



EMPLOYMENT TRIBUNALS

Claimant: Mrs T Knight

Respondent: Nottingham University Hospital NHS Trust

PUBLIC PRELIMINARY HEARING

Heard at: Nottingham Tribunals Hearing Centre (remotely by video)

On: 11 December 2023

Before: Employment Judge S Shore

Appearances

For the claimant: In person

For the respondent: Mr J Kendall, Counsel

JUDGMENT

1. The claimant's claim of breach of contract was not presented within the requisite time period and is therefore struck out as the Tribunal has no jurisdiction to hear it.
2. The Tribunal was unable to determine the time points on the claims of direct discrimination because of age or harassment related to age.
3. The claimant's claims of direct discrimination because of the protected characteristic of age (contrary to section 13 of the Equality Act 2010) have no reasonable prospect of success and are dismissed in their entirety.
4. The claimant's claims of harassment related to the protected characteristic of age (contrary to section 26 of the Equality Act 2010) have no reasonable prospect of success and are dismissed in their entirety.
5. The claimant's claim of unfair dismissal will proceed to a final hearing. A case management order has been made.

REASONS

Introduction and History of Proceedings

1. The claimant was employed as by the respondent, latterly as Consultant Clinical Scientist Head of Service, from 1 January 2000 (claimant's ET1) or 2004 (respondent's ET3) to 26 July 2023, which was the effective date of termination following the claimant's resignation on 3 May 2023. At the date of dismissal, the claimant was 60 years old.
2. The claims arise from the events following the claimant's retirement on 31 March 2021 and immediate re-engagement on 2 April 2021 under the respondent's 'retire and return' scheme, which saw her role reduced from a full-time post to a 50% part-time post that was meant to be job shared. The respondent's case is that it was unable to appoint a suitable candidate to take on the other 50% of the role and appointed a slightly less senior person than the claimant to undertake the work.
3. The claimant started early conciliation with ACAS on 16 June 2022 and obtained a conciliation certificate on 22 July 2022 [1]. The claimant presented her ET1 and a supporting document [2-23] on 25 August 2022. The claimant alleged that she was subjected to direct discrimination because of the protected characteristic of age, harassment relating to the protected characteristic of age, and breach of contract.
4. The Tribunal issued case management orders on its own initiative on 5 September 2022 [26-29] that set a final hearing for three days on 19, 20 and 21 February 2024.
5. The respondent presented an ET3 [32-37] and Grounds of Resistance [38-45] on 3 October 2022. The respondent requested a stay in the proceedings as the claimant had submitted a grievance on 16 June 2022 that had not been resolved. It asserted that some of the claimant's claims were out of time and that the Tribunal had no jurisdiction to hear the claimant's breach of contract claim. Further information about the claimant's claims was requested.
6. On 19 October 2022, the Tribunal asked the claimant for her comments on the application for a stay [46]. She responded on 28 November 2022 and a three-month stay was granted on 28 November 2022 [49]. A preliminary hearing listed for 5 December 2022 was postponed.
7. The preliminary hearing was relisted for 3 March 2023 before Employment Judge V Butler [55-59] who was unable to do much case management and listed a further preliminary hearing for 26 June 2023.
8. The claimant resigned her employment on 3 May 2023, giving notice to expire on 26 July 2023.
9. The claimant submitted further particulars of her claims of direct discrimination because of age and harassment related to age on 21 May 2023 [50-68]. The

- respondent submitted an amended Grounds of Response on 19 June 2023 [69-83].
10. The claimant applied to amend her claim on 22 June 2023 [84] to include a claim for constructive unfair dismissal. The respondent produced an amended List of Issues on 30 June 2023 [117-122].
 11. A preliminary hearing was held on 26 June 2023 [123-127] before Employment Judge Hutchinson. The application to add a claim of unfair dismissal was allowed by consent. EJ Hutchinson agreed the List of Issues looked to be a correct summation and ordered the respondent add the issues relating to the new claim of unfair dismissal and to send a copy to the claimant who had to indicate whether the List was agreed.
 12. On his own initiative, EJ Hutchinson ordered that a public preliminary hearing take place on 16 August 2023 to determine the following matters:
 - 12.1 Whether the Tribunal has jurisdiction to consider the Claimant's claim for breach of contract.
 - 12.2 In respect of time limits:
 - 12.2.1 Whether it is possible to determine what parts of the claim were presented out of time and whether it would be just and equitable to extend time; and
 - 12.2.2 If it is possible to do so, to determine those issues and strike out any claims that are out of time; or
 - 12.2.3 If it is not possible to do so, reserve the issue of time limits to the final hearing.
 - 12.3 Whether the direct discrimination and harassment claims have no reasonable prospects of success and should be struck out.
 - 12.4 In the alternative, whether the discrimination and harassment claims should be made the subject of deposit orders.
 13. The respondent sent a further amended List of Issues with tracked changes to the claimant on 30 June 2023 [116-122]. The preliminary hearing was postponed and relisted to today because of personal matters affecting the claimant [203-204].
 14. The parties discussed the List of Issues that was submitted to the claimant, who produced her comments in a tracked changes document on 10 July 2023 [128-135]. The matter was referred to the Tribunal and on 19 July 2023, EJ Adkinson ordered that the question of the List of Issues would be resolved at this hearing [145-146].
 15. The respondent submitted a re-amended Grounds of Resistance on 24 July 2023 [147-166].

The Hearing

16. I was provided with the following documents for this hearing:
 - 16.1 An index to the preliminary bundle;
 - 16.2 The bundle itself, which consisted of 204 pages;
 - 16.3 The Claimant's witness statement that consisted of four pages; and
 - 16.4 The respondent's position statement.
17. I read all the above documents in full before the hearing. If I refer to any of the documents in the bundle, I will add the relevant page numbers in square brackets.
18. Mrs Knight had prepared a statement of her financial means in the event that I decided to make a deposit order. She sent a copy to the Tribunal and the respondent's solicitor during the lunch break. I did not need the financial details and have destroyed the document sent to me.
19. Mr Kendall said his instructing solicitor had submitted copies of six precedent cases on Friday 8 December. The email had not reached me, so I asked my Clerk to find and forward the email to me. I read the parts of the judgments that Mr Kendall took me to in his submissions. All cases were referenced in the Position Statement. They were:
 - 19.1. **Capek v Lincolnshire County Council** [2000] ICR 876;
 - 19.2. **Lyfar v Brighton and Hove Hospital Trust** [2006] EWCA Civ 1548;
 - 19.3. **Aziz v FDA** [2010] EWCA Civ 304;
 - 19.4. **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23;
 - 19.5. **Cygnets Behavioural Health Ltd v Britton** [2022] EAT 108; and
 - 19.6. **Wright v Nipponkoa Insurance (Europe) Ltd** UKEAT/0113/14/JoJ.
20. The claimant is unrepresented. I reminded her that the Tribunal operates on a set of Rules (I have set out the link to those Rules below). Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

 - (a) ensuring that the parties are on an equal footing;*
 - (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
 - (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
 - (d) avoiding delay, so far as compatible with proper consideration of the issues; and*

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

21. We started at 11:00am. After dealing with housekeeping issues, the claimant gave her evidence in chief on affirmation. Neither Mr Kendall nor I asked any questions of Mrs Knight. Mr Kendall then started his submissions. We took a break at 12:20pm. We returned at 12:30pm and continued to 12:45pm, when Mr Kendall finished his submissions.
22. On the resumption at 13:45pm, I heard Mrs Knight's submissions until 15:25pm.
23. I then took a break to make my decision. I considered the evidence and the documents together with the closing submissions and case law that had been submitted. I returned at 16:30pm to give the Judgment that is recorded above.
24. I then converted the hearing to a preliminary hearing (in private) for case management purposes. A separate case management order has been prepared.

Law

Breach of Contract

25. The law on breach of contract in Employment Tribunals is set out in the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 (the Order"). The relevant parts of the Order for this hearing were Articles 3 and 7.
26. I was also referred to the case of **Capek v Lincolnshire County Council** [2000] ICR 876, particularly the extract reproduced at paragraph 17 of the respondent's Position Statement:

"In the context of the Order of 1994, however, there are clear indications that if, as here, there is an effective date of termination, the jurisdiction of the tribunal is confined to those cases in which the complaint is presented within the period between two fixed points of time, i.e., the start date (the effective date of termination) and the end date (the end of the period of three months beginning with the contract termination date). These complaints were not presented within the period between those two points of time. They were presented before the start date."
[...]

*"It is also significant that, as already indicated, the contract jurisdiction only exists in cases where the employee's employment has been terminated. The tribunal does not have jurisdiction to entertain complaints for breach of contract which are alleged to have been committed during the currency *887 of a contract of employment if no termination of that employment occurs: see article 3(c) . That suggests that it was not contemplated that*

an employee should be entitled to invoke this jurisdiction of the tribunal before his employment was terminated.”

Discrimination

27. The law related to direct discrimination is set out in section 13 of the Equality Act 2010. The law related to harassment is set out in section 26 of the Equality Act 2010.

13. Direct discrimination

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

The relevant protected characteristics are—

(a) age;...

26. Prohibited conduct (Harassment)

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.

In deciding whether conduct has the effect referred to, 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.

28. The Rule related to Strike outs in Employment Tribunals is Rule 37. A link to the Rules is contained in the case management order that was made after this hearing.

REASONS

Breach of Contract

29. I find that the claimant started early conciliation on 16 June 2022 and obtained an EC certificate on 27 July 2022. She presented her ET1 on 25 August 2022. Her effective date of termination of employment was 26 July 2023.
30. I therefore find that the ET1 was not presented within the two fixed points in time and that the Tribunal has no jurisdictions to hear it following the principle set out in the case of **Capek**.

Time

31. I could not make a decision and decided to deal with reasonable prospects.

Reasonable Prospects of Success

32. The bar for strike out is high and should be rarely exercised.
33. In considering strike out, I have taken the claimant's case at its highest.

Direct Discrimination

34. Whilst I assessed the claimant's claim at its highest, she still had to show a case that, on the face of that the treatment she complains as being direct discrimination of was "because of" her age. The respondent and claimant looked at the direct discrimination claim from opposite ends of the same telescope. There are few disputed facts from what I have seen of the papers, but the interpretation that is put on those facts fundamentally differs.
35. The question of whether she was subjected to less favourable treatment must be assessed by reference to a comparator. The comparator must be someone who does not share the claimant's protected characteristic (i.e., age), but in all other respects there must be no material difference in the circumstances (**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11).
36. We discussed the claim and the comparators at some length. The claimant named an actual comparator, Ms Benton, and identified a hypothetical comparator. The claimant said in her further particulars of claim [60] that Ms Benton:

"...who is not of retirement age, has not been pressured into indicating how long she might remain in her role, nor has she been manipulated in this regard by the withholding of significant resources."

37. She described her hypothetical comparator as follows [60]:

"Because the 49-year-old has not retired and returned, DLT do not perceive her as older and therefore transient in post (on her way out). There is no opportunity to exploit the funding for the role and they do

not ask her when she will vacate the post or withholding resources until she does. If arrangements need to be reviewed, they will implement Workforce Change policy, as described above.”

38. I find neither comparator to fit the **Shamoon** model. I agree with the respondent’s submission that the claimant’s construction of the comparator – real or hypothetical – would be someone who was younger than the claimant but who had announced that they were retiring in the next two or three years. The claimant does not seem to say that they would have been treated any differently.
39. I find that at the start of the acts of direct discrimination complained of the claimant was 57 years old. The youngest possible age at which one of the respondent’s employees could retire and return was 55. I find that the claimant must compare herself to someone who retired and returned (as this was the core of her claim) in order to be materially the same. Her claim was that she was treated less favourably than her younger comparator (actual or hypothetical), so I find that she could not possibly identify a younger real or hypothetical comparator. Her claim must fail.
40. I agree with the respondent’s submission that the claim advanced by the claimant was, in reality, an age-related s15 Equality Act 2020-type claim – a claim that she has been subjected to unfavourable treatment (the alleged direct discrimination acts) because of something arising from her age (the something being her impending retirement). Such a claim is not permissible.
41. Mrs Knight argued that as ‘retire and return’ was only open to those who were 55 years old or older, any adverse treatment would be age discrimination, because of the age of the only individuals who could retire and return. That point missed two vital issues:
 - 40.1. The claimant must identify a comparator; and
 - 40.2. The claimant must show that the less favourable treatment was because of age.
41. The claimant failed to identify a credible comparator or connect the less favourable treatment to her age, even at the height of her case.

Harassment

42. To succeed, the claimant must show that the unwanted conduct complained of related to her age.
43. I find that none of the claimant’s allegations of harassment are explicitly related to age. I find that none of them could even be said to be tangentially related to age.
44. I find that the closest (and only instance) the claimant came to drawing a link between age and the conduct complained of is at 8.12 in the List of Issues [141] where it is alleged that Ms Richardson sent an email in which she used the words “the plan as described before will be to recruit once [you] finally retire”. I find that, in line with my findings above, this cannot be said to be related to age but to retirement.

45. If I am wrong about that, then as the only matter that has any link to age whatsoever, the claimant would have issues with the fact that the claim was made out of time.
46. The claimant must do more than identify unwanted conduct and her age, she must link, even if only on the face of it, the unwanted conduct, and the protected characteristic (per **Madarassy v Nomura International plc** [2007] IRLR 246). I find that Mrs Knight has failed to make the link, even on her case at its highest. I find that, at its highest, the claimant's case is about her status as a returning retiree, not her age.

Employment Judge Shore

Signed 8 December 2023

Sent to the parties on:

...15th of January 2024....

For the Tribunal Office:

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