



EMPLOYMENT TRIBUNALS

Claimant: Mr Vlad Tudose

Respondent: Armour Home Electronics Limited

Heard at: London South (in public by CVP)

On: 7th September 2023

Before: Employment Judge Rhodes

Representation

Claimant: In person

Respondent: Ms B Balmelli (counsel)

RESERVED JUDGMENT

1. The Employment Judge considers that the claimant's allegations or arguments that he was discriminated against on the ground of sex have little reasonable prospect of success. The claimant is ORDERED to pay a deposit of £200 not later than 21 days from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit.
2. The complaint of unfair dismissal has no reasonable prospect of success and is hereby struck out.
3. The complaint of sexual orientation discrimination has no reasonable prospect of success and is hereby struck out.
4. The complaint of wrongful dismissal has no reasonable prospect of success and is hereby struck out.

REASONS

Introduction

1. The claimant complains of unfair dismissal, sexual orientation (polygamy/polyamory) discrimination, sex discrimination and wrongful dismissal. Although the claimant had ticked the 'other payments' box on page 8.1 of the claim form, no such complaint was set out in box 8.2 or included in the amounts sought by way of remedy at box 9.2. It was also not listed among the claimant's list of complaints in his document at page 45 prepared for this hearing. There is therefore no actual 'other payments' complaint before the Tribunal, which is separate from the discrimination and dismissal complaints noted above.
2. I did not hear oral evidence but was referred to a 142-page bundle. Pages references below are references to pages in that bundle. I heard oral submissions from both parties. Respondent's counsel also prepared written submissions supported by a bundle of authorities. Shortly before the start of hearing, the claimant emailed a series of submissions to the Tribunal. The respondent's solicitor was copied into this email but, unfortunately, it was not brought to my attention until after the hearing. I have, however, taken this material into account in the light of the **Downham Market School** case referred to below.
3. As I did not hear oral evidence, I did not resolve any disputes of fact. The 'findings' section below sets out what I considered to be uncontested matters based on the pleadings and the contents of the bundle.

The law

Strike out/deposit orders

4. Rule 37 of the Employment Tribunal Rules of Procedure 2013 ("the Rules") confers on a Tribunal the power to strike out all or any part of a claim on various grounds. For the purposes of today's hearing, the relevant ground under consideration is contained at Rule 37(1)(a), namely that it "has no reasonable prospect of success".
5. Rule 39 confers on a Tribunal the power to order a party to pay a deposit (not exceeding £1,000) as a condition of advancing an argument or allegation which has little reasonable prospect of success. In the event that any such deposit is not paid by the specified deadline, the argument or allegation to which it relates shall be struck out (Rule 39(4)).
6. In the event that the party against whom the deposit order was made pays the deposit and goes on to lose in respect of the relevant argument or allegation for substantially the same reasons given in the deposit order, that paying party will be rebuttably presumed to have acted unreasonably for the purposes of a costs application under Rule 76 and will forfeit the deposit to the other party (Rule 39(5)).

7. By a letter from the Tribunal dated 10th August 2023, the claimant had been put on notice that one of the purposes of today's hearing was to consider whether to strike out all or any part of the claim and/or make deposit orders and today's hearing was conducted in public.
8. In considering whether to strike out a complaint, a Tribunal needs to form a view of its merits and be satisfied that it has no reasonable prospects of success. Tribunals should take particular care when considering to strike out discrimination complaints, particularly those which are fact-sensitive. The House of Lords in ***Anyanwu and another v South Bank Student Union and another* 2001 ICR 391** held that discrimination complaints should only be struck out in the most obvious cases.
9. In ***Balls v Downham Market High School and College* 2011 IRLR 217**, the EAT held that a Tribunal must consider whether on a careful examination of all the available material (including information on the Tribunal file), it can properly conclude that the complaint has no reasonable prospect of success. This involves more than considering whether it is likely or possible that the complaint will fail.
10. A claimant's case should be taken at its highest and an assumption made that the claimant's pleaded case will be made out (***Silape v Cambridge University Hospitals NHS Foundation Trust* EAT 0285/16**).
11. That said, a Tribunal can still strike out a discrimination complaint which involves disputes of fact, provided that it is aware of the danger of reaching a conclusion that it has no reasonable prospect of success without having heard evidence on disputed facts (***Ahir v British Airways plc* 2017 EWCA Civ 1392**).
12. The making of a deposit order is a less draconian sanction than a strike out. The test of "little reasonable prospect" is less rigorous than "no reasonable prospect" and a Tribunal therefore has greater leeway to make such an order. It does not, however, follow that a Tribunal will necessarily make a deposit order in relation to an allegation with little reasonable prospect of success – it must exercise its discretion to do so in accordance with the overriding objective to deal with cases justly and fairly (***Hemdan v Ismail and another* 2017 ICR 486**).
13. In ***Hemdan***, Simler P gave the following guidance:

"The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for a strike out which requires a tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis."
14. Before making any decision relating to the deposit order, the Tribunal must make reasonable enquiries into the paying party's ability to pay the deposit, and must take this into account in fixing the level of the deposit (Rule 39(2)).

Unfair dismissal

15. To qualify for the statutory right not to be unfairly dismissed, an employee needs to have had at least two years' continuous employment as at the effective date of termination (section 108 Employment Rights Act 1996).

The protected characteristic of sexual orientation

16. Section 12 Equality Act 2010 defines sexual orientation as follows:

- (1) *Sexual orientation means a person's sexual orientation towards—*
(a) *persons of the same sex,*
(b) *persons of the opposite sex, or*
(c) *persons of either sex.*
(2) *In relation to the protected characteristic of sexual orientation—*
(a) *a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation;*
(b) *a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation.*

17. Counsel for the respondent drew my attention to a decision of the Australian Federal Court in ***Bunning v Centacare [2015] FCCA 280 (11 February 2015)*** which held that polyamory did not fall with the definition of sexual orientation in Australia's Sex Discrimination Act 1984, which definition is materially the same as that contained with section 12 above.
18. In now-archived guidance notes produced by the Department of Trade and Industry that accompanied the 2003 Sexual Orientation Regulations ('Explanation of the provisions of the Employment Equality (Sexual Orientation) Regulations 2003 and Employment Equality (Religion or Belief) Regulations 2003'), the Government asserted that the definition of sexual orientation given in Reg 2(1) (which, is virtually identical to the definition in section 12 Equality Act) did not cover 'sexual practices or sexual conduct'.

Wrongful dismissal

19. Dismissing an employee without notice may be justified where the employee has committed a repudiatory breach of contract. The issue of whether a particular act of misconduct amounts to a repudiatory breach is a question of fact for the Tribunal.
20. In ***Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22*** it was held that "*dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category.*"

The facts

21. As noted in the introductory section, the following factual background is based on uncontested matters.

22. The respondent employed the claimant as a Project Engineer from 29th March 2021 until 5th January 2023, a period of just over one year and nine months.
23. The claimant describes his sexual orientation as polygamous or polyamorous and that this is a particular manifestation of his heterosexuality. Despite describing himself as polygamous, the claimant is not and never has been married.
24. On 16th December 2022, the claimant had what he describes as a "flirtatious conversation" with a female colleague.
25. On 19th December 2022, this female colleague complained that she had been sexually harassed by the claimant during the course of the conversation referred to above, in conjunction with an allegation that the claimant had touched her twice as she walked past him earlier in the day on 16th December 2022.
26. The claimant was investigated in relation to that allegation. The respondent considered suspending him but decided that the risk to other members of staff of his remaining in the workplace pending the outcome of the investigation was minimal.
27. On 28th December 2022, the respondent invited the claimant to a disciplinary hearing scheduled for 3rd January 2023 to respond to the allegation of sexual harassment. The claimant was provided with a copy of the evidence gathered during the investigation and warned that, if the allegation was upheld, one possible outcome of the hearing was that his employment may be terminated.
28. Later the same day, the claimant responded to the disciplinary hearing invitation by a four-page email which he copied to 11 colleagues, including the colleague who had made the complaint against him (page 86).
29. In that email, the claimant declined to attend the disciplinary hearing. He said that he was "surprised" that the matter had led to a formal hearing as he thought the matter would be resolved by updating the Staff Handbook to make clear that "flirting at work" was not permitted. The claimant went on to reject that the complainant had found his behaviour offensive and listed a number of occasions on which he had seen her flirting with other male colleagues. He accused her of lying and making a malicious complaint against him.
30. The claimant appears to have accepted the factual basis of the allegation against him but denied that it amounted to harassment. For example, the claimant said that his colleague had "*responded to my first flirt that day about her appearance by saying that she appreciates it*" and that, as she had not previously told him to stop or displayed a negative attitude regarding any of his "*actions towards her*", he "*had false hope*".
31. The respondent regarded the copying of the email to the claimant's colleagues as a breach of its email policy by divulging private and confidential information obtained during the course of the investigation and suspended him from work on 29th December 2022. The respondent added

this allegation to the sexual allegation as matters to be addressed at the disciplinary hearing which remained scheduled for 3rd January 2023.

32. The following day, the claimant sent a letter to the respondent in which he sought a pay rise, a promotion and the dismissal of the colleague who had complained against him (page 94). The claimant said that he would resign if these conditions were not met.
33. On 3rd January 2023, the claimant attended the office as usual. He said that he had not received notification that he was suspended. He declined to attend the disciplinary hearing as to do so would be to admit that he had committed misconduct. He left the premises.
34. The disciplinary hearing was rearranged for 5th January 2023 and the claimant was given a further opportunity to attend. Again, he declined to do so. The hearing proceeded in his absence, the respondent upheld the allegations against him and he was summarily dismissed the same day.

Conclusions

Unfair dismissal

35. The claimant did not have two years' continuous service. He is not making a complaint of automatic unfair dismissal. He argued that, as he had reached a relatively high position of responsibility with the respondent, he ought to have earned the right not to be unfairly dismissed. That is not how the statutory right arises. The claimant did not have the requisite service so he did not have the statutory right not to be unfairly dismissed and his complaint cannot succeed. This complaint is therefore struck out.

Sexual orientation

36. The claimant relies upon polygamy or polyamory as his sexual orientation. As he has never been married, the claimant cannot correctly describe himself as polygamous which the online Cambridge dictionary defines as meaning "*married to more than one person at the same time, or relating to this practice*".
37. As far as polyamory is concerned, the claimant describes this as being attracted to groups of females more than individual females. The online Cambridge dictionary defines polyamory as "*the practice of having sexual or romantic relationships with two or more people at the same time.*"
38. Although the claimant said that his polyamory is linked to his heterosexuality, it is not a practice which is unique to heterosexuals. People of any sexuality could be polyamorous. It also does not fit within the definition of sexual orientation in section 12 of the Equality Act 2010.
39. As per the decision in ***Bunning***, polyamory is a manifestation of sexual orientation, not an orientation itself.
40. The claimant has no reasonable prospect of successfully arguing that polyamory is a sexual orientation.

41. In any event, the claimant could not articulate the basis on which he was seeking to argue that he had been discriminated against on the ground of his polyamory.
42. The claimant could not formulate a comparator. If polyamory is a sexual orientation, the hypothetical comparator would be someone who only has relationships with one person at a time and who had been accused of sexual harassment. The claimant could not articulate how such a person would have been treated differently if accused of sexual harassment.
43. The claimant ruled out a homosexual comparator. His position appeared to be that a homosexual man would not have found himself facing an allegation of sexual harassment in the same circumstances as the claimant because a homosexual man would not have been flirting with a female colleague.
44. Although it was difficult to follow the thrust of the claimant's argument, it appeared to be tantamount to: if he did not have a heterosexual polyamorous tendency to be attracted to groups of women, he would not have been flirting with his colleague and he would not have faced an allegation of harassment. As he puts it at page 51 of the bundle, "*an attack on my attraction to groups of females is an attack on my heterosexuality.*" However, the respondent was not attacking his attraction to groups of females; rather, it was dealing with an allegation of sexual harassment by a single female.
45. There was nothing in either the claim form or the claimant's submissions that gave rise to even a *prima facie* case of sexual orientation discrimination.
46. Even taking the claimant's case at its highest, it has no reasonable prospects of success. Not only does the claimant have no reasonable prospect of successfully arguing that polyamory is a protected characteristic he also has no reasonable prospect of establishing discrimination, even if it did amount to one.
47. Whilst I remind myself that I must proceed with great caution when considering the strike out of a discrimination complaint, this falls within those categories of complaints in which it is obvious that strike out is appropriate.
48. The complaint of sexual orientation discrimination is therefore struck out as having no reasonable prospects of success.

Sex discrimination

49. Again, the claimant struggled to articulate this complaint. His claim form does not assist as it does not contain any particularised complaint of sex discrimination.
50. At the hearing and in his written submissions emailed just before the start of the hearing, the claimant referred to two documents in the bundle as evidencing his sex discrimination complaint. The first was the investigation report at page 82. He says that that report contains the opinion of the investigator that the "*claimant has a negative and inappropriate towards*

women" and that the investigator goes on to conclude (in the "other relevant information" section) that the claimant poses a potential risk to women.

51. The second document relied upon is the respondent's letter dated 5th January 2023 (page 103) which records that one of the acts of misconduct for which he was dismissed was that he had "harassed a female member of staff." He says that the use of the word "female" suggests that the respondent considered the sex of the complainant to be an important factor in its decision-making.
52. Expanding upon this, the claimant argued that the respondent attached greater weight to the complainant's evidence than his because she is a woman.
53. This argument is weak for a number of reasons. First, even on the claimant's own case, there was "flirtatious conversation" between him and the complainant. There is therefore little dispute about the background facts.
54. Second, the claimant twice declined the opportunity to attend the disciplinary hearing at which he could have challenged the complainant's account and given his own version. By not engaging in the process, considerably increased the likelihood that the respondent would find against him.
55. Third, the respondent's finding that the claimant had breached the email policy did not rest upon any contested evidence: the email spoke for itself.
56. I consider that this complaint is highly likely to fail but that is not the same as concluding that it has no reasonable prospect of success. The claimant is entitled to argue, for example, that a woman accused of sexual harassment may not have been assessed as posing a potential risk to men. This complaint is not as hopeless as the sexual orientation complaint, which faces an additional obstacle that polyamory is not a protected characteristic. I therefore stop short of striking out this complaint.
57. However, it is still a very weak complaint and, in my view, has little reasonable prospect of success. I therefore conclude that the threshold for making a deposit order is met.
58. As per *Hemdan*, the making of a deposit order does not automatically follow from a finding of little reasonable prospect of success. I must still consider whether it is in keeping with the overriding objective to make such an order. I find that it is for the following reasons.
59. Cases need to be dealt with justly and fairly. That includes saving unnecessary expense and the respondent will have to incur further legal costs, and devote further resources, if this matter proceeds to a final hearing.
60. Justice also requires that the Tribunal's resources are allocated fairly between all parties whose cases need to be heard by the Tribunal Service. There needs to be some deterrent to having to allocate the Tribunal's resources to hearing weak claims.

61. It is not, however, the purpose of a deposit order to make it difficult for the paying party to find the sum payable and to thereby achieve a strike out by the 'back door'. I heard from the claimant about his current financial situation. He currently earns £210 per week. He does not have a mortgage or pay rent. He estimates that his disposable income is approximately £80 per week. I am giving the claimant three weeks in which to pay the deposit and it would be wrong to order a deposit which is greater than his disposable income over that period. I therefore set the amount of the deposit order at £200 payable within 21 days of the date on which this judgment is sent to the parties.
62. I draw the claimant's attention to the guidance note at the end of this judgment.
63. If the claimant pays the deposit, this matter will be listed for a case management preliminary hearing.

Wrongful dismissal

64. The relevant issue for a Tribunal in determining the claimant's wrongful dismissal complaint is whether the claimant committed an act or acts of misconduct that amounted to a repudiatory breach of contract.
65. The claimant's contract of employment contained a right on the part of the respondent to dismiss him without notice "*in the event of any serious breach by you of the terms herein and in any event of any act or acts of gross misconduct by you*" (clause 10.4).
66. Further, clause 18.3 states that "*You are required to act at all times with consideration for the needs of the Company's clients and your colleagues, and comply with the rules, procedures and policies of the Company*".
67. The respondent's Staff Handbook lists various matters which it considers to be sufficiently serious to warrant summary dismissal. These include (of relevance to this claim):
- breach of the respondent's Equal Opportunities Policy (which includes a section on sexual harassment)
 - unauthorised disclosure of confidential information
 - acts of discrimination.
68. Whilst the Staff Handbook is not, of itself, determinative of the issue of whether a particular act of misconduct amounts a repudiatory breach, each of the examples quoted above are capable of amounting to such a breach.
69. The claimant was dismissed for two acts of misconduct: sexual harassment and a breach of the email policy by disclosing confidential information.
70. Whilst the claimant denies that his "flirtatious conversation" amounted to harassment, there is no denying that he sent the email of 28th December 2022 and deliberately copied in his colleagues. That email contained private

and confidential information obtained via the investigation process and the claimant was not authorised to disclose it.

71. There is no reasonable prospect that the claimant will successfully argue that the sending of that email did not amount to a deliberate action which poisoned the employment relationship (in the language of **Adesokan**). His wrongful dismissal complaint is almost certainly bound to fail.

72. For that reason, I strike out the wrongful dismissal complaint.

Employment Judge Rhodes
Date: 28th September 2023

NOTE ACCOMPANYING DEPOSIT ORDER

Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a “deposit order”) requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.
2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.
What happens if you do not pay the deposit?
3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.
When to pay the deposit?
4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.
5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.
What happens to the deposit?
6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.
How to pay the deposit?
7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.
8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.
9. Payment must be made to the address on the tear-off slip below.
10. An acknowledgment of payment will not be issued, unless requested.
Enquiries
11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.
12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 976 3033. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit.

Case No: 2302011/2023

If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.



DEPOSIT ORDER

**To: HMCTS Finance Support Centre
Temple Quay House
2 The Square
Bristol
BS1 6DG**

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order