



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Clay
Respondent: Oasis Dental Care Ltd
Before: Employment Judge G. King

JUDGMENT

1. Pursuant to Rule 39(1), the Employment Judge considers that the Claimant's claim for:

- a) Harassment (s.26 Equality Act 2010) in respect of the email from Dawn Gray to the Claimant of 9 November 2022;

has little reasonable prospect of success. The Claimant is ORDERED to pay a deposit of **£350.00** not later than **14 days** from the date this Order is sent, or on or before **18 October 2023** whichever is later, as a condition of being permitted to continue to advance those claims.

2. Pursuant to Rule 37(1), the Employment Judge considers that the Claimant's claim for:

- a) Unfair Dismissal;

has no reasonable prospect of success, and is struck out.

REASONS

1. The Claimant brings a claim of harassment, pursuant to section 26 of the Equality Act 2010. This relates to an email sent to the Claimant by her manager, Dawn Gray, on 9 November 2022, which contains the phrase “we talked about Stockholm syndrome and the desire to make an abuser like you and how this could be seen with this action”.
2. The Claimant says she found this comment very offensive. She says that Dawn Gray has no clinical training and so could not diagnose Stockholm syndrome. The Claimant says that the comment was made verbally to her in a meeting with Dawn Gray on 8 November and then reiterated an email of 9 November. The Claimant says the meeting on 8 November involved a discussion about the Claimant’s PTSD, and this is the relevant protected characteristic that she relies upon for the purposes of this claim.
3. The Claimant also brings a claim of unfair dismissal, pursuant to section 94 of the Employment Rights Act 1996, in respect of her dismissal on 22 December 2022.

Law

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

4. Striking out – Rule 37

(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—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(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.

5. Deposit orders – Rule 39

(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.

(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.

(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.

(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. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(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—

(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

(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.

Employment Rights Act 1996

6. Unfair Dismissal

7. The right – section 94

(1) An employee has the right not to be unfairly dismissed by his employer.

8. Qualifying period of employment – section 108

(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

Equality Act 2010

9. Harassment

10. Harassment is defined in section 26 of the Equality Act 2010 as follows:

- (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.”

11. In *Richmond Pharmacology v Dhaliwal* UKEAT/0458/08/CEA, the EAT provided guidance to the effect that an Employment Tribunal deciding harassment claims should consider in turn:

- a. the alleged conduct,
- b. whether it was unwanted,
- c. its purpose or effect and
- d. whether it related to a protected characteristic.

As to effect in particular, at paragraph 15, the EAT made clear the importance of the element of reasonableness, having regard to all of the relevant circumstances, including context and in appropriate cases whether the conduct was intended to have that effect.

12. In *Pemberton v Inwood* [2018] EWCA Civ 564, Underhill LJ revisited *Dhaliwal* in light of the introduction of s.26 and the difference in language to the predecessor harassment legislative provisions. Underhill LJ made clear that in considering whether conduct had the proscribed effect, the Tribunal must consider both the subjective perception of the complainant and whether it was objectively reasonable for that conduct to be regarded as having that effect taking into account all other circumstances.

13. In *Tees Esk and Wear Valley NHS Foundation Trust v Aslam* [2020] IRLR 495, the EAT held that section 26 does not apply to on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be. There must be some part of the factual matrix which properly leads to the conclusion that the conduct is related to the particular characteristic.

14. The type of harassment complained of by the Claimant is “related to a... protected characteristic”. The phrase is relatively wide. It allows for a looser connection between the conduct and the protected characteristic

than the “because of” test in direct discrimination. It is not necessary to consider whether the alleged perpetrator would have treated someone without the relevant protected characteristic in the same way.

Consideration

15. S.26 Harassment claim

16. In order for the Claimant’s s.26 Harassment claim to succeed, the Claimant will need to demonstrate to the Tribunal that the comment in the email amounted to conduct that has the purpose or effect of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. The Respondent’s application for strike out is based firstly on the argument that the comment in the email would not be capable of amounting to such unwanted conduct, and the Claimant would have no reasonable prospect, or in the alternative little reasonable prospect, persuading a Tribunal of this.
17. Secondly, the Respondent argues that, even if the comment in the email did amount to such unwanted conduct, the Claimant would have no reasonable prospect, or in the alternative little reasonable prospect, of persuading a Tribunal that it was conduct relating to a relevant protected characteristic.
18. The Tribunal notes that the Claimant’s pleaded case is that it is the comment in the email of 9 November that she describes as disability discrimination. The Claimant’s claim form (ET1) does not make mention of the meeting of 8 November. The Tribunal is of the view that it would require an application to amend her claim form in order for the Claimant to bring a claim of disability discrimination in respect of this meeting.
19. The Tribunal is not persuaded by the argument that Claimant would have no reasonable prospect, or in the alternative little reasonable prospect, of persuading a Tribunal that the comment in the email amounted to conduct that has the purpose or effect of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.
20. The Tribunal, however, is persuaded in part by the Respondent’s second argument. Even if the Tribunal takes the Claimant’s case at its highest, there is, on the face of it, nothing in the email to suggest that the reason for the unwanted conduct is related to the Claimant’s relevant protected characteristic, i.e. disability, namely her PTSD. The Tribunal notes the high bar for strike out, especially in claims involving disability, and is not persuaded that the Claimant has no reasonable prospect of success in relation to this claim. The Tribunal does find, however, that the Claimant will have little reasonable prospect of succeeding with this claim, as the Tribunal finds it will be very difficult for the Claimant to show that the comment about Stockholm syndrome is related to her PTSD.
21. The Tribunal understands that the Claimant is not bringing this s.26 Harassment claim on the basis that Stockholm syndrome is the relevant

protected characteristic, but for sake of completeness, if that were to be the case, the Tribunal finds that the Claimant would have little reasonable prospect of success in demonstrating to the Tribunal that Stockholm syndrome is a protected characteristic under the Equality Act 2010.

22. The Tribunal therefore makes a deposit order in relation to the s.26 Harassment claim relating to the email of 9 November 2022. Having made reasonable enquiries into the Claimant's means, the Tribunal is satisfied that a deposit of £350.00 is appropriate.

23. Unfair Dismissal

24. The Claimant was sent a letter from the Employment Tribunal on 29 March 2023, which contained a strike out warning, given that she did not have two years qualifying service to bring a claim of unfair dismissal. The Claimant was given until 5 April 2023 to give reasons why her complaint of unfair dismissal should not be struck out.

25. The Claimant replied by email on 3 April 2023. In her email, she highlighted the elements of her dismissal that she considered were unfair. In response to the Claimant's application before the Tribunal today, the Claimant accepted that she did not have two years qualifying service. She explained that she believed her case was exceptional and so should be allowed to proceed. She said she felt that the law should protect her rights as an employee.

26. An employee's statutory rights are set out in the Employment Rights Act 1996. It is section 108 of this legislation that sets out that an employee must have two years qualifying service in order to bring a claim of unfair dismissal. There is nothing in the Claimant's unfair dismissal claim that makes it exceptional, but even if there was, such exceptional circumstances would still not allow her to proceed with her claim. The Claimant did not have the required qualifying period and therefore the Tribunal finds that she would have no realistic prospect of success with a claim of unfair dismissal at a final hearing. The claim of unfair dismissal is therefore struck out.

Employment Judge G. King
Date: 27 September 2023

Judgment & reasons sent to the parties on 19 October 2023

For the Tribunal Office