



EMPLOYMENT TRIBUNALS

Claimant: Ms T Musamadya

Respondents: Nouvita Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford (CVP)

On: 14 March 2024

Before: Employment Judge S Moore (sitting alone)

Appearances

For the Claimant: Mr Nithini, (the Claimant's uncle)

For the Respondent: Ms Halsall, counsel

JUDGMENT

The claim is struck out on the grounds the complaints have been brought out of time and/or they stand no reasonable prospect of success.

REASONS

Introduction

1. On 28 April 2023 the Claimant brought a claim alleging sex and race discrimination and victimization pursuant to sections 13 and 27 of the Equality Act 2010 (EqA).
2. At a Preliminary Hearing on 15 December 2023, the issues were identified as follows:
 - 1 The Claimant is a black Zimbabwean woman.
 - 2 Are all of the Claimant's claims within time?
 - 3 Direct Sex Discrimination –Sex/Race

a. What treatment does the Claimant say amounted to less favourable treatment?

i. On 21 January 2020, the hospital manager failed to follow up the claimant's complaint and investigate her grievance.

ii. On 27 March 2023, the hospital manager:

1.informing the Claimant that he would have to cancel the claimant's remaining shifts for the week and would no longer book her for shifts.

2.denied the claimant the opportunity to question the statements from undisclosed witness or witnesses as set out in the ACAS Code and Article 6 of the Human Rights Act 2018.

3.subjecting the claimant to different standards to the anonymous witnesses

4.using a falsehood to justify cancelling the claimant's shifts and not booking her again at Baldock Manor Hospital.

5.disclosure of the Claimant's personal identifying information (photograph of her car)

6.There was no investigation conducted. No investigation or disciplinary procedures were applied or adhered to in dealing with the matter of the allegation about the client's parking.

iii. On 27 March 2023 anonymous witnesses made false allegations about the claimant parking in the neighbourhood all week.

b. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators?

c. The Claimant relies on hypothetical comparators.

4. Sexual Harassment

a. Did the Respondent engage in unwanted conduct of a sexual nature? The claimant says that T, a nurse at the respondent's premises:

i. said to me, "has anyone ever told you that you have a nice big pair of... eyes." As he paused, he looked towards my chest then after saying his sentence he started laughing. This happened in the locker room by the reception. [date to be confirmed by the claimant].

ii. the date of the work away day, beginning of July 2019, I was under the influence of alcohol, I remember he was talking about my breast but cannot remember what exactly he was saying then he touched my right breast at DOODOO bar in Luton.

iii. at the work Christmas party, he kept asking me what the situation was between myself and a colleague, at the time, asking if that person was my boyfriend and said that people at Baldock talk and he has been hearing rumours. Then he went on to further ask me to kiss him, I refused two or three times, and he told me that I had kissed him at the away day of which I have no memory of

b. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

5. Victimisation

a. Did the Claimant carry out a protected act?

i. The Claimant says she raised a grievance about sexual harassment in January 2020.

b. If there was a protected act, what treatment did the Respondent undertake that put the Claimant to a detriment because of the protected act?

i. Mr. Ambrose Niamey neglected the Claimant's complaint/grievance as set out in the ACAS Code. No investigation or further action was taken. There was no outcome provided to the Claimant.

3. At that same Preliminary Hearing this hearing was listed to consider the Respondent's application to strike out the claim and or for a deposit order, pursuant, respectively, to rules 37 and 39 of the Employment Tribunal Rules of Procedure 2013.
4. In preparation for this hearing, the Respondent wrote on 18 January 2024 stating that the basis of its application to strike out or for a deposit order was because:
 - The Claimant had failed to identify why the alleged less favourable treatment was because of sex and race;
 - The complaints were out of time; and
 - The Claimant was not employed by the Respondent and was an agency worker.
5. Today Ms Halsall stated that she was no longer relying on the 3rd bullet point because she accepted the Respondent could be liable to the Claimant for acts of discrimination by its employees or agents pursuant to s.41(5) Equality Act 2010 (EqA). Further that the treatment complained of fell into two groups, that which occurred in 2020 and that which occurred in 2023, and only that which occurred in 2020 was out of time.
6. For the purpose of its application, the Respondent did not seek to rely on any evidence other than the Claimant's pleaded case and the agreed List of Issues from the previous Preliminary Hearing.

7. Mr Nithini had submitted two statements, one from the Claimant dated 3 March 2024 and one from Mr Moses Murevanhema dated 13 March 2024. Although the Claimant did not give oral evidence, other than in relation to her means, Ms Halsall did not object to Mr Nithini relying on those statements.

Background

8. The Claimant describes her ethnicity as black Zimbabwean. She is a mental health support worker.
9. Her claim form states she was employed by Delight Supported Living, a nursing agency from about March or April 2018. In March 2019 she was assigned to work at Baldock Manor Hospital, which is run by the Respondent company.
10. On 21 January 2020 the Claimant made a complaint of sexual harassment in respect of a male nurse, T, who was another agency worker (although from a different agency to that which employed the Claimant). The complaint was made to the hospital director Mr Ambrose Nyaley (AN) orally and by email. AN is a black man of West African ethnicity.
11. On 30 January 2020 AN emailed the Claimant to say he had received the complaint and would be in touch to investigate it.
12. Before the investigation could be completed T resigned and the Claimant never heard anything more about her complaint.
13. More than three years later, on 27 March 2023, the Claimant was told by the Respondent, the instruction having come from TN, that her engagement at the hospital was being terminated because she had disregarded the Respondent's instruction to park in the designated area and the previous day had parked on the hospital premises. She was shown an email which had been sent to all staff which attached photographs of the Claimant's car. It stated the car had been parked on site all day and during the week had been parked within the neighbourhood. The email further stated that because the member of staff in question (which was the Claimant) had chosen to ignore the parking instructions her engagement had been cancelled.
14. There is no dispute that the Claimant knew she was supposed to park in the designated area and that she was not allowed to park in the hospital grounds or in the neighbourhood (a residential area). Further, while she states the allegation that she had parked in the residential neighbourhood during the week was untrue she does not dispute that she parked in the hospital grounds on 26 March 2023.
15. In her statement the Claimant says this was because there were no spaces in the designated parking and although she intended to move her car later in the day she was too busy to do so.
16. The statement from Mr Murevanhema, who I am told was the senior nurse on shift on 26 March 2023, says he gave the Claimant permission to park her car in the hospital grounds until after the shift handover, but the Claimant couldn't move her car later because she was on observation duties with a patient and as the day progressed the matter was forgotten. He further states that when the Claimant was suspended he sought to intercede with AN but received the response that "the Claimant had received several warnings relating to parking in

non-designated areas which she had chosen to ignore and that, as such, the suspension would be upheld”.

17. Mr Nithini submitted that notwithstanding the Claimant had not referred to Mr Murevanhema giving her permission to park in the hospital grounds in either her Claim Form or her witness statement, the correct version of events was as set out in Mr Murevanhema’s statement and therefore, for the purposes of the Respondent’s application, I proceed on the basis that the contents of that statement are true.

Conclusions

- (1) Complaint 4 (sexual harassment), Complaint 3.a.i. (direct discrimination as regards AN failing to follow up the Claimant’s complaint), and Complaint 5 (victimization as regards AN failing to follow up the Claimant’s complaint).
18. The alleged acts of sexual harassment appear to have taken place in 2019 and the Claimant made her complaint to AN on 21 January 2020 and received his reply on 30 January 2020.
19. Sections 123(3)(b) and 123 (4)(b) EqA provide that failure to do something is to be treated as occurring when the person in question decided upon it and a person is to be taken to decide on failure to do something on the expiry of the period in which he might reasonably be expected to do it.
20. It follows that the failure of AN to act on the Claimant’s complaint is to be treated as occurring when he might reasonably have been expected to act on it, which must have been within weeks, or a couple of months at most, of the Claimant making her complaint, i.e. by the end of March 2020. It follows that the primary 3-month period of limitation for bringing a complaint about that matter expired at about the end of June 2020. So even allowing for a period of Early Conciliation the claim is at least 2 & ½ years out of time.
21. Further I do not accept Mr Nithini’s submission that the Claimant can rely on the events of March 2023 to argue on the basis of section 123(3)(a) EqA that there was discriminatory conduct extending over a period of time. Even assuming, for the purposes of this argument, the treatment of the Claimant in March was discriminatory, the Claimant makes no complaint about the way AN (or anyone else employed by the Respondent) treated her between the events in early 2020 and the events in early 2023; accordingly there was no discriminatory conduct extending over that period but rather (at its highest) two separate acts of discrimination.
22. It follows that the question is whether the complaints in question have been brought within such period as is just and equitable and should be allowed to proceed. The Claimant says in her statement that she was not aware of the time limits and in submissions Mr Nithini said the Claimant was worried that if she pursued the matter she might lose her position with the Respondent. However, I don’t consider this is a good enough reason to explain the very lengthy delay. When the Claimant gave evidence as regards her means, she said that while she worked at the hospital, she was self-employed and running her own business, and generating about £42,000 profit per annum. If the Claimant was able to set up and run her own business, I consider it would have

been reasonable to expect her to investigate the possibility of bringing a claim, together with the question of time limits, had she been minded to do so.

23. Further, if the claim were to proceed the Respondent would be prejudiced by the delay. As regards the allegation of sexual assault, T no longer works at the hospital, and left more than 3 years ago and even before the Respondent could investigate the matter at the time. As regards the complaint against AN, he would have to answer questions at trial in respect of decisions (or omissions) he made more than three years ago.
24. As regards the prejudice caused to the Claimant by the complaint not being allowed to proceed, I take into account the fact I consider the complaint to be, on its face weak. It is unlikely that the Respondent would be liable for the acts of T within the meaning of s.109(2) EqA (since he was an agency worker). Further, as regards the failure of AN to investigate the matter, while regrettable, it is unlikely that the Claimant would be able to prove this was an act of discrimination or victimization by AN rather than simply due to the fact that T left the workplace soon after the complaint was raised and before the investigation could be completed.
25. I therefore find it would not be just and equitable to extend time which means the complaints have been brought out of time and the Tribunal does not have jurisdiction to hear them.

(2) Complaint a.ii. & iii (direct sex/race discrimination)

26. The core of these complaints is that AN terminated the Claimant's engagement because of her sex or race, Mr Nithini put it on the basis that he was looking for a way of terminating the Claimant's engagement.
27. Although the Tribunal's power to strike out under rule 37(1) should be exercised cautiously and the bar is set high, the power can be exercised where the complaints are clearly without substance, even in discrimination claims.
28. In **Ahir v British Airways plc [2017] EWCA Civ 1392, CA**, Underhill LJ stated at [16] that "Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is no reasonable prospect of the facts necessary to liability being established." And at [18] "On the face of it, none of the relevant individuals had any knowledge of [the protected acts], let alone was motivated by them. On the face of it, this was a case of dismissal for the dishonesty involved in the appellant having submitted a CV which gave a false account of the circumstances of his departure from Continental Tyres." Underhill LJ continued at [19]:

"I have, of course, twice used the phrase 'on the face of it'. That invites the obvious riposte that the whole problem with a strike-out is that the appellant has no chance to explore what may lie beneath the surface, in particular by obtaining further disclosure and/or by cross-examination of the relevant witnesses. I am very alive to that. However, in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she

believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it.”

29. **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, CA**, where at [77] Underhill LJ stated that that “there is no absolute rule against striking out a claim where there are factual issues...Whether it is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed.”
30. In this case the factual dispute is limited. The Claimant accepts that she parked in the hospital grounds on 26 March 2023 and that she knew she wasn't allowed to do that. She now relies on a statement by Mr Murevanhema to say he had given her permission to park there that day (at least initially) and that after he heard the Claimant had been dismissed, he told AN about this. Mr Nithini argues that the fact Mr Murevanhema says he told AN that he had given the Claimant permission to park in the hospital grounds is important because it shows that AN terminated the Claimant's engagement despite those mitigating circumstances, which shows there was something more behind AN's decision, and that something more was (or could have been) the Claimant's race or sex.
31. However, I don't accept Mr Murevanhema's statement does suggest there was something more behind AN's decision. His statement is essentially that when he spoke to AN on the Claimant's behalf, he was met with the response that AN was fed up with the Claimant parking in non-designated areas and that he had warned her before about it. Further AN's email of 27 March 2023 refers to having received information that the Claimant had been parking in the neighbourhood residential area during the preceding week. Although the Claimant says this wasn't true, and AN had been told falsehoods by other people, both that email and the contents of Mr Murevanhema's statement suggest no more than that AN believed the Claimant had repeatedly failed to comply with the parking rules.
32. I also bear in mind the fact that the Claimant has made no complaint about AN's treatment of her in respect of anything else (other than failing to deal with her complaint about T more than 3 years earlier in 2020).
33. Further as regards the other people who supposedly gave AN false information that the Claimant had been parking in the neighbourhood during the preceding week, and the allegation they were motivated by race and/or sex discrimination, the Claimant hasn't suggested who those people might be or identified anyone employed by the Respondent (other than AN) who she believes ever discriminated against her during the course of her engagement.
34. I am therefore satisfied that these complaints of discrimination are fanciful and speculative. There are no facts capable of suggesting that things are not what they seem and from which the Tribunal could properly infer (in the absence of an explanation from the Respondent) the existence of race or sex discrimination.
35. I therefore consider they have no reasonable prospect of success and should be struck out.

Employment Judge S Moore

Date: 14 March 2024

Sent to the parties on:
22 March 2024

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For the Tribunal:
T Cadman

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