



EMPLOYMENT TRIBUNALS

Claimant: MS. HAS NAZIR

Respondent: COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

JUDGMENT

Heard at: By CVP
On: 11 and 12 October 2023

Before: Employment Judge N. Clarke

Appearances

For the Claimant: Ms H Nazir on her own behalf
For the Respondent: Mr T. Wilkinson, Counsel

1. The **following claims are struck out** on the basis that they have no reasonable prospect of success:
 - 1.1 A claim of direct race discrimination by a colleague, MS, saying that he did not want to share a taxi with the Claimant on 17 October 2019
 - 1.2 Claims of direct disability discrimination.
 - 1.3 Claims of harassment related to age, as follows:
 - a) That the Respondent, through its managers, asked the Claimant to take down a Word document she had posted to Teams chat on around 4 April 2020 because other employees were upset about it?
 - b) That the Respondent, through its employees, discussed Brexit on 17 October 2019 and managers failed to deal appropriately with the Claimant's complaint about it from 17 November 2019?
2. The following harassment related to age claims have little reasonable prospect of success and **the Claimant is ordered to pay a Deposit of £250 on each claim (£750 in total) by 26 October 2023 as a condition of being permitted to continue to advance those allegations.** 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 Claim is dismissed under Rule 47:

- a) In relation to a colleague LI:
 - LI said in the chat section of a Microsoft Teams meeting, she “wants to have a word with the Taliban” on 14 September 2021.
 - The Claimant’s managers, failed to act on the Claimant’s grievance, sufficiently or at all, being a grievance made about the above matter on 15 September 2021?

 - b) In relation to a colleague EP:
 - Refused to grant the Claimant leave on 30 and 31 May 2022.
 - Gave the Claimant work that she was not trained in, namely HR work about sorting annual leave?

 - c) Failed to deal appropriately with a complaint made against the Claimant by NA in December 2021 by dismissing his complaint by around 18/1/22.
3. The Claimant’s application to amend her claim to include an allegation of direct race discrimination, by the Respondent using her former name (Hasrat instead of Has) on five occasions between 15 June 2019 and 8 April 2022, is refused and that claim is dismissed.

REASONS

Introduction

1. The case was listed by virtue of an Order of 6 March 2023 to decide:
 - 1.1 Whether the Claimant is disabled by virtue of nasal polyps, and issues consequential to that.
 - 1.2 Whether any claim should be struck out
 - 1.3 Whether any claim should be subject to a deposit order
 - 1.4 Further case management directions.
2. The previous order contained a prose summary of the Claimant's case and Respondent's defence, which indicates a long discussion at that hearing. It had obviously not been possible to formulate a List of Issues. The following List was discussed and agreed in this hearing:
 - A. Harassment related to age (s26 EqA 2010),
 - a) Did the Respondent:
 - I. Through its employee LI, say, in the chat section of a Microsoft Teams meeting, she "wants to have a word with the Taliban" on 14 September 2021.
 - II. By its managers, fail to act on the Claimant's grievance, sufficiently or at all, being a grievance made about the above matter on 15 September 2021?
 - b) Did it relate to age? The Claimant avers that LI acted in the way she did because of her youth and immaturity and that the managers' failure to act compounded that.
 - c) Was that unwanted conduct?
 - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
 - e) If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
 - B. Harassment related to age
 - a) Did the Respondent:
 - I. Through its employee EP, refuse to grant the Claimant leave on 30 and 31 May 2022.
 - II. Through its employee EP, give the Claimant work that she was not trained in, namely HR work about sorting annual leave?
 - b) Did it relate to age? The Claimant avers that EP acted in the way he did because of his youth and immaturity.

- c) Was that unwanted conduct?
- d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- e) If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

C. Harassment related to disability

- a) Did the Respondent:
 - I. Lose the Claimant's Occupational Health Report of 25 February 2022 on around 28 March 2022?
 - II. Fail to have a conversation with the Claimant about workplace adjustments as recommended in that report between 25 February and 3 July 2022?
- b) Did it relate to disability? The Claimant avers that the report concerned her disability of nasal polyps.
- c) Was that unwanted conduct?
- d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- e) If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

D. Direct race discrimination (s13 EqA):

- a) The Claimant describes her races as being of Pakistani background.
- b) Did the Respondent use the Claimant's former name (Hasrat instead of Has) on:
 - i. 8/4/22 (in an email from the Foreign Office, when the Claimant was seconded there)
 - ii. In October or November 2021 (the DWP using her former name)
 - iii. 12/2/20 (when someone had booked travel tickets in her former name)
 - iv. 17/2/20 (when someone booked a hotel in her former name),
 - v. 15/6/19 (when someone had booked travel tickets in her former name)
- c) Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The Claimant says she was treated worse than Marie Quigley.

d) If so was it because of race?

E. Indirect race discrimination (s19 EqA):

a) A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

Nominating and booking hotels for employees to stay in with bed and breakfast provided when on assignments away from the office.

b) Did the Respondent apply the PCP to the Claimant?

c) Did the Respondent apply the PCP to persons with whom the Claimant does not share the characteristic or would it have done so?

d) Did the PCP put persons with whom the Claimant shares the characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic in that the Claimant was not comfortable eating the food provided at those hotels and prefers to eat chapatis for breakfast?

e) Did the PCP put the Claimant at that disadvantage?

F. Harassment related to age:

a) Did the Respondent fail to deal appropriately with a complaint made against the Claimant by NA in December 2021 by dismissing his complaint by around 18/1/22.

b) Did it relate to age? The Claimant avers that the managers acted in the way they did because of their youth and immaturity.

c) Was that unwanted conduct?

d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

e) If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

G. Harassment related to age:

c) Did the Respondent, through its managers, ask the Claimant to take down a Word document she had posted to Teams chat on around 4 April 2020 because other employees were upset about it?

d) Did it relate to age? The Claimant avers that the managers acted in the way they did because of their youth and immaturity.

- e) Was that unwanted conduct?
- f) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- g) If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

H. Harassment related to age:

- a) Did the Respondent, through its employees, discuss Brexit on 17 October 2019 and did managers fail to deal appropriately with the Claimant's complaint about it from 17 November 2019?
- b) Did it relate to age? The Claimant avers that the employees and managers acted in the way they did because of their youth and immaturity.
- c) Was that unwanted conduct?
- d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- e) If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

I. Discrimination arising out of disability (s15 EqA)

- a) Did the Respondent treat the Claimant unfavourably by failing to pursue her complaints, listed below, sufficiently:
 - i. A complaint about EP made on 8 June 2022
 - ii. A complaint about NA in December 2021/January 2022
 - iii. A failure to pursue mediation on 8 January 2022
 - iv. A complaint in an email of 10 November 2021
 - v. An email about working expectations on 4 October 2021
 - vi. A complaint about LI on 15 September 2021
 - vii. A failure by a manager, to get back to the Claimant about her concerns on 27 April 2021.
 - viii. A complaint about having a Word document taken down, made on 9 April 2020.
 - ix. A complaint about the behaviour of colleagues made on 7 November 2019.
 - x. A complaint about the behaviour of colleagues made on 17 October 2019.
- b) Did the following arise in consequence of the Claimant's disability: being tired and lacking the energy to pursue workplace complaints?
- c) Was the unfavourable treatment because of that?

J. Direct disability discrimination (s13 EqA)

- a) The Claimant relies on the disability of “stress”
- b) Did the Respondent, through its manager JI, dismiss the Claimant’s complaint about EP on around 1 June 2022?
- c) Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant’s.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The Claimant says she was treated worse than EP because the complaint process took account of EP’s “stress” but not the Claimant’s.

K. Direct disability discrimination (s13 EqA)

- a) The Claimant relies on the disability of “stress”
- b) Did the Respondent, through its manager LL, dismiss the Claimant’s complaint about AC on around 27 April 2021?
- c) Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant’s.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The Claimant says she was treated worse than AC because the complaint process took account of AC’s “stress” but not the Claimant’s.

L. Direct race discrimination (s13 EqA):

- a) The Claimant describes her races as being of Pakistani background.
- b) Did the Respondent, through its employee MS, say that he did not want to share a taxi with the Claimant on 17 October 2019?
- c) Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant’s.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The Claimant relies on a hypothetical comparator

3. The Respondent argued that some of these issues amounted to amendments that required permission, that some should be struck out and that some should be made subject to a deposit order. They relied on a Skeleton Argument. The Claimant had produced a number of documents since the last hearing, which set out her position, namely a Chronology, Cast List, two witness statements and a Timeline. The Claimant replied to the Respondents submissions orally.
4. I gave oral reasons for my decisions on those issues and made case management orders by agreement with the parties.

Law

5. On the question of amendments, I reminded myself about the guidance in Vaughan v Modality Partnership [2021] ICR 535. The core test is the balance of injustice and hardship in allowing or refusing the application and the parties must therefore make submissions on the specific practical consequences of allowing or refusing the application. The factors in Selkent Bus Co Ltd v Moore [1996] ICR 836 should not be treated as a checklist to be ticked off to determine the application.
6. On Strike Out, Rule 37 provides that a claim or part of it may be struck out if it has no reasonable prospect of success. In Mbuisa v Cygnet Healthcare Ltd ETA 0119/18 the EAT said that tribunals should be slow to strike out a claim brought by a litigant in person. Guidance in Cox v Adecco [2021] ICR 1307 notes that cases where the prospects turn on factual disputes are likely to be unsuitable for strike out. A claimant's case must be taken at its highest. In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person 'may become like a rabbit in the headlights' and fail to explain the case she has set out in writing. Care needs to be taken with discrimination cases as they are generally fact-sensitive and require full examination - Anyanwu v South Bank Student Union [2001] ICR 391, HL
7. A Deposit Order may be made under Rule 39 where a claim has little reasonable prospect of success. The tribunal retains a discretion in the matter and the power to make such an order under Rule 39 has to be exercised in accordance with the overriding objective — to deal with cases fairly and justly — having regard to all of the circumstances of the particular case — Hemdan v Ishmail [2017] ICR 486, EAT. This means that regard should be had, for example, to the need for case management and for parties to focus on the real issues in the case.
8. On Time Limits, I had in that when the time limit starts to run is more difficult to determine in cases of continuing acts or where the allegation is of a discriminatory omission under section 123 EqA.

Procedure

9. I took account of the bundle of documents before me, which included the Claimant's pleadings, an email of 14 June 2022 and the additional documents referred to above. I took account of the Respondent's Pleadings and Skeleton Argument. I heard oral submissions from both parties.

Conclusions

Allegation A

10. The Claimant presented her ET1 on 9 June 2022. In box 8.2 of the form she states, "*will be adding on full information - finishing my write up and collecting the necessary information*".
11. On 14 June 2022 the Claimant sent an e-mail to the Tribunal in which she said, "*in section 8.2 please could you attach the following information - hopefully be OK as I have submitted it yesterday*". That additional information was in time for the purposes of Early Conciliation, the certificate having been issued on 7 June 2022. Where claims were in time at the commencement of Early Conciliation, there would have been no difference if the Claimant had waited until 14 June to submit everything together. In those circumstances it is appropriate to treat the 14 June email as being part of the original pleading of the claim.
12. As to the first part of Allegation A, (a (I.) above), the Claimant makes reference to "*bullying on teams chat*" inbox 8.2 of the ET1.
13. The Claimant referred to a bullying complaint from September 2021 in the 14 June e-mail and at paragraph 4 on the third page of the e-mail said that this complaint had been outstanding since 14 September 2021. Although the individual was not named in that document, the Respondent could easily have determined who it was by reference to that date. The Claimant explained, in her oral submissions, that she had not named individuals in her pleadings because of concerns about confidentiality. That is an understandable error for a litigant in person to make.
14. In those circumstances I have concluded that first part of Allegation A is not a matter that requires permission for amendment, but is instead simply clarification of a claim that appears on the pleadings. Even if I am wrong about that, I would have given permission for an amendment in any event: The balance of prejudice is in the Claimant's favour, as refusing the amendment would prevent the claim from proceeding. The Respondent had not been able to point to any specific prejudice beyond a general point about passage of time and the impact on memory that would result.
15. The second part of Allegation A (a (II.) above), is pleaded sufficiently, which the Respondent accepted. No amendment issue arises.

16. As to time limits, whether the second part of the claim was an ongoing failure that brings it in time will be a question for evidence at trial and is not suitable for determination at this stage. The first part of the allegation is the substance of the second part. Whilst the actors are different, there is a clear factual nexus and the allegations are two sides of the same coin, such that it is arguable that there is a course of conduct. Again, that is a matter for trial.
17. Turning to the merits, in their application to the question of Strike Out or Deposit. The Claimant complains that her colleagues were immature, which she says was because of her youth, and that this immaturity led to the acts of harassment that she complains of. Her managers compounded the problems by failing to investigate, act and rectify the issues. She says that these circumstances amount to age discrimination.
18. Harassment only requires conduct to be *related to* a protected characteristic. That is a wider definition than “on the grounds of”. There is also a body of authority that the protected characteristic need not be held by the victim, with successful claims of harassment for perceived, abstract and attributed characteristics.
19. Given the wide ambit of “related to”, I do not conclude that the claim has no reasonable prospect of success.
20. However, the claim nevertheless has very significant hurdles in my judgment.
21. First, age and maturity are not necessarily the same thing.
22. Secondly, people can be outspoken, tactless or inappropriate for many reasons. The claim requires a causal link between those things and age, which may be difficult to make.
23. Thirdly the claim is conceptually difficult because the complaint is about the immaturity of colleagues, rather than the Claimant’s maturity. Whilst “related to” has a wide ambit, the focus of the cases is on the protected characteristic of the victim, even if it is attributed or perceived, etc. The whole purpose of the legislation is to protect victims.
24. Fourthly, the Claimant has not been able to give the ages of the individuals she complains about. In any event, there does not seem to be a significant age difference, because the Claimant herself is only now in her early 40s.
25. Finally, and as is reflected in paragraph 74 of the Case Management Order, the acts of the Claimant’s colleagues (including managers) may well have related to the Claimant’s nature and manner of approach, rather than a protected characteristic.
26. I bear in mind that to some extent these issues may depend on the evidence and I also heed the warnings in the authorities about making conclusions at this stage. However, taking account of the above, the claim is weak, in my judgment, and has little prospect of success. There is a need to focus on the real issues and I therefore make a Deposit Order on Allegation A.

Allegation B

27. I agree with Counsel for the Respondent that this does not appear on the pleadings and requires permission to amend. The Claimant could not point to the allegation in the original pleadings.
28. However, I allow the amendment. The Respondent could not point to any specific prejudice but relied on a general proposition that memories fade. These claims are very recent to the presentation of the claim. I intend to allow the Respondent to submit an Amended Response and they can apply for costs in respect of any alleged financial prejudice. On the other hand, the prejudice to the Claimant would be to prevent a potentially valid claim from proceeding. The balance of prejudice falls in her favour.
29. The question of time limits will be for the Tribunal at trial.
30. For the same reasons as Allegation A (because this is a like allegation), I make a Deposit Order.

Allegation C

31. This allegation appears in the 14 June email (paragraph 1 on page 3). I am not satisfied that it requires an amendment. Even if it did, I would have allowed an amendment; the fact of loss of the report and steps taken thereafter will all be matters of record for which there should be contemporaneous documents. There is unlikely to be any significant prejudice to the Respondent and the balance is in favour of the Claimant.
32. The question of time limits will be for trial.
33. I cannot conclude that this allegation has no or little prospect of success. It will turn on the evidence and should be left to trial.

Allegation D

34. This allegation does not appear on the ET1, the 14 June email or even in the record of the Case Management Hearing in March 2023. It is new. The allegations go back as far as June 2019. The dates that apply to the named comparator (i.e. when it is suggested that she changed her name) are unclear. Although the Claimant provided a number of documents since the March 2023 hearing, she has presented no explanation for the late presentation of this allegation.
35. The allegation would require significant investigation by the Respondent because it covers a significant period of time and includes a number of departments (one of the allegations concerns a period when the Claimant was working in the Foreign Office, for example). The balance of prejudice is against the Respondent, and I therefore refuse the application to amend.

Allegation E

36. This allegation appears clearly in the 14 June email and does not require an amendment.
37. Any time issue should be left to trial.
38. It is arguable and not suitable for Strike out or a Deposit Order.

Allegation F

39. This allegation appears in the pleadings and there is no need for an amendment.
40. Any time issue should be left to trial.
41. For the same reasons as Allegation A (because this is a like allegation), I make a Deposit Order.

Allegation G

42. This allegation appears in the pleadings and there is no need for an amendment.
43. This is a very old allegation, going back to April 2020. The Claimant has offered no real explanation for the delay other than saying that she was waiting for the internal complaints process to conclude. The age of the allegation also makes it very unlikely that a Tribunal would conclude that this was part conduct extending over a period. I take account of my conclusion on Allegation A on the merits, which would apply equally to this allegation.
44. Taking those factors together I have concluded that this Allegation has no real prospect of success and that it should therefore be Struck Out.

Allegation H

45. I Strike Out this Allegation for the same reasons as Allegation G.

Allegation I

46. This is an amendment. The first time any allegation of this sort is articulated is in the Claimant's witness statement is dated in April 2023. Again there is no real explanation for the delay.
47. The balance of prejudice in respect of the first three acts of unfavourable treatment is against the Claimant. The Respondent should be able to investigate and respond to those matters with relative ease, since they relate to acts in 2022 and should be documented. The other acts, which run from October 2019 to November 2021 are old and the balance of injustice is against the Respondent who would, I accept, find it difficult to investigate and respond to such old allegations.

48. I therefore allow the amendment to that extent.
49. The question of the time limits will be left to trial.
50. The merits of the allegations is a matter that will require evidence in my judgment and is not suitable for determination at this stage.

Allegation J

51. This too is an amendment. Although there are references to “stress” in the pleadings, it has never been pleaded as a disability. Indeed before me the Claimant explained that this was because she was aware that it would “need to be for a year and was only for a few months”, which would seem to be a reference to the definition of “long-term” under Schedule 1 to the Equality Act 2010.
52. There is significant prejudice to the Respondent in having to deal with an additional claim of disability at this stage. Directions were given at the previous Case Management Order in March 2023 for disclosure of documents relevant to nasal polyps as a disability. As a result, the Respondent conceded the issue. If I were to allow the amendment, it would be appropriate to make a like order, resulting in further delay to these proceedings. In addition, the claim appears weak on the Claimant’s own concession. The balance of injustice therefore falls against the Respondent and so I refuse the application to amend.
53. In any event, I would have struck this claim out. Direct Disability Discrimination claims are very limited in scope, involving the comparison of an individual with a disability to a person in the same position in all material respects, save that they do not have a disability. The Claimant’s complaint is that another individual had allowances made for them on account of their stress when she did not. The direct discrimination claim is therefore misconceived and has no reasonable prospect of success.

Allegation K

54. I make the same order, for the same reasons, as Allegation J.

Allegation L

55. This is a very old allegation, from October 2019. There is no basis to suggest that it was part of a continuing act and no real explanation as to why it was brought out of time. There is no real prospect of the Claimant having time extended in those circumstances, and I therefore Strike Out this claim.
56. I explained the position on Deposit Orders with the Claimant and asked her to give evidence about her means. She indicated that she would not pay a deposit and therefore did not wish to say anything further about her means. I explained that I would therefore have to make an order based on the limited information before me. The Claimant understood but did not wish to provide further information. I therefore made a Deposit Order for £250 on each Allegation (A, B and F).

Summary

Allegation	Amendment	Strike out/deposit
A	Not required	Deposit Order
B	Allowed	Deposit Order
C	Not required	
D	Refused	
E	Not required	
F	Not required	Deposit Order
G		Strike Out
H		Strike Out
I	Allowed in part	
J	Refused	
K	Refused	
L	Not required	Strike Out

- 57. Allegations A, B and F proceed, subject to Deposit Orders.
- 58. Allegations C, E and I (in part) proceed.
- 59. All other claims are dismissed.

17 October 2023

Sent to the parties on:

20.10.2023

For the Tribunal Office:

Employment Judge Clarke