



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
D

AND

Respondent
E

JUDGMENT MADE AT A HEARING BY CVP

HELD AT Birmingham

ON 1 February 2020

EMPLOYMENT JUDGE Hughes

Representation

For the Claimant: In person

For the Respondent: Mr S Willey, Solicitor

JUDGMENT

- (1) The claimant's indirect sex discrimination claim has no reasonable prospect of success and is hereby struck out.
- (2) The respondent agrees to pay 21 hours accrued but untaken time off in lieu ("TOIL") to the claimant in respect of his unauthorised deductions from wages claim within 21 days.
- (3) I hereby declare that the claimant was entitled to an itemised pay statement for April 2020 and I record that this has been provided.

REASONS

1 This case was listed for a hearing to determine a preliminary point as to whether the claimant's claim that his dismissal amounted to indirect sex discrimination should be struck out on the grounds of no reasonable prospect of success, or to order a deposit on grounds of little reasonable prospect of success. The hearing was also listed to determine the claimant's claim for unauthorised deductions from wages and in respect of failure to provide an itemised pay

statement for April 2020. The hearing was listed during a Preliminary Hearing for case management purposes before Employment Judge Cookson. The Hearing came before me on 1 February 2021. I shall first deal with the unauthorised deductions from wages claim and the claim for an itemised pay statement.

2 When the hearing came before Judge Cookson, the unauthorised deductions from wages claim was identified to be in respect of failure to pay the correct amount to the claimant when he was on suspension on full pay. The respondent provided a witness statement and documentation about suspension pay in the trial bundle – R1, and a table – R2. During the hearing before me, the claimant clarified that he did not dispute the respondent’s calculations, but that he was claiming for 21 hours in respect of untaken TOIL. Mr Willey said that he had only become aware of that claim two working days before the hearing. I had no documentation about that claim, but the claimant had a diary with him (which neither I nor Mr Willey saw) from which he provided dates when the TOIL was said to have accrued ranging from 7 February 2019 to 15 November 2019. The respondent’s initial position was that the claim was out of time. The claimant disputed that because he said the TOIL could have been taken at any point up to the termination of his employment (21 April 2020) which, if correct, would mean the claim was in time. The respondent took instructions and agreed to pay the 21 hours claimed within 21 days because it no longer has access to the TOIL records from the premises where the claimant was based.

3 The claimant also claimed that the respondent failed to provide an itemised pay statement for April 2020. The respondent disputed this, and said it was provided on three occasions. A copy was in bundle R1. Rather than seek to resolve the question of whether the pay statement had been provided at the relevant time, I decided to make a declaration that the claimant was entitled to it, and to record that it has been provided. No pay is due in respect of this matter.

4 I shall now turn to the question of strike out/deposit. After hearing from both parties, I decided to strike out the indirect sex discrimination claim on the grounds that it had no reasonable prospect of success. The claimant asked if he could appeal my decision. I have treated that as a request for written reasons for my decision.

5 The following summary is taken from the Case Management Order of Judge Cookson, and explains her reasons for listing the strike out/deposit hearing in respect of the indirect sex discrimination claim.

“5.1 The claim is about the reason for the termination of the claimant's employment. The claimant was arrested in connection with an allegation of rape made against him by his wife in November 2019. It appears the case is still being investigated and he has not been charged. The claimant was subsequently dismissed and believes this was sex discrimination because

it was connected with the rape allegation. The claimant does not have sufficient service to claim unfair dismissal.

5.2 In its response, the respondent says that the reason for the claimant's dismissal was redundancy. It is significant that the respondent says that even if the Tribunal finds that the allegation of sexual misconduct was the reason or part of the reason for the claimant's dismissal then the respondent will say that he was not dismissed because he was male. He was dismissed because he had been accused of sexual misconduct. The respondent would have acted in the same way if the person involved was female. It was the fact and nature of the allegation which was relevant and not the sex of the alleged perpetrator.

5.3 We spent some time discussing the claimant's case. He says he is not claiming direct discrimination, that is that his dismissal was because of his sex. Rather he says he was the subject of indirect sex discrimination.

5.4 Indirect discrimination occurs when an employer applies a provision, criterion, or practice (PCP) to an employee which is discriminatory in relation to a protected characteristic possessed by that employee. Such discrimination can only occur where the PCP is one that the employer applies, or would apply, to people who do not share the protected characteristic - i.e. the PCP must be of neutral application.

5.5 The claimant says that the PCP in this case is a practice that if an allegation of rape is made, it is investigated by a line manager who makes the decision about the individual's employment, and he says this impacts disproportionately against men because only men will be accused of rape.

5.6 The respondent says that it does not have a specific practice in relation to rape. It has the same practice in relation to any serious criminal accusation and in particular in relation to any allegation of serious sexual misconduct because it looks after vulnerable young people. It denies that there are any statistics or evidence which would suggest a disproportionate impact on men.

5.7 I am aware that the claimant struggled to understand why I raised concerns about whether the claimant's PCP could work both in terms of the PCP itself and also the question of disproportionate impact so I have added some further narrative here.

5.8 For an indirect discrimination claim to succeed each the four elements of s 19(2) EqA must be met, namely: there must be a PCP which the employer applies or would apply to employees who do not share the protected characteristic of the claimant; that PCP must put people who share the claimant's protected characteristic at a particular disadvantage

when compared with those who do not share that characteristic; the claimant must experience that particular disadvantage; and then, the employer must be unable to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

5.9 In Dziedziak v Future Electronics Ltd EAT 0271/11, a claim of indirect sex brought by a woman Mr Justice Langstaff, the then President of EAT, stated: "In this case the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion, or practice, and in that sense the provision as regards the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification".

5.10 Since a claimant bears the burden of proof in respect of the first three conditions in S.19(2), the claimant must identify the PCP capable of supporting his case.

5.11 My concern about the claimant's alleged PCP is illustrated by the case of Taiwo v Olaigbe and anor EAT 0254/12 where the EAT held that 'the mistreatment of migrant workers' did not amount to a valid PCP. The suggested PCP would apply only to migrant workers, so was not on its face a neutral criterion that disproportionately disadvantaged some of those to whom it applied when compared with others to whom it applied. Insofar as the claimant says that the PCP should refer to an allegation of rape "because only men would be charged with rape" the claimant's own assertion of the PCP would not be valid because it would not apply to women.

5.12 In the circumstances I consider that it is appropriate for the preliminary hearing to consider if the claimant's indirect sex discrimination claim has little or no reasonable prospect of success."

6 As can be seen from the above extract from her Order, Judge Cookson set out in some detail her reasons for listing the indirect sex discrimination claim for a determination as to whether to strike out or to order a deposit.

7 For these purposes, the agreed facts are:

7.1 The claimant was employed by the respondent as a Support Worker working with vulnerable young people from 24 October 2018 to 21 April 2020.

7.2 The claimant was suspended on full pay on 21 November 2019 pending an internal disciplinary investigation which had not concluded when he was dismissed.

7.3 On 22 November 2019 the police notified the respondent as follows:

“The information we are providing is that on the 18th November 2019, the subject has been arrested for Rape - which is alleged to have taken place on the 5th November 2019. The subject has been released pending further investigation with the expected end date being given as the 18th February 2019. [R1- 40]”

7.4 The claimant was already on suspension and therefore was not suspended because of it. If the claimant had not been on suspension, he would have been suspended on fully pay pending the outcome of the police investigation because of the nature of the allegation. The respondent did not investigate the allegation.

7.5 The respondent lost the contract to provide services at the place the claimant was based and undertook a redundancy consultation exercise with the claimant and other staff prior to the contract coming to an end.

7.6 The police investigation had not concluded when the respondent terminated the claimant’s employment.

8 For these purposes, the disputed facts are:

8.1 The claimant had been offered redeployment at another site before the respondent knew of the rape allegation.

8.2 During a telephone call in April 2020, the respondent told the claimant he was going to be dismissed rather than offered redeployment because of the outstanding rape allegation.

9 Points 8.1 and 8.2 are the claimant’s case taken at its highest. The respondent does not accept they are correct.

The Law

10 Rules 37 and 39 of the Tribunal Procedure Rules provide me with the power to strike out all or part of a claim or make a deposit order. The relevant parts are as follows:

37 Striking Out

(1) At any stage of the proceedings...on the application of a party, a tribunal may strike out all or part of a claim...on any of the following grounds:-

- (a) that it is scandalous or vexatious or has no reasonable prospect of success
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant... has been scandalous, unreasonable, or vexatious;
- (c) for non-compliance with any of these Rules or with an order of the Tribunal.

39 Deposit orders

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

11 The test to be applied in respect of striking out is not whether the claim is likely to fail but whether it has no reasonable prospect of success such that it cannot be said that the prospects are more than fanciful. It is well established that it is inappropriate to strike out claims which are fact sensitive and where there are central disputes of fact. This applies particularly to discrimination and public interest disclosure claims (Anyanwu v South Bank Student Union and another [2001] UKHL 14; [2001] 1 WLR 638 and Ezsias v North Glamorgan NHS Trust [2007] ICR 1126, CA).

Discussion and Conclusions

12 I have taken the claimant's indirect sex discrimination case at its highest i.e. that 8.1 and 8.2 are proved correct i.e. that he was not offered redeployment because of the rape allegation. That cannot possibly succeed as an indirect sex discrimination claim because the claimant cannot establish it is a neutral PCP. His case is predicated on the argument that only men can be accused of rape and therefore the alleged PCP places men at a disadvantage, and that he, as a male,

was disadvantaged by not being retained. That PCP would not apply to women and is therefore not neutral.

13 I have explained this to the claimant, but he did not accept it.

14 I have suggested that the claimant's case, as put by him, would be of direct sex discrimination i.e. that not being retained because of the unresolved rape matter, was less favourable treatment because he is a man. Judge Cookson also explored that possibility. A direct sex discrimination claim, in my judgement, is arguable in law, but is not without real evidential difficulties. If that had been the claimant's case, it is likely that I would have ordered a deposit on grounds of little reasonable prospect of success. However, the claimant confirmed three times that he is not claiming direct sex discrimination, but indirect.

15 My reasons for concluding that this is not a tenable argument in law are essentially the same as those set out by Judge Cookson when she explained her reasons for listing a strike out/deposit hearing. I infer, from the wording she used, that she did not think the claimant understood the point she was making. I have tried to explain the point again, because indirect discrimination is a very difficult concept, but I fear that I too was unsuccessful. The claimant described the case management discussion as a "breakthrough moment", which rather missed the point.

16 Because the claimant is unrepresented, I canvassed an alternative PCP with the respondent and with him. This was, that when an allegation of serious sexual misconduct is made against a member of staff, they are suspended on full pay, pending the outcome of the police investigation, after which consideration is given as to whether further action by the respondent is necessary. Mr Willey was prepared to concede that the respondent might be said to operate such a PCP. He was prepared to concede, for the purposes of the hearing before me, that such a PCP might disadvantage men more than women if, statistically, men are more likely to be accused of a serious sexual offence. Without seeing statistics, and without wishing to make stereotypical assumptions, it seemed to me the latter proposition was tenable. Mr Willey said that if such a PCP were to be established, then it would evidently be justifiable because of the nature of the respondent's business. That is a fair point. Also, given the (agreed) circumstances, it could be argued that suspension on full pay is the least detrimental course of action, and preserves the status quo.

17 Whilst not accepting my suggested formulation of a PCP, the claimant conceded that it would be a reasonable PCP and that it would be justifiable to be suspended on full pay, but said it would still be unlawful because it disadvantaged him as a man accused of rape because it resulted in his dismissal. Put another way, the claimant's explanation of why my suggested PCP was unlawful relied on direct, not indirect, sex discrimination.

18 The above arguments were canvassed a number of times, with the same result and it is fair to say that the argument became circular.

19 Since the claimant expressly confirmed (more than once and on more than one occasion) that his claim is not for direct sex discrimination, I concluded that the indirect sex discrimination argument was untenable in law, and must be struck out as being totally without merit.

20 In my judgement, the claimant's claim is more properly viewed as one of unfair dismissal, which the Employment Tribunal has no jurisdiction to hear because he has insufficient service.

Signed by Employment Judge Hughes on 4 February 2021