



EMPLOYMENT TRIBUNALS

Claimant

Miss Katherine Yates

Respondent

v Norfolk and Suffolk NHS Foundation
Trust

Heard at: Norwich

On: 3, 4 and 5 October 2023

Before: Employment Judge Postle

Members: Ms J Costley and Mr K Mizon

Appearances

For the Claimants: In person

For the Respondent: Mr Strelitz, Counsel

JUDGMENT

1. The unanimous decision of the Tribunal is that the Claimant's claim under the Equality Act 2010 for the protected characteristic of race, particularly Section 26 allegations of harassment, are not well founded.
2. The Claimant is Ordered to pay a contribution towards the Respondents Costs in the sum of £5,000.

REASONS

Background

1. The Claimant brings claims to the Tribunal under the Equality Act 2010 ("EqA") for the protected characteristic of race, particularly a s.26 claim of racial harassment. The Claimant describes herself as being of mixed race.
2. There are three main allegations and they are as follows:-
 - 2.1. Allegation 1 - In early February 2019 shortly after her employment commenced the Claimant recalls being called a "skinny bitch" by another employee who she recalls as 'Sarah'. She cannot recall Sarah's last name. She made a complaint about this to her Line Manager Mr Hennessy. She alleges Mr Hennessy did not take the complaint seriously. The Claimant contends that had she have

been of different race, Mr Hennessy would have treated the complaint more seriously.

- 2.2. Allegation 2 - The Claimant alleges that generally Mark Hennessy favoured white staff over staff of a different ethnic background, including that of the Claimant. By way of example the Claimant states that if she said anything at the end of a meeting or raised her hand to make a point, she would be ignored or would be treated in a hostile manner. She alleges that this form of treatment continued throughout her employment.
- 2.3. Allegation 3 - When provided with a lease car, the Respondent needed to examine her Driving Licence. She holds a UK Driving Licence but on it, it states her place of birth to be Zambia. In July 2019 Deborah Murrell was examining that Driving Licence as part of the car hand over process. This examination according to the Claimant took place over the course of five minutes. The Claimant states that Ms Murrell in some form of exaggerated manner examined the Driving Licence more carefully than otherwise would have been the case, e.g. by holding it up, etc. The Claimant contends that she would not have behaved in this way if the Driving Licence had not shown her place of birth to be Zambia.
3. In this Tribunal we heard evidence from the Claimant through a prepared Witness Statement. The Claimant called no further witnesses.
4. For the Respondents, we heard evidence from Mr Hennessy the Claimant's Line Manager, Ms Deborah Murrell Service Manager, Ms Joanna Venner and Ms Amanda Walker, all giving their evidence through a prepared Witness Statement. There was a further Witness Statement on behalf of the Respondents from Ms Angela Furner, who was unable to attend as she has recently been absent due to ill health.
5. It is important to note at this stage, the evidence of Ms Venner and Ms Walker was unchallenged by the Claimant despite Employment Judge Postle warning the Claimant on a number of occasions the consequences of failing to cross examine those witnesses on matters relating to the issues before the Tribunal.

The Facts

6. The Respondent is an NHS Foundation Trust providing Mental Health Services across Norfolk and Suffolk and Learning Disability Services in Suffolk.
7. The Claimant began her employment with the Respondents on 22 January 2019 as an Assistant Practitioner until her employment was terminated by reason of gross misconduct on 17 December 2020. The Claimant has therefore insufficient service under the Employment Rights Act 1996 to

bring claims for ordinary unfair dismissal as the Claimant had originally filed for.

8. Throughout the Claimant's employment she had regular monthly supervision with her Line Manager. All of which were minuted and sent to the Claimant during her employment for her approval / amendment. Not once were any of these Minutes amended by the Claimant. Her explanation now is that she never read them. However, what those Minutes show is consistently her Manager Mr Hennessy supporting her, encouraging her, putting her forward for important roles and praising her work on numerous occasions. In fact, rarely if at all do you find any negative comments from Mr Hennessy or comments which might lead you to conclude the Claimant was struggling in her role, or indeed that Mr Hennessy had taken against the Claimant because of the Claimant's mixed race or otherwise. The Tribunal repeats, far from it, there is a theme of having an excellent relationship with Mr Hennessy and an employee who showed real promise in her role.
9. One very good example of the support the Claimant received from Mr Hennessy was in the week ending 22 March 2020, in which his actions clearly demonstrate a sympathetic and supportive Manager willing to listen to the Claimant's situation and who bent over backwards to help the Claimant. In that there was a very late request for leave, on 19 March 2020, that was granted. The Claimant then failed to turn up for work on 20 March 2020 and Mr Hennessy was so concerned (since the Claimant had previously indicated she was looking at a property) as there had been no contact from the Claimant. He then emailed her, but he received no response. He called her mobile and he received no response. He called her Mother and received no response. He then drove to the Claimant's Mother's house where no one was in. Mr Hennessy then contacted HR to see if there was anything further he should be doing. The Claimant eventually contacted Mr Hennessy on 21 March 2020 to confirm she was okay. She then requested leave for 21 March 2020 and this was granted. She then called on 22 March 2020 and requested leave again and again this was granted.
10. Clearly, the above are not the actions of a Manager who disliked the Claimant, or who in some way had it in for the Claimant.
11. On 2 April 2019, in the Monthly Management Supervision Meeting, Mr Hennessy asked at the outset if the Claimant had any particular issues she wished to raise. The Claimant informed Mr Hennessy that a colleague weeks beforehand had called her a "*skinny bitch*". Mr Hennessy enquired as to the context and the discussion that took place over the comment. The Claimant was asked whether she wanted to take any further action. The Claimant's response was clear, she did not want the matter taken any further. The Claimant subsequently did not raise the matter again.

12. The relationship between the Claimant and Mr Hennessy following the above was clearly from the Minutes of the Supervision Meeting and the evidence of Ms Venner and Ms Walker, amicable, friendly, supportive and encouraging. There is no suggestion the Claimant was singled out or prevented from speaking during the morning 'huddle' and likewise at Clinical Governance Meetings. Further example of the Claimant's relationship with Mr Hennessy is seen during the course of the Investigation Meeting on 27 November when the Claimant was potentially facing a Disciplinary Hearing, she was asked whom might be able to support her and in an unguarded and candid response she suggested her Line Manager Mr Hennessy.
13. The evidence of Ms Venner and Ms Walker entirely supports the fact the Claimant was not in any way stopped from speaking in any meetings, or spoken to in a hostile manner, or disregarded and in that respect the Tribunal refers to Ms Venner's Witness Statement at paragraphs 4, 6 and 7 and Ms Walker's Witness Statement at paragraphs 4, 5 and 6.
14. Far from the Claimant being ignored or having to put her hand up, the unchallenged evidence of Ms Venner and Ms Walker demonstrates an entirely contrary picture. It also suggested, reading between the lines, that the Claimant was not a shrinking violet.
15. In July the Claimant had requested a lease car, which Ms Murrell was to arrange. As part of the arrangements it was necessary to inspect the Claimant's Driving Licence, as it would be for any other employee wishing to avail themselves of a lease car. The inspection would require checking the Driving Licence picture for identification purposes, checking the Licence was valid and in date. The Claimant came to see Ms Murrell on 2 July and produced her Driving Licence, it was inspected, no doubt thoroughly as one would expect for any employee and she then asked to photocopy the Licence to provide to the Administration. Following this Ms Murrell emailed the Claimant to confirm the lease car was authorised and the Claimant's response (at page 168) was, "*Thank you so much*", with a smiley emoji.
16. The Claimant asserts that Ms Murrell scrutinised her Driving Licence for a protracted length of time, staring at the front, holding up to the air, reading all the information and comparing it with her own Driving Licence. The Claimant says that when she returned to her office she complained to Tracy Bruce and Rebecca Bell about what had just happened. However, the Claimant again makes no formal complaint whatsoever or raises the matter whether formally or informally. Furthermore, the Claimant has made no attempt to call either Tracy Bruce or Rebecca Bell as witnesses to testify the Claimant's version of events. The Claimant asserts she did not raise a complaint at the time because she did not know how to; the Tribunal find this incredulous.

The Law

17. Section 26 of the Equality Act 2010 (“EqA”) states,

26 Harassment

- (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.

18. The question arises for the Tribunal, firstly did the conduct complained of actually happen and then, was it related to the Claimant's race? And only then go on to consider sub-sections (i) and (ii).

Conclusions

19. Miss Yates accepted in cross examination, Ms Murrell inspecting the Driving Licence said nothing about the Claimant's race and Ms Murrell's conduct in inspecting the Driving Licence was required, it was appropriate and necessary in order to approve the lease car. That conduct simply had nothing to do with the Claimant's race.
20. Even if there had been a protracted inspection of the Driving Licence, the Tribunal would still not conclude that had anything to do with the Claimant's race.
21. In relation to the February incident, the comment made by 'Sarah'. The Claimant informed Mr Hennessy of the comment, a discussion took place about its context and then whether the Claimant wanted the matter taken further. Her response was that she did not.
22. Therefore, Mr Hennessy's conduct in dealing with the issue had absolutely nothing to do with the Claimant's race and he clearly did not fail to support the Claimant because of her race.
23. In relation to Allegation 2, the suggestion that at the end of the meeting if the Claimant raised her hand to make a point she would be ignored or treated in a hostile manner, this as Counsel for the Respondent says, is dead in the water. It is clearly unsupported by the unchallenged evidence on two counts of Ms Venner and Ms Walker. They paint an entirely opposite picture of the Claimant being able to speak openly, she was listened to, there was no suggestion that people had to put their hands up and indeed, the suggestion that the Claimant was willing and confident enough to challenge the Clinical Specialist. That is not the action of someone who was disregarded.

24. Even if the Tribunal were wrong in the conclusions on the substantive claims, there is then the question of jurisdiction. Certainly in the case of Allegation 1 and 3, if one accepts Allegation 2 was a continuing act, clearly the February 2019 and July 2019 claims are considerably out of time given the fact that there is a three month time limit to link allegations protecting claims to the date one opens ACAS Early Conciliation. These claims are more than 12 months out of time. The Claimant could and should have enquired much earlier about her rights to bring claims if she felt that she had been the subject of racial harassment.
25. These days one only has to Google, pick up the telephone to the Citizens Advice Bureau, or make a quick call to a firm of Solicitors to enquire about employment rights and time limits. The Claimant simply did nothing until she was dismissed and wanted to bring a claim for unfair dismissal and then was able to Google and find out what she needed to do firstly with regard to Early Conciliation through ACAS.
26. In the circumstances, the Claimant has not advanced anything before this Tribunal why it would be appropriate, i.e. just and equitable, to extend time. Therefore Allegations 1 and 3 be dismissed on those grounds in any event they are substantially out of time.

Credibility

27. If one looks at the overwhelming evidence in the Bundle from Monthly Management Meetings, the exchange of emails and the tone of them, they are simply inconsistent with the Claimant's portrayal before this Tribunal that she has been the subject of racial harassment or singled out because of her race. The Tribunal do not accept her explanation that she was a people pleaser and desperate to be liked.
28. Indeed, the Tribunal note that over a long period of time, the documentary evidence in the Bundle simply does not suggest the Claimant was unhappy at work, or with her Manager Mr Hennessy, or that she felt that she was not treated the same as white staff and singled out for hostile treatment.
29. This is simply not borne out by the facts.

Application for Costs by the Respondent

30. At the conclusion of the Judgment, Mr Strelitz, Counsel for the Respondents made an Application for costs.
31. The basis of the Application was that the Respondents are a public funded body. Their costs up to today were running into £70,000. The Claimant made serious allegations against two individuals at the Respondents which have the potential for career ending.

32. It has previously been put to the Claimant that the documentary evidence will be before the Tribunal at the Full Merits Hearing and contains absolutely no evidence to support racial harassment, particularly in the way it is advanced by the Claimant, and in any event, the claims are out of time. This was put to the Claimant in an email letter of 13 September 2022 and the reasons why the Claimant's claims could not succeed was set out, in particular that the claims had no prospects of success and in any event were out of time. Indeed, the Respondents offered £1,000 in full and final settlement without any admission of liability, as an economic settlement. This was rejected by the Claimant.
33. On 11 August 2023, the Claimant was then written to by email from the Respondents setting out, once again, that the case was hopeless and that there was no evidence in the Bundle which supports the Claimant's case and in any event the claims were out of time. Also repeating an offer for £1,000 on a non-admission basis, thus effectively an economic settlement.
34. The Claimant responded the same day rejecting the offer, asserting her rights to pursue the claim and considering it necessary to have a Hearing.
35. Once again, the Respondents on 14 August 2023 emailed the Claimant and reiterated the position and took time setting out the reasons why the Claimant's claim would not succeed. The Claimant nevertheless continued with the claim and despite being advised to take some legal advice, failed to take any reasonable legal advice.
36. The basis of the Respondent's Application is the Claimant's unreasonable conduct and are only asking for a contribution towards their costs in the sum of £5,000.
37. Miss Yates was given an opportunity to respond. She acknowledges nothing she has said she believes has been taken into account and she felt the Respondent's position was intimidating the way they contacted her wanting her to drop the case. She told the Tribunal she was not working at the moment, she has no jobs or interviews lined up, she is house bound, isolated and being supported by her GP. She is currently in receipt of Universal Credit at around £744 per month and has no savings.

Conclusion on Costs

38. The unanimous view of the Tribunal is acknowledging the Respondent's position and their attempts to persuade the Claimant to withdraw her claim, particularly on the basis that the documentary evidence and the findings ultimately found by the Tribunal support their argument that the Claimant would not succeed. What is more, it was out of time.
39. The power to award costs arises under the Employment Tribunal Rules of Procedure 2013, particularly Rule 76 which states,

“A Tribunal may make a Costs Order or Preparation Time Order and shall consider whether to do so where it considers that,

- a. a party (or that party’s Representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
- b. ...
- c. ...”

40. The Rule 84,

“In deciding whether to make a Costs Preparation Time or Wasted Costs Order, if so what amount, the Tribunal may have regard to the paying party’s and their ability to pay.”

41. The Tribunal reminds itself that effectively it is a three stage process in deciding whether to make a Costs Order. The first stage is to consider whether any of the factors under Rule 76 have arisen. The Tribunal are unanimously of the view, given our findings of fact, that the documentary evidence before this Tribunal did not support the Claimant’s picture that she was being subjected to racial harassment and in any event, certainly two of the allegations were out of time. The Claimant was warned on a number of occasions by the Respondents why the claims could not succeed and the Claimant nevertheless continued with the claims. Given these factors, the Claimant has acted unreasonably.
42. The second stage of the process is then whether the Tribunal should exercise its discretion and make an award of costs. Given the findings of fact, given the warnings the Claimant had and the failure by the Claimant to take any advice, the Tribunal were unanimous in the view that it was appropriate to exercise their discretion to make an Order for Costs.
43. The Tribunal have had regard to the Claimant’s ability to pay, but the Respondents are a public funded body and have incurred something in the region of £70,000 worth of costs and the Respondents are only asking for a contribution limited to £5,000. In many ways the Claimant should consider herself fortunate that the Respondents are not pursuing a much higher sum.
44. Even though the Tribunal considered the Claimant’s means, we nevertheless think it appropriate that the Claimant should make a contribution towards the Claimant’s costs in the sum of £5,000. In due course and as time passes, the Tribunal have no doubt the Claimant will find gainful employment again.

Case Number:- 3303063/2021.

Employment Judge Postle
Date: 20/11/2023
Sent to the parties on: 4/12/2023.
For the Tribunal Office:
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