



EMPLOYMENT TRIBUNALS

Claimant: Mr A Abushama
First Respondent: Extons Foods Limited
Second Respondent: Proman Supply Chain Limited
Heard at: Manchester Employment Tribunal
On: 25, 26, 27 and 28 March 2024
Before: Employment Judge M Butler
Mr I Frame
Ms S Moores

Representatives

For the claimant: Self-representing
For the first respondent: Mr Wilford (Solicitor)
For the second respondent: Mr Stenson (of Counsel)

JUDGMENT (AT PRELIMINARY HEARING IN PUBLIC)

1. The claims of victimisation against both the first and second respondent are dismissed.
2. There are no claims remaining against the second respondent in these proceedings. The second respondent is removed from these proceedings.

REASONS

INTRODUCTION

3. This case was listed for a final hearing to commence today. The time estimate was four days.

Case No: 2400006/2023

4. The claimant made an application to strike out the respondents responses, the first respondent made an application to strike out the claim and the claimant made an application to amend his claim.
5. Following consideration and determination of those matters, and following a review of the readiness of the case to be heard, the tribunal decided that it would convert this hearing to a preliminary hearing held in public to determine three preliminary points:
 - a. Did the claimant make a protected act in the way pleaded?
 - b. Did the second respondent of knowledge of the protected act?
 - c. Was the claimant subject to a detriment in respect of non-payment of statutory sick pay?
6. In short, the tribunal considered that it would be unfair to proceed with the final hearing given that the claimant had not had sight of the first respondent's witness statements until the afternoon of the first day of this hearing in circumstances where he was unrepresented, and his first language was not English.
7. The tribunal did consider that the claimant could address the three identified points above. The three matters identified above were discrete matters. They did not involve a lot of evidence. The protected act was pleaded as being an oral disclosure, and therefore involved little by way of documentary evidence. The claimant had produced a witness statement for day 2 and his particulars of claim were sufficiently detailed to stand as his evidence. The claimant had had sight of all the relevant evidence by 01 February 2024, at the latest. The tribunal could ask questions and take evidence where there were gaps in his evidence. And the tribunal considered that determining these matters was in accordance with furthering the overriding objective. Particularly as it would in effect determine whether the second respondent remained in the process, given that there were no other claims brought against it.
8. The tribunal benefitted from a short bundle of documents that ran to 512 pages, although the tribunal only needed to consider up to circa 20 pages to determine the issues in question.
9. The claimant gave evidence on these matters, Ms Mikolajewska gave evidence (although in reality this was limited to paragraphs 13 and 14 of her witness statement) and Mr Young gave evidence (again, in reality this was limited to paragraphs 9, 12 and 13 of his witness statement).
10. A separate record of preliminary hearing has been released to the parties recording the management of this hearing.

LIST OF ISSUES

11. The tribunal informed the parties on day 2 that it was only determining the following three matters:
 - a. Did the claimant make a protected act in the way pleaded?
 - b. Did the second respondent of knowledge of the protected act?
 - c. Was the claimant subject to a detriment in respect of non-payment of statutory sick pay?
12. To ensure that the claimant was able to present his case on these three matters, the tribunal did not hear any evidence until day 3.

LAW

Victimisation

13. Section 27 of the Equality Act 2010 ('EqA') states that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

...

(c) Doing any ... thing for the purposes of or in connection with the EqA 2010.

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

Burden and standard of proof

14. Section 136 EqA provides, so far as is relevant:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

15. However, cases which show no more than an assertion of a difference of treatment and a difference of protected characteristic/status (per Mummery LJ at paragraph 56 of his judgment in **Madarassy v Nomura [2007] ICR 867**):

"...only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

CLOSING SUBMISSIONS

16. Both Mr Wilford and Mr Stenson made oral closing argument. The expectation was that the claimant would make oral closing submissions following Mr Stenson. However, he requested that he produce written submissions. The tribunal agreed to this, but limited his written submissions to two pages, and required them to be presented that same day (by 11pm). This was to ensure that the tribunal had sufficient time to deliberate and reach a decision on day 4 of this hearing.

FINDINGS OF FACT

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

17. The claimant attended work on 27 July 2022. The parties do not dispute this.
18. The claimant on 28 July 2022 did not attend work. He emailed Klaudia Kocan of the second respondent at 12.50 on 28 July 2022 (p.173). In that email he stated that 'I'm sick today, I can't come in, I have a pain in my stomach'.
19. The claimant sent a further email on 28 July 2022, this time at 13.19. This was sent to Aleksandra Follert of the second respondent, and explained that 'I'm sick today, I can't come to work, I have a pain in my stomach and back.'
20. In neither of these emails sent on 28 July 2022 did the claimant raise any issues concerning race discrimination or him going to complain about race discrimination.
21. The claimant emailed Klaudia Kocan of the second respondent on 29 July 2022 at 09.28 (see pp184-185). In this email the claimant raised concerns about his workload on the 27 July (he references the day before yesterday), his lack of break, and that this caused him pain in his back and leg. And that this means he cannot now attend work. This was his notification of that. He further raises an issue to do with pay for an additional hour work that he had done. In this email he does not suggest any of the treatment was discriminatory due to race, or that it was differential treatment of him.
22. Klaudia Kocan forwarded on the claimant's email to several people from the first respondent, including Ms Mikolajewska (see p.183). From this point Ms Mikolajewska was aware of the matters raised by the claimant in his email of 29 July 2022.
23. Ms Mikolajewska emailed Klaudia Kocan to enquire about who the supervisor was. Although Klaudia Kocan's email on p.186 refers to having spoken to Paulina, the tribunal accepts Ms Mikolajewska's evidence that this communication was through email rather than orally. We make this finding as the tribunal considered Ms Mikolajewska an honest and credible witness, whose evidence remained consistent throughout and there was no evidence to the contrary.
24. Ms Mikolajewska did not get a response from Klaudia Kocan as to who the claimant's supervisor was. And this matter was not raised again by either Ms Mikolajewska or Klaudia Kocan.
25. The claimant attended the premises of the first respondent on 29 July 2022. This was to collect some clothes that he had left on the premises and was not with the intention of raising allegations of discrimination with a member of the first respondent. That was the evidence of the claimant under cross-examination.
26. The tribunal finds that the claimant did not have a meeting with Ms Mikolajewska on 29 July 2022, and more specifically did not have a meeting with Ms Mikolajewska in which he raised concerns of race discrimination. The claimant's case is that such a meeting took place, whilst Ms Mikolajewska's evidence is that no meeting at all took place. The tribunal concluded on the balance of probability

that no such meeting took place. In support of this the tribunal considered the claimant's email of 29 July 2022 (referenced above, at pp184-185) and the claimant's grievance document dated 05 August 2022 (see p.195 and further referenced below). In the email of 29 July 2022, the claimant does not make any reference to differential treatment or race discrimination being a concern, and this was only some hours before he says he raised it with Ms Mikolajewska. If this was a concern at the time and he was about to raise it with his manager, the tribunal would have expected to see some reference in this email at this point. Turning to the claimant's grievance of 05 August 2022 (p.195). The claimant in this document makes no reference to differential treatment, makes no reference to race discrimination and makes no reference to having raised concerns with Ms Mikolajewska. These two documents created around the time of the alleged conversation makes no reference to the alleged discrimination that the claimant says he had then raised with Ms Mikolajewska, and in the grievance documents there is no reference to such a meeting with Ms Mikolajewska. It is in these circumstances and the lack of detail that the claimant provided in his evidence when asked as to the content of the alleged conversation that led the tribunal to this finding.

27. The claimant raised a grievance through an email sent to Klaudia Kocan of the second respondent on 05 August 2022 (p.195). In this document the claimant raises concerns about his pay. An injury at work. His workload. Lack of training. Lack of rest breaks. And matters concerning sick notes and sick pay. The claimant accepted that in this document he did not raise differential treatment, race discrimination, nor did he explain that he had raised concerns of discrimination in a meeting with Ms Mikolajewska on 29 July 2022.
28. The last day that the claimant attended work with first respondent was 28 July 2022. The claimant was informed that his contract for services had been terminated as he was unavailable for work. He received this notification at the latest 16 August 2022 (this is consistent with the claimant's particulars of claim).
29. On 28 July 2022, the claimant was sent a letter from the second respondent informing him that he was not entitled to statutory sick pay (see p.176 and p.179).
30. Klaudia Kocan emailed the claimant on 08 August 2022 to inform him that he would be paid Statutory Sick Pay from his last day of work (see.197. Although Klaudia Kocan references 27 August in this email that is plainly incorrect as the email was sent before that date and therefore cannot be referencing a last working day that had not yet happened, and the claimant's last working day was 27 July. Therefore, this must be a typo).
31. The claimant was paid statutory sick pay by the second respondent in his December pay slip (see p.318). This covered all statutory sick pay for the period up until 16 August 2022. This is the claimant's evidence. And was also repeated by the claimant in his closing submission, where he sets out that he received all statutory sick pay up until 16 August 2022 in his December pay slip but was not paid for the period thereafter.

CONCLUSIONS

32. The claimant's claim of victimisation against both the first and second respondent all concern a conversation the claimant says he had with Ms Mikolajewska on 29 July 2022 (rather than 27 July 2022 as per the issues recorded by EJ Horne).
33. The tribunal has found that no conversation at all took place between Ms

Case No: 2400006/2023

Mikolajewska and the claimant on 29 July 2022. And therefore, the claimant has not done the protected act as alleged. His claims of victimisation brought against both the first and second respondent must therefore fail.

34. Even if the tribunal is wrong on this and there was some sort of conversation, the tribunal would have concluded that the claimant did not raise any concerns of differential treatment or race discrimination in any such conversation. And the tribunal in those circumstances would have concluded that it was not satisfied that the claimant had done the protected act as alleged in any event.
35. In those circumstances the victimisation claim against both the first and second respondent must fail following our conclusion that no protected act was made.
36. And further, specific to the second respondent, the claimant in no way made it aware that he had had a conversation with Ms Mikolajewska in which he raised differential treatment or race discrimination. The claimant's case in respect of the second respondent and its knowledge of the existence of any protected act rested on his grievance email of 05 August 2022 (the email of 29 July 2022 took place before any alleged meeting with Ms Mikolajewska and therefore could not reference any oral protected act he says he made to Ms Mikolajewska). It is clear on the face of the grievance document, and accepted by the claimant, that he did not make the second respondent aware of any alleged conversation with Ms Mikolajewska. His case against the second respondent was brought based on an unsupported contention that the two respondents must speak to one another and therefore the second respondent must have known. However, there was no reason for the tribunal to reject Mr Young's evidence when he explained that the second respondent had no knowledge of any such alleged protected act and therefore his evidence was accepted. In those circumstances, the second respondent could not be subjectively affected by something it did not know about in any decisions it made against the claimant.
37. Furthermore, the victimisation complaint insofar as it relates to the second respondent is brought on a single detriment, that being of refusing to pay the claimant statutory sick pay.
38. As found above, the claimant was paid statutory sick pay covering the period of his illness up until the 16 August 2022, the date on which he was informed that his assignment with the first respondent had formally ended.
39. Strictly speaking his pleaded detriment is not made out, and therefore must fail.
40. However, this part of the complaint developed to cover not receiving statutory sick pay for the period from 16 August 2022 until the final date of his sick note, that being 31 August 2022. Even this fails. The claimant during this period had no contract for service. And therefore, had no entitlement to statutory sick pay. And therefore, not receiving statutory sick pay in circumstances where he had no entitlement cannot and is not a detriment.
41. So even had the tribunal concluded that the claimant had made a protected act (which it did not), and that the second respondent had sufficient awareness of it such that it could subjectively effect the decision making of it in respect of the claimant (which it did not), the tribunal would have concluded that the claim of victimisation against the second respondent must fail as it has not subjected him to the detriment as pleaded.
42. The victimisation complaint is the only live claim brought against the second respondent in these proceedings. That has now been dismissed. The second respondent will play no further part in these proceedings, save for if the claimant

makes an application for a time preparation order in due course, on the conclusion of the final hearing against the first respondent.

Employment Judge **Mark Butler**

Date 04 April 2024

JUDGMENT SENT TO THE PARTIES ON

23 April 2024

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>