EMPLOYMENT TRIBUNALS

Claimant: Mr K MacIntosh

Respondent: Eurochange Limited

Heard at: Manchester (remotely, by CVP) **On:** 1 November 2023

Before: Employment Judge Cookson

REPRESENTATION:

Claimant: In person
Respondent: Mr Hoyle

JUDGMENT having been sent to the parties on 14 November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following written reasons are provided:

WRITTEN REASONS

Introduction

1. This judgment relates to a public preliminary hearing listed by Employment Judge Benson to determine a number of matters including to decide if all or any of the claimant's claims should be struck out on the grounds of no reasonable prospect of success or subject to a deposit because they have little reasonable prospect of success.

2. Before determining that issue I allowed the claimant leave to amend his claim to include a claim of sexual harassment.

3. The strike out issue had been listed on EJ Benson's own initiative. Both parties made submissions, with the respondent inviting me to strike out all of the claim including the newly added sexual harassment claim.

4. These written reasons record why I concluded that it was not appropriate to strikeout any of the complaints in this claim. The request for written reasons was made by the respondent at the conclusion of the hearing. I did not strike

out the claim or any of the separate grounds of complaint, but I did make a number of deposit orders and my order in that regard explains the grounds for that those deposits.

Background

5. I have briefly summarised the background to the claim and the legal complaints.

6. Mr Macintosh refers to a number of incidents which happened when a new manager, Mr Bullock, joined the team.

7. First he refers to two incidents which says were attempts by Mr Bullock to belittle him.

8. During an incident on 16 January 2023 when he says Mr Bullock belittled him by telling him how to conduct an investigation and probation meeting despite Mr Macintosh being an experienced HR professional who had worked in his role for many years.

9. Again, on or around 22 February 2023 when Mr Bullock belittled the claimant by showing him how to cut and paste from a document. I sought to better understand the claimant's case about this. He says that the incident was belittling because it was a straightforward task, but also he had simply been following some instructions from Mr Bullock to take notes during a training session and despite being one of number of staff taking notes, he was the only one who was shown how to cut and paste instead causing Mr Macintosh to feel that he had been belittled in front of colleagues.

10. Mr Macintosh also relies on an incident when he says Mr Bullock instructed him to travel to Stevenage to dismiss someone, despite knowing how difficult it is for Mr Macintosh to travel because of his health conditions, only for to find that when Mr Macintosh arrived in Stevenage that Mr Bullock had changed his mind. Mr Macintosh believes that in essence that was a deliberate decision by Mr Bullock.

11. Mr Macintosh relies on these incidents as complaints of harassment related to disability and unfavourable treatment because of something arising in consequence of his epilepsy, and he also says they were fundamental breaches of the implied term of trust and confidence or contributed to a cumulative fundamental breach of that term.

12. The final straw for the constructive dismissal complaint came, it is alleged, as a result of Mr Bullock's conduct during a meeting on 24 February 2023 when in particular it is said that Mr Bullock had not believed what the claimant had told him about his medical conditions despite Mr Macintosh offering medical evidence. Mr Macintosh also says he that his role was under threat because of references that had been made to team leaders needing to be more visible in future and that Mr Bullock had said that he was not sure that the role could continue remotely.

13. It is not in dispute that the claimant's resignation letter in April 2023 does not refer to any of these matters as being the reason for his resignation.

14. As a result of an amendment that I have allowed, there is also a complaint of sexual harassment (Equality Act 2010 section 26), that during a HR team meeting at Stevenage on 8 February 2023 Mr Bullock asked the claimant who would be in his fantasy "manwich" meaning who would he want to include in a fantasy sexual threesome. The claimant says he refused to answer and then was pressed to answer by Mr Bullock and others present during the meeting in particular Katie Cotton, Grace Hall and Shannon Carter-Claire as identified in the information sent to the tribunal. The claimant alleges that this was unwanted conduct of a sexual nature which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

15. I heard submissions from both parties which I referred below where appropriate to explain my conclusions.

The law

The Power to Strike Out

16. *Rule 37 of the Employment Tribunal Rules of Procedure - Striking out*

"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;..."

17. In terms of exercising that power it is generally accepted tribunals should be slow to strike out a claim brought by a litigant in person on the basis that it has no reasonable prospect of success. In Mbuisa v Cygnet Healthcare Ltd EAT 0119/18 the EAT highlighted that strike-out is a draconian step that should be taken only in exceptional cases. The case suggested that particular caution should be exercised if a case is badly pleaded –for example, by a litigant in person, especially one whose first language is not English or who does not come from a background such that or she is familiar with articulating complex arguments in written form. This latter issue does not apply but the claimant is a litigant in person. He has an HR background which may make him more familiar with some aspects of employment law than some litigants, but he is still a litigant in person.

18. This does not mean that a claim involving a discrimination complaint cannot be struck out of course, but I have taken into account the guidance of the House of Lords in ***Anyanwu and another v South Bank Student Union and others*** [2001] UKHL 14 that in general discrimination claims should not be struck out except in the most obvious of cases, and also the guidance of the Court of Appeal in the case of ***Balls v Downham Market High School & College*** UKEAT/0343/10/DM which reminds me that

"*Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same [as previously set out in relation to a different ground;] the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."*

19. it is not for me to decide if the respondent's written and oral assertions regarding disputed matters are likely to be established as facts or are likely to succeed, I have to look at the claimant's case.

The law relating to constructive unfair dismissal complaints

20. In very brief summary, section 95(1)(c) of the ERA provides an employee is dismissed if: - "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

21. An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, ie. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract. The conduct of the employer must be more than just unreasonable or unfair to constitute a fundamental breach.

22. If there is a fundamental breach of contract, the employee must resign, at least in part, in response to the breaches not for some other unconnected reason and do so before affirming the contract. Delay of itself does not mean the employee has affirmed the contract but if it shows acceptance of a breach, then in the absence of some other conduct reawakening the right to resign, the employee cannot resign in response to the earlier breach.

23. In cases like this, involving an allegation of constructive dismissal because an alleged breaches of the implied duty of trust and confidence, an employer must not, without reasonable and proper cause, conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee. It is not necessary for the employee to show the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer.

24. The employer's motive is irrelevant. The test of fundamental breach is purely contractual, and the surrounding circumstances are not relevant, at this stage, although they may be relevant to the reason for the dismissal.

25. A breach of the implied term of mutual trust and confidence may result from a number of actions over a period when taken together may cumulatively. The last straw does not have to be a breach of contract in itself or of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant. An entirely innocuous act by the employer cannot be taken as the last straw, even if the employee genuinely but mistakenly interprets it as hurtful and destructive of their trust and confidence in the employer. The employee will bear the burden of proof to show that they were constructively dismissed.

The law relating to the discrimination complaints

26. Harassment –

a. section 26(1) of the Equality Act:

(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.

b. S26(2)

(2)A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b)the conduct has the purpose or effect referred to in subsection (1)(b)…

c. S26(4)

(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.

27. Section 15 EqA precludes discrimination arising from a disability

S15 (1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.

28. Section 15 EqA is aimed at protecting against discrimination arising from or inconsequence of the disability rather than the discrimination occurring *because* of the disability itself, which is covered under direct discrimination. The term unfavourably rather than the usual discrimination term of less favourably means that no comparator is required for this form of alleged discrimination. So, for example, where a disabled employee was viewed as a weak or unreliable employee because he or she had taken long periods of disability-related absence and this had caused their dismissal, the person may not suffer a detriment because they were disabled as such, but because of the effect of that disability.

29. The employer's motivation is irrelevant. S15 EqA requires unfavourable treatment to be because of something arising in consequence of the disabled person's disability. If the something is an effective cause – an influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously), the causal test will be satisfied. However the employer must know or reasonably be expected to know about the employee's disability.

30. Harassment and 'discrimination because of something arising in consequence of disability' claims under the EqA are subject to the 'shifting burden of proof' set out in S.136 of the Act. This provides that the initial burden is on the claimant to prove facts from which the tribunal could decide, in the absence of any other explanation, that the respondent has contravened a provision of the Act (what lawyers sometimes call a 'prima facie case'). The burden then passes to the respondent to prove that discrimination did not occur. If the respondent is unable to do so, the tribunal is obliged to uphold the discrimination claim. That recognises that discrimination is difficult to prove but, nevertheless there is an initial burden on the claimant to show some evidence to suggest there is a case to answer.

Discussion and conclusions

The unfair dismissal complaint

31. In a constructive dismissal which is based on a last straw, the last straw is significant. In this case even taking Mr Macintosh's case at its highest, I have concluded that there is little reasonable prospect of him establishing that Mr Bullock's conduct at the meeting on 24 February 2023 was more than innocuous but that is not the same as there being no prospect of him doing so.

32. Mr Macintosh says that Mr Bullock was dismissive of his medical conditions. The correspondence from the time shows that Mr Bullock discussed obtaining

an occupational health report. That was not inappropriate. Mr Macintosh has been somewhat vague about what precisely was said that was a fundamental breach of contract or contributed to it but I accept that he says Mr Bullock showed a dismissive attitude and there is factual dispute about this.

33. Secondly the claimant points to what was said about the future, in particular an implication that he might not be able to work from home. However even taking that at its highest, it seems to have been no more than a suggestion of things which might happen. It does not appear to be suggested that Mr Bullock had said that the changes referred would happen such that there can have been said to be an actionable anticipatory breach of contract.

34. In short Mr Macintosh's case seems to be a weak one. However, there are no contemporaneous minutes of this meeting. I can see Mr Macintosh is relying on what he says Mr Bullock's attitude towards him was. The tribunal at the final hearing will have to decide precisely what happened. I cannot say that the claimant's case has no more than a fanciful prospect of succeeding on that basis. If Mr Bullock is found to have been dismissive and hostile towards the claimant in light of his medical conditions and home working arrangements, and depending on precisely what is found to have been said, there might be a final straw which could be relied on. I can see a significant evidential and legal hurdle for Mr Macintosh to establish the last straw event relied upon even allowing that the burden is on the balance of probabilities. I conclude that the claimant's prospects for proving that the respondent's conduct in that regard was not "entirely innocuous", are slim but they are more than fanciful.

35. In his submissions Mr Hoyle has drawn my attention to the lack of reference to anything in the resignation letter about breach and the fact that notice was given of termination. However, these matters are not necessarily fatal to an employee successfully showing they were constructively dismissed. The terms of the resignation letter in particular, which not only does not refer to any breach and it also appears to speak positively about the claimant's employment with the respondent. This is a further evidential hurdle for the claimant but I cannot find it means that the claimant cannot succeed as appears to be suggested by Mr Hoyle.

The discrimination complaints

36. Mr Macintosh makes complaints that the belittling incidents and the instruction to travel to Stevenage referred to above were also either harassment relating to his disability of epilepsy or discrimination because of something arising as a consequence of his disability. The "something arising" is that he may become confused following a seizure and that he could not travel unaccompanied, and regular travel was difficult for him.

37.. I am concerned that even if Mr Macintosh establishes to the Tribunal that those things happened as he alleges that may be little reasonable prospect of him being able to persuade the Employment Tribunal that the burden of proof has shifted to the employer to show a non-discriminatory reason for that treatment occurring although I cannot say that there is no reasonable prospect of him doing so.

38. To succeed in in his complaints the claimant has to show facts from which the Tribunal could conclude that either the conduct in question was related to his disability of epilepsy (to succeed in a harassment complaint) or that those things happened because of something arising in consequence of his epilepsy. The claimant does not have to prove this on the balance of probabilities, but he must be able to point to the something which at least suggest there is discrimination.

39. Mr Macintosh has told me that it is his case that the only possible explanation for the belittling incidents could be a negative perception of him because he has a condition which affects his brain, namely epilepsy. In relation to the "cut and paste" incidents he points to a difference in is treatment compared to his colleagues. I have not struck those complaints because at the heart of each allegation is a factual dispute which I have concluded needs to be determined by a Tribunal when they have heard all of the evidence and I cannot say that they have no reasonable prospect of success. Mr Macinstosh will have to establish there is something which points to discrimination. At present it is not clear what that is, but the claimant is a litigant in person and the events as described by the claimant in relation to these matters could, potentially, amount to unfavourable treatment or unwanted conduct and it may be that when all the evidence is considered the tribunal find that the employer will have to show that Mr Bullock had a non-discriminatory reason for that treatment.

40. In relation to the travel to Stevenage, the claimant does not appear to dispute that there had had been an agreement that he should travel to inform an employee that they had not successfully completed probation. His case is not about that as such but rather that Mr Bullock had changed his mind and deliberately withheld that from Mr Macintosh knowing the travel to Stevenage would be difficult from him. If that is correct, I accept there could be unlawful harassment, but to succeed the claimant must meet show there is evidence that suggests that the reason could be his disability. That is likely to be difficult evidence hurdle to get over in practical terms, but I cannot say the is no reasonable prospect of doing so.

41. In terms of the s15 complaints, there is also a dispute in relation to the question of knowledge about disability. Mr Hoyle suggest to me that the s15 complaint cannot succeed because at the time when Mr Macintosh says that he told Mr Bullock about his epilepsy, Mr Bullock was not yet employed by the respondent. I am not aware of any authority for that contention, and none has been suggested to me. There is clearly a factual despite about what Mr Bullock knew but Mr Hoyle's argument ignores the question of the knowledge of the respondent employer. These are matters for the tribunal at the final hearing to determine. It is not a reason to find that the claimant's case has no reasonable prospect of success.

42. The last discrimination complaint which Mr Hoyle invited me to strike out was the allegation of sexual harassment related to an incident at which Mr Macintosh was repeatedly asked by Mr Bullock and other which celebrities he would like a "Manwich" (a sexual threesome) with. Mr Hoyle appears to suggest that this is clearly banter but that is a factual dispute which can only be determined on the evidence. Enquiring into somebody's sexual preferences in this way, even if it intended to be light-hearted, may be unwanted and is clearly conduct of a sexual nature. Mr Macintosh has told me that not only was it

unwanted but that he had made it clear it was unwanted because he refused to answer and was still pressed to give an answer by several people when it must have been clear he did not want to.

43. This is not a complaint which can be said to have little reasonable prospect of success let alone no prospect of success. There may be an evidential dispute about precisely what was said and whether it was unwanted but those are matters for the Tribunal who can hear all the facts in the case and look at all of the evidence.

44. In summary for the reasons explained I have not found that it is appropriate to strike out the claimant's complaints of unconstructive unfair dismissal and disability discrimination.

Employment Judge Cookson
Date: 21 November 2023

REASONS SENT TO THE PARTIES ON
23 November 2023

FOR THE TRIBUNAL OFFICE