



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103102/2023

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Held in Chambers on 13 November 2023

Employment Judge P O'Donnell

Ms A Miller

Claimant

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Mochridhe Limited

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

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1. The claim under s26 of the Equality Act 2010 based on allegations of harassment said to have been carried out by third party, having been withdrawn by the claimant is hereby dismissed under Rule 52. For the avoidance of doubt, the claim under s26 of the Equality Act 2010 based on an allegation of harassment said to have been carried out by an employee of the respondent has not been withdrawn or dismissed and will proceed to be determined at the final hearing.

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2. The respondent's application to strike-out the claim under Rule 37 is refused.

3. The claimant's application to amend the claim dated 9 November 2023 is granted.

REASONS

Introduction

1. The claimant has brought a complaint of harassment contrary to s26 of the Equality Act 2010. In her ET1 lodged on 31 May 2023, the claimant narrates a series of events involving inappropriate behaviour and comments made by a service user. The claimant alleges that she asked her manager to speak to the service user about these matters and that her manager stated to the service user that he could have sex with female staff if they consented to it which prompted further inappropriate behaviour on the part of the service user.
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2. The respondent resists the claim. In particular, they have sought to have the claim struck out under Rule 37 of the Tribunal Rules of Procedure on the basis that the allegations of harassment relate to harassment by a third party for whom the respondent has no liability under the Equality Act, as presently worded (the provisions relating to third party harassment having been repealed some years ago).
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3. The present hearing was listing in chambers to deal with the strike-out application.
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4. On 9 November 2023, the claimant emailed the Tribunal to clarify that the only act of harassment which she sought to advance was the comment by her manager that service users were permitted to have sex with female staff if there was consent. She enclosed a proposed amendment to the ET1 inserting a paragraph clarifying her position. The email is clear that the claimant is not insisting on a claim based on allegations of third party harassment.
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5. On 10 November 2023, the respondent's agent responded to the claimant's email of 9 November. The respondent has not objected to the application to amend in terms but, rather, seeks to insist on the strike-out application on the basis that the remaining claim based on the alleged comment by the claimant's manager is still a claim based on third party harassment. It is said on behalf of the respondent that if the amendment is allowed then there is insufficient time before the final hearing for the respondent to lodge a revised ET3.
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Decision

6. In the Tribunal's view, the first issue to be determined is the status of any allegation of third party harassment. The Tribunal considers that the terms of the claimant's email of 9 November 2023 effectively withdraws the claims of third party harassment. The Tribunal, therefore, dismisses the claim under s26 of the Equality Act 2010 under Rule 52 insofar as it is based on allegations of harassment said to have been carried out by third party.
7. For the avoidance of doubt, the claim under s26 of the Equality Act arising from the alleged comment by the claimant's manager is not dismissed under Rule 52 and remains live. Further, this dismissal does not mean that no evidence can be led at the final hearing about these matters; the allegations of harassment by the service user form the fundamental background to the remaining allegation of harassment and the claim cannot be determined without hearing evidence of the context in which the comment by the manager was allegedly made.
8. Turning to the application to strike-out the remaining claim under Rule 37, the Tribunal does not agree with the respondent that the claim being pursued is one which amounts to an allegation of third party harassment.
- a. The fact that the claimant alleges that the comment by her manager caused the service user to continue with his alleged conduct does not mean that the alleged comment by the claimant's manager cannot amount to unlawful harassment in itself. The Tribunal is more than capable of distinguishing between acts for which a respondent is liable and acts for which they are not.
 - b. There may be a question as to the degree to which any injury to the claimant flows from the alleged act of the manager as compared to the alleged acts of the service user but this is a matter for the Tribunal to assess after hearing the evidence. It is not uncommon for a Tribunal to be faced with a scenario whereby it has upheld some but not all allegations of discrimination requiring it to assess the extent to which any injury to feelings has been caused by the acts which it has upheld.

9. In these circumstances, the Tribunal does not consider that the respondent has made out any ground under Rule 37 on which the remaining claim could be struck out. The application for strike-out is refused.
10. Finally, in respect of the claimant's application to amend, the Tribunal agrees with the claimant that this is not strictly necessary. The remaining claim is clearly set out in the ET1 as pled and the claimant is simply providing clarification that this is the only claim on which she insists. The proposed amendment does not, therefore, raise any new cause of action or plead any new facts. As a result, the proposed amendment does not raise any issue of time bar.
11. It is quite clear that the respondent has been aware, from the outset, that the allegation against the claimant's manager is a claim they have to answer; paragraph 6 of their grounds of resistance sets out a denial that the manager made the comment in question; paragraph 8 of the grounds of resistance sets out the respondent's plea-in-law regarding this allegation in which they argue that the allegation does not amount to harassment; paragraph 9 goes on to set out a defence under s109(4) of the Equality Act in which the respondent denies liability for any unlawful act by the claimant's manager.
12. Contrary to what is suggested in the email of 10 November on behalf of the respondent, there is no need for them to submit a revised ET3. They have already set out a clear defence to the remaining allegation of harassment.
13. In these circumstances, although the amendment application has been made close to the final hearing, there is no prejudice to the respondent if it is allowed. It does not alter the case they have to answer nor does it require them to lead additional witnesses or documentary evidence.
14. Similarly, if the amendment is not granted then there is no prejudice to the claimant. She would continue to advance the remaining claim as pled in the original ET1.
15. On balance, the Tribunal considers that it would assist the parties and the Tribunal determining the case to grant the amendment on the basis that it

provides clear and unambiguous confirmation that the claim is being advanced only in respect of the alleged comment made by the claimant's manager.

16. For this reason, the application to amend is allowed.

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Employment Judge: P O'Donnell
Date of Judgment: 13 November 2023
Entered in register: 13 November 2023
and copied to parties