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EMPLOYMENT TRIBUNALS

Claimant: Mr M French
Respondent: Informa UK Limited
Heard at: East London Hearing Centre
On: 15 March 2019
Before: Employment Judge Ross

Representation

Claimant: In person
Respondent: Ms Natalie Connor (Counsel)

JUDGMENT

The judgment of the Tribunal is that: -

1. The complaint of breach of contract is struck out.
2. The complaints under Section 47B and Section 103A Employment Rights Act 1996 are struck out.
3. The following Claimant's allegations or arguments set out within the list of issues identified at the Preliminary Hearing on 13 February 2019 have little reasonable prospect of success:
 - 3.1. The allegations of direct age discrimination set out at issues 4.6(a), (d), (e), (f), (g), (h), (i), and (j).
 - 3.2. The allegations of direct sex discrimination set out at issues 4.6(i) and (j).
4. The claimant is ORDERED to pay a deposit of £200 in respect of each of the ten allegations in Paragraph 3 above not later than Tuesday 7 May 2019 as a condition of being permitted to continue to advance the allegation or argument.

The Judge has had regard to any information available as to the Claimant's ability to comply with the order in determining the amount of the deposit.

REASONS

1 The complaints and issues in this case are identified in the Preliminary Hearing Summary prepared by Employment Judge Russell at the Preliminary Hearing of 13 February 2019. By application dated 7 February 2019, the Respondent applied for:

- 1.1 The Claimant's claim to be struck out under Rule 37 on the basis of the complaints having no reasonable prospect of success; or
- 1.2 That the Claimant pay a deposit order under Rule 39 on the basis that each complaint has little prospect of success.

2 By email of the same day, the Claimant responded to the application in detail. I heard oral submissions from the parties today, after some delay awaiting the hearing bundle sent by the Respondent's solicitors. There was no prejudice to the Claimant by this because I ensured that he had a copy of the pleadings, a copy of the list of issues and the application to strike out before submissions began.

The Law

3 By Rule 37(1)(a) of the Rules of Procedure, a complaint may be struck out where all or part of the claim or response has no reasonable prospect of success.

4 As a general principle, discrimination cases should not be struck out except in the very clearest circumstances: see *Anyanwu v South Bank Students Union* [2001] IRLR 305. At paragraph 37 of that case Lord Hope stated:

"...discrimination issues of the kind which had been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The Tribunal can then base its decision on its findings of fact rather than on an assumption as to what the Claimant may be able to establish if given an opportunity to lead evidence."

5 In *Anyanwu*, Lord Hope also observed that the time and resources of the Tribunal should not be taken up by hearing evidence in cases that are bound to fail. This point has been re-emphasised more recently by the Court of Appeal in *Ahir v British Airways Plc* [2017] EWCA Civ 1392 paragraph 16. In *Ahir*, it was held that discrimination claims could be struck out even where there was a dispute of fact, where there was no reasonable prospect of the facts necessary to establish liability being established.

6 Counsel referred me to the recent case of *Mechkarov v Citi Bank* [2016] ICR 1121

where the law is summarised by Mr Justice Mitting at paragraph 14. I incorporate that summary. As explained in *Mechkarov* at paragraph 15, the same principles apply in whistleblowing cases as apply in discrimination cases in terms of striking out. Whistleblowing cases have a lot in common with discrimination cases; in both, the cause of acts is in issue.

7 Rule 39(1) confers a power to order a party to pay a deposit where all or part of a claim or response has little reasonable prospect of success.

8 I have directed myself to consider the whole of Rule 39 and Rule 37. In respect of Rule 39, I have taken into account the Claimant's means which I shall come to.

Conclusions

A. Breach of contract

9 Article 4 of the Extension of Jurisdiction Order 1994 provides that proceedings may be brought before an Employment Tribunal in respect of a claim for damages or any sum due at the termination of employment. The Claimant was dismissed on 26 September 2018, which is admitted by the Claimant. The Claimant also admitted that he was paid one week in lieu of notice.

10 Today, the Claimant argued that he was entitled to damages of one month's pay. The Claimant's case is that there was a contractual requirement to terminate in writing.

11 In my judgment, the claim for damages for breach of contract has no reasonable prospect of success for the following reasons:

11.1 The notice period for staff dismissed during the first three months of their employment by the Respondent is one week: see clause 7 of the statement of terms and conditions (at page 279 of the bundle).

11.2 Therefore, even if the Claimant was dismissed for a reason other than gross or serious misconduct (such as age) the Claimant has no claim for damages for breach of contract having been paid all the damages he would have been entitled to under his contract. Clauses 7 – 9 do not prevent the Respondent paying the Claimant in lieu of notice after termination.

B. Public Interest Disclosure

12 Section 43B Employment Rights Act 1996 sets out disclosures qualifying for protection. I incorporate that section here. The Claimant relies on the disclosures identified in the list of issues. The Claimant is relying on section 43(1)(b) and (f).

13 There are substantial issues of fact. The allegations of the Claimant are as follows:

13.1 He contends that the sole or principal reason for the dismissal was because he made the disclosure at 4.2 of the list of issues.

13.2 The Claimant was subjected to the detriment of not being offered a permanent job because of the alleged public interest disclosure.

14 Even putting the Claimant's case at its highest, the Claimant has no reasonable prospect of showing that his version of the facts would succeed. This is because:

14.1 The disclosure relied upon at 4.2 list of issues was made after the decision to terminate the Claimant's contract made on 26 September 2018. This is apparent from the Claimant's third page of the particulars attached to the ET1 and was admitted by the Claimant today. The Claimant argued that his first opportunity to make the alleged protected disclosure was after his dismissal was received on 26 September.

14.2 The disclosure relied upon was made after the decision not to offer the Claimant one of the two permanent roles: page 1 of the attachment to the ET1 shows this. In addition, the Claimant's email of 21 September 2018 at page 301 showed the decision was communicated to him on that day. Before me, the Claimant accepted this.

15 The Claimant's response to the application to strike out this complaint demonstrates a failure to understand the specific requirements of the public interest disclosure provisions in the Employment Rights Act 1996. I tried to explain to him the need for a cause or link between the disclosure and the detriment or dismissal.

16 In conclusion, the complaints under Section 47B and Section 103A Employment Rights Act 1996 are struck out.

17 Whether the Claimant reasonably believed the disclosure was in the public interest is a fact-sensitive question: see for example *Morgan* at paragraph 19. I would not have struck out or found that there was little reasonable prospect of success on that argument.

C. Age Discrimination

18 In respect of the allegation of age discrimination, the Respondent contended that the claim was a construct, because the Claimant could not bring an unfair dismissal claim. It is impossible to decide such a broad criticism without hearing all the evidence after a full merits hearing.

19 Using the list of issues as a tool to identify individual complaints of discrimination, I have reached the following conclusions.

Issue 4.6(a)

20 Putting the Claimant's case at its highest the Respondent refused his request for equal opportunities training. The Employment Tribunal at the full merits hearing must decide the reason why and whether this is tainted by direct age discrimination. There is a central factual dispute as to the reason. Applying *Anyanwu* and the authorities referred to I have decided not to strike out this allegation.

21 However, there are factors which led me to conclude that this complaint has little reasonable prospects of success. These are:

- 21.1 The Claimant is in a similar age category to the alleged comparators. All are in their 20s. It is unlikely, albeit not implausible, that the difference in treatment is because of the relatively similar ages.
- 21.2 From the particulars provided by the Claimant, there is no link between the refusal and age. There is simply an allegation of a difference in treatment and a difference in age.
- 21.3 The Claimant alleged that this treatment was because he was older than his comparators. This is inconsistent with his complaints under 4.6c – 4.6j which all relate to him being younger than comparators. It does seem less likely to be both age discrimination due to being older in some instances and younger in others.

Issue 4.6b

22 It is common ground that on 21 September 2018 the Claimant was rejected for two permanent roles. Again, the question is the “reason why”. This is a factual issue which is in dispute.

23 The Respondent relies on the scores at page 380 of the bundle to argue that the Claimant scored lower than the two successful candidates. In addition, the Respondent argued that there was no real distinction between the age of the successful candidates and the Claimant, and there was no complaint at the time by the Claimant of age discrimination.

24 I disagreed with the Respondent’s argument. Here the age difference may be significant after the evidence is heard. Both successful candidates were on the face of their ages quite inexperienced (being aged 19 and 22 years), whereas the Claimant had ten years’ experience. Secondly, the question is not what the scores were, but whether the scoring was affected by any direct age discrimination. The Claimant makes the point that there were different assessors for his interview.

25 I concluded that the reason why the Claimant was not successful is the question of evidence which is fact-sensitive. The application to strike out and the application for a deposit order is refused in respect of this allegation. It is not possible to assess the prospects of success until the evidence is heard.

Issue 4.6c

26 Putting the Claimant’s case at its highest, I take it that this statement was made as being a fact.

27 The Respondent argues that I should interpret the statement as referring to a level of seniority not age. The Respondent directed me to Mr Henderson’s statement (page 363). The difficulty for the Respondent is that the meaning of this statement can only be

assessed once the contextual facts are established. This is a matter of evidence.

28 The application for a strike out or a deposit order in respect of this complaint is refused. It is impossible to assess the prospects of success on this allegation without hearing all the evidence about the incident.

Issue 4.6d

29 The allegation as set out in the defined list of issues is based on the Claimant's assertion that the comment is untrue, from which the Employment Tribunal can infer it would not have been said to his comparators.

30 Again, I have not found the allegation has no reasonable prospect of success. The Tribunal must establish the reason why the statement was made and whether any part of the reason is because of age. This is fact-sensitive as is the question of whether the comment is a detriment.

31 However, the allegation of the reason why the statement was said appears to rest on the Claimant's perception, rather than any evidence of a cause or link between the statement and the age of the Claimant. This suggests that the complaint has little reasonable prospect of success.

32 The Claimant stated that he out-performed his comparators, but this does not explain why the comment is untrue, nor why it is related to his age. Furthermore, the comparators are all in their 20s.

33 These factors all point to there being little reasonable prospect of success for this allegation.

Issue 4.6e

34 The Claimant was summarily dismissed on 26 September 2018 at a meeting involving Mr Henderson, Ms Gamblin and Ms Banks. The Claimant alleges that this was because he was younger than the three managers who were all over 30. The Claimant stated today that they were all over 35.

35 I considered this allegation has little reasonable prospect of success for the following reasons:

35.1 There was an absence of any disciplinary process on the face of the Claimant's case. This does therefore suggest less favourable treatment, which is why I rejected the application to strike out.

35.2 There is no logical or comprehensible reason provided by the Claimant as to why this treatment was based on age. Indeed, the respective ages of the Claimant and the three managers are fairly close together. The Claimant is 29 years old. It is less plausible that the less favourable treatment is because of age where the ages are so closely aligned.

Issue 4.6f

36 I accepted the Claimant's submissions that this allegation did not have no reasonable prospect of success. He stated that he was ganged up on by the older managers and that Mr Steel was compromised in terms of his independence. The reason why Mr Steel preferred the management evidence about the meeting on 26 September 2018 is in issue.

37 I have found this complaint to have little reasonable prospect of success, however, for the following reasons:

- 37.1 The relatively small age range between the Claimant and the three managers explained above.
- 37.2 The Claimant admitted that he failed to attend any investigation meeting with Mr Steel, the grievance officer.
- 37.3 On the face of the grievance investigation report, it was comprehensive and Mr Steel made no reference within it to the age of any of the witnesses nor that he knew of the Claimant's age.
- 37.4 The three managers are senior to the Respondent; and even on the Claimant's case at least two of their accounts corroborate each other.

Issue 4.6g

38 The Claimant admitted that he was dismissed on 26 September 2018 and that the three management witnesses referred to were not. The Claimant admitted that he attended the office the following day. The Claimant argued that he had filed a grievance by this time and said the three managers should have been suspended; the fact that he was excluded showed less favourable treatment than the managers received.

39 Bringing the Claimant's case to its highest, the reason why he was excluded is an issue that is fact-sensitive and it is not possible to say that this complaint has no reasonable prospect of success. However, I concluded it has little reasonable prospect of success because:

- 39.1 The Claimant's acceptance that he had been dismissed at the time of his exclusion, whereas the managers had not (there was no suggestion the managers were facing any disciplinary action).
- 39.2 The Claimant relied on the difference in ages and the alleged difference in treatment. He was unable to point to any other factual link with the exclusion nor why that was caused by age.
- 39.3 The Claimant and the managers were in a quite similar age range.

Issue 4.6h and 4.6j (28 September 2018 and 18 October 2018)

40 The Claimant alleged that it was an act of direct age discrimination from Mr Steel to prefer the witness evidence of the three managers. I find that these allegations have little reasonable prospects of success. I repeat the points made in the conclusions under 4.6f above.

41 In addition, the contemporaneous documents showed that Ms Bennell was not a decision-maker but Mr Steel was. I have taken into account the Claimant's point that Ms Bennell was an influence on Mr Steel, with his claim that Mr Henderson wanted this; but none of this is evidenced in any documents that I was referred to and it is the perception of the Claimant. This further led me to conclude that this allegation has little reasonable prospects of success. The application to strike out this particular allegation is refused.

Issue 4.6i

42 There was no dispute that this language was used by Mr Henderson in a letter after the Claimant was dismissed. The Claimant stated that this statement was made to discredit him in future investigations. The Claimant may or may not be correct, but this does not suggest that it was due to him being 29 years old or in a particular younger age range. The Claimant also said that Mr Henderson was retaliating due to the grievance that the Claimant had put in which had raised discrimination as a complaint.

43 I am unable to find that there was no reasonable prospect of success for this allegation. Again, it is a question of evidence whether the words were used because of age to paint the Claimant as an angry younger man.

44 However, I concluded this allegation has little prospect of success due to the following:

44.1. There was no apparent link between the statement and the age of the Claimant. This was on the face of it only the Claimant's perception. The statement was not age-specific. The Claimant was not significantly younger than Mr Henderson.

44.2. The Claimant appears to say that the reason was because of victimisation (retaliation for his grievance) or to discredit him. Both may or may not be correct, but neither would indicate that it was because of age.

D. Sex Discrimination

45 I have concluded that it would not be just to strike out either of the complaints of sex discrimination. The central facts and the "reason why" are in dispute. A trial of the evidence is required.

46 Turning to each of them to consider the question of whether a deposit order should be made.

Issue 4.6i – allegation of direct sex discrimination

47 I find that this complaint has little reasonable prospects of success:

47.1 There is no link between the statement and the sex of the Claimant. They appear unrelated.

47.2 As explained above (at paragraph 44.2), the Claimant's reasons for the treatment today do not indicate the reason as being either sex or age.

Issue 4.6j – allegation of direct sex discrimination

48 The Claimant received the grievance outcome on 19 October 2018. His case is that this is effectively discrimination because it supports three discriminating members of staff. The reason why Mr Steel and/or Ms Bennell preferred the evidence of Mr Henderson is a question of fact requiring oral evidence.

49 I concluded, however, that this complaint has little reasonable prospects of success for the following reasons:

49.1 It seemed unlikely that Mr Henderson's account was preferred to the Claimant because of sex, because both share the same gender.

49.2 Mr Henderson's evidence is corroborated by at least one other manager, which the Claimant admitted.

49.3 The Claimant did not attend an investigation meeting. He did not put his side of events to the investigating manager.

Exercise of discretion

50 I have decided to make deposit orders in respect of the complaints listed at issues 4.6a, d, e, f, g, h, i, j.

51 In respect of issues 4.6i and 4.6j, a deposit order will be made in respect of each of the age and sex discrimination allegations.

52 I have taken into account the Claimant's means. He earns £27,000 per annum in a permanent role. This equates to approximately £1,900 net per month. He shares household bills with his partner. He estimated that, after joint bills and personal bills, he had around £500 or £600 left each month. He stated that he had £21,000 in savings.

53 I concluded that it was appropriate to award £200 for each of the ten allegations, amounting to £2,000. This sum is to be paid within 28 days. At the hearing, the Claimant was told that the deposit would need to be paid within 28 days of the hearing. Given the delay in promulgating this Judgment, I consider it just that the time limit be extended. The Claimant must pay the £2,000 in cleared funds by 4pm on 7 May 2019.

54 I have stood back and considered the proportionality of awarding £2,000 in total given the Claimant's savings, earnings and the amount of his spare money each month. This award is proportionate. It does not impair the Claimant's access to justice and he can afford to pay.

55 I have considered in reaching my figures the maximum that could have been ordered; and noted that I have awarded significantly less than the maximum that could have been awarded for each allegation, which was the figure sought by the Respondent.

56 Also, I have considered that it is proportionate to make an order in this amount because the Respondent's costs of defending those ten allegations, which have little reasonable prospect of success, will be likely to be significantly in excess of £2,000.

Employment Judge Ross

4 April 2019