations out and I am not going to make deposit orders. The claimant links the comments that are made and are described in LOI.1.r. and s. to a perception about the norms of marital status of a person with children who is of her sex and her ethnic background, namely Indian. She also argues that the comments were influenced by religion in the sense of the religious ethos of the school. I do query what the claimant is describing is in fact to do with her religion or to do with the religion of the questioner. However, it is not obviously unarguable that there is some connection with the claimant's race in the sense of ethnic background. If those words are shown to have been said, then they themselves call for explanation and I am of the view that those allegations have reasonable prospect of success.

25. The final allegation of direct race discrimination that is said there to have no or little reasonable prospect of success is LOI.1.cc., that of having to work in rooms where the windows and doors were open in November and December without heating or warm clothing. In essence, the claimant's allegation is that in a number of respects her health and wellbeing was not prioritised compared with the white Teaching Assistants. Although the conditions that are triggered by cold have been found not to be disabilities (namely asthma and joint pain), it does not follow from that that this could not be considered as less favourable treatment on grounds of some other protected characteristic. In the context of the thrust of her complaint as set out in a number of the other allegations, this seems to me to be sufficiently similar to the other allegations that it should go forward as part of the whole.

26. I turn to the arguments that two particular elements of the direct disability discrimination complaint should be struck out or the subject of deposit orders: Those are based on LOI.1.d. and cc.

27. The claimant here appears to me to have confused the conditions which meant that the acts complained of were disadvantageous to her with any basis for asserting the respondent acted on grounds of the only one of those conditions that causes her to be protected as a disabled person under the Equality Act 2010, namely migraine. The basis that she put forward in argument of a potential inference of unlawful grounds is an alleged failure to follow their own risk assessment. There is some basis, then, for an assertion that, in addition to being direct race discrimination, those respondent were motivated by the claimant being a person who gets migraines and I do not accept that there are no reasonable prospects of success.

28. I agree with the respondent's argument that the allegation of failure to make reasonable adjustments that was in the agreed amended list of issues was predicated solely on the claimant being disabled by reason of asthma and joint pain. It follows from my judgment that the claimant is not disabled by reason of those conditions that that particular head of claim should be struck out as having no reasonable prospects of success.

29. So far as the victimisation claim is concerned, following discussion I think the claimant understood that there were a number of allegations which happened *before* the date on which she first complained about discrimination and therefore could not have happened *because of* her complaint of discrimination. Those allegations may proceed as discrimination complaints (subject to any other ruling by this judgment).

30. That does not mean that all of the list of issue numbers that are listed in the application will be struck out because at least one of them spans a period of time that straddles 5 February 2021. Any that are similarly affected will continue, but only in so far as the claimant relies on conduct that postdates 5 February 2021.

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Employment Judge George

Date: …23 August 2023……..

Sent to the parties on: 31 August 2023

For the Tribunal Office