



# EMPLOYMENT TRIBUNALS

## At a Preliminary Hearing

**Claimant:** Miss F Harris

**Respondent:** Rotherham VE Ltd t/a Vision Express

**Heard at:** Midlands (East)

**On:** 16 February 2022

**Before:** Employment Judge R Broughton (sitting alone)

### Representation

**Claimant:** In person

**Respondent:** Ms Barney of Counsel

## JUDGMENT AT AN ATTENDED PRELIMINARY HEARING

The judgment of the Employment Tribunal is that the Respondent's application for a deposit order under Rule 39 is refused.

The Respondent's application under Rule 37(1)(a) for an order striking out the claims is withdrawn.

Issues of jurisdiction in relation to time limits are reserved to the final hearing.

### REASONS

#### The claim

1. The claimant was employed by the respondent, a company that sells corrective glasses and lenses, as an Optical Assistant. She complains of acts of direct sex discrimination and harassment over the period February to December 2019 and then on 19/20 August 2020 by her Line Manager, Mr Wing. For a period in between those dates the claimant was absent from work on furlough.
2. Early conciliation started on 17 November 2020 and ended on 20 November 2020. The claim form was presented on 20 November 2020.

### The Hearing

3. The hearing was listed today to deal with an application by the Respondent to strike out the claims under Rule 37 (1)(c) and/or an application for a deposit order under Rule 39. Today's preliminary hearing was also listed to consider an amendment application by the Claimant and time limits if deemed appropriate by the Judge on a review of the papers and also to consider an amendment application by the Claimant.
4. I was assisted today by a bundle of 127 pages. Some additional documents were produced by the Claimant which have been inserted (pages 128 to 137). The inclusion of those additional documents is not opposed by the Respondent. References to page numbers are to the pages in the bundle.
5. The amendment application is concerned only with revising/ clarifying the dates when the alleged acts of direct discrimination and harassment took place. The Claimant has marked up a Scott schedule which sets out the revised dates of the alleged acts in red (pages 42 to 46). Counsel for the Respondent confirmed that those amendments are not substantial, do not change the nature of the claim and are not opposed.
6. Under Rule 29 the amendment application was granted in accordance with the overriding objective under Rule 2 and applying the guidance in **Selkent Bus Co. Ltd v Moore EAT 2 May 1996**. The outcome of the amendment application and the case management orders for the hearing are addressed in separate case management orders and a separate record of this hearing.

### Respondent's Application: Strike Out/ Deposit Order

#### Statutory Provisions

7. Section 26 of the Equality Act 2020 defines Harassment as;
  - (1) 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.
  - ...
  - (4) In deciding whether conduct has the effect referred to in subsection (1)(b), 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.
  - (5) The relevant protected characteristics are—

sex;

...

8. Direct discrimination under section 13 Equality Act 2010 is defined as;

*(1) 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.*

9. The power of the Employment Tribunal to strike out a claim is provided under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237 which states:

*Striking out (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response 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 or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

*(c) for non-compliance with any of these Rules or with an order of the Tribunal;*

*(d) that it has not been actively pursued;*

*(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

*(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

10. The power to order a deposit is provided by rule 39 which states:

*(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.*

11. A Tribunal may make a deposit order where a specific allegation or argument has little reasonable prospect of success however, this is not a mandatory requirement. Whether to make such an order, even where the Tribunal deem there to be little reasonable prospect of success, remains within the discretion of the Tribunal to determine.

12. The applicable time limit in respect of claims of discrimination is set out in section 123 Equality Act 2010. The relevant provisions provide as follows;

*1) proceedings on a complaint within section 120 may not be brought after the end of—*

*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

...

*(3) For the purposes of this section—*

*(a) conduct extending over a period is to be treated as done at the end of the period;*

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

### **Case law**

13. The EAT in **Hasan v Tesco Stores Ltd UKEAT/0098/16** held that when considering whether to strike out a claim, a tribunal must (a) consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established (first stage); and (b) having identified any established ground(s), the Tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the rule (second stage).
14. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In **Anyanwu v South Bank Students' Union [2001] IRLR 305**, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 24: *“For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.”*

### **Analysis**

15. I was assisted by submissions from both parties and I considered those in full.
16. Counsel for the Respondent informed the Tribunal prior to delivering my judgment orally at the hearing, that it was not pursuing the application for an order to strike out under Rule 37 (1)(a) but was pursuing the application for a deposit order in relation to the last allegations, which relate to events which the Claimant alleges took place on 19 and 20 August 2020.
17. There are a number of events that took place it is alleged in 2019, from the making of inappropriate remarks by Mr Wing in February 2019 to comments made by Mr Wing at a work review and comments about attending work meals in November/ December 2019. The complaints which predate Mr Wing's alleged conduct toward her in respect of the uniform on 19 and 20 August

2020, would be out of time unless those earlier last acts are found to be acts of harassment or direct discrimination which form part of conduct extending over the relevant period up to the last alleged acts in 2020.

**19 and 20 August 2020 allegations – direct discrimination**

18. The complaint which relates to the events of 19 and 20 August 2020, is both a claim of direct discrimination and a claim of harassment and essentially relates to the requirement that the Claimant wear a particular top at work and the pressure she was put under to do so. It does not appear to be in dispute that this was a top that was made by a co-worker, an employee of the Respondent, and which the Claimant complains was uncomfortable and ill-fitting. The top was made from material which the Respondent contends could be washed regularly at high temperature which was more suitable for providing protection against Covid 19. The Claimant complains however that the top was not only uncomfortable, it also revealed her bust and her bra because of the cut of it and the material it was made from. She further submits that a male comparator was not required to wear the same uniform.
19. In essence, the Respondent submits that in relation to the direct discrimination claim, the top was a temporary measure and the requirement to wear the top was because of the Covid pandemic and thus was a health and safety measure. It was not *because* of a protected characteristic; i.e. it was not because of the Claimant's sex and therefore cannot amount to direct discrimination.
20. Further, in terms of the Claimant's comparator (a colleague Simon Brown), the Respondent submits that this is not a suitable comparator because his circumstances were materially different in that he was not required to wear a uniform, certainly not the same sort of uniform, because he has a different job from the Claimant's, he is a laboratory technician and, further, the Respondent's position that he was not at work at the relevant time and therefore there was no requirement for him to wear any sort of uniform.
21. The Claimant submits that Simon Brown was normally required to wear the same uniform as she was other than he wore 'the male equivalent' i.e. he wore a shirt rather than a blouse however he was not required to wear a temporary 'homemade' version of the uniform as she and as the other female members of staff were required to wear.
22. Further, the Claimant submits that it is not correct that Simon Brown was not at work during the relevant period and referred to an email from HR which stated that Mr Brown had returned on flexible furlough in June 2020 and that flexible furlough arrangements had finished at the end of July 2020. As the Tribunal understands it, the Claimant does not seek to argue that the reason for requiring her to wear the top was not because of health and safety reasons, although she questions the benefit of it. Her complaint is that men were simply not treated the same, they were not required to wear a 'temporary homemade' uniform. She refers to Mr Wing not wanting to pay for new uniforms.
23. Taking the Claimant's case at its highest as I am required to do, there appears (and I have not been taken to any documents which would seem to indicate

otherwise), that there was a difference in treatment in terms of the uniforms that the Claimant and her male comparator were required to wear and there is a difference in sex between the Claimant and her male comparator. In terms of the comparator, taking again the Claimant's case at its' highest, it would appear that her comparator is an appropriate comparator and that their circumstances were not materially different.

24. The Equality and Human Rights Commissions Code of Practice (ECHR) on the Equality Act 2010 recognises that it is not necessarily direct discrimination for a dress code to stipulate different standards of dress for men and women, providing equivalent standard is required of both sexes. For example, it goes on to state that the dress code might legitimately stipulate that men must wear a collar and tie and all women must wear a blouse. However, the code goes on to warn that it might be direct discrimination if the dress code requires a different overall standard of dress for men and women, for example requiring men to dress in a professional and business-like way but allowing women to wear more casual clothes. It also goes on to provide that it may be direct discrimination if the dress code is similar for both sexes but applied more strictly to men than women.
25. In *Hutcheson v Graham and Morton Ltd* ET Case No. s/626/83 the complainant was a senior female employee who was required to wear a nylon overall while men were allowed to wear lounge suits. The Tribunal held that she had suffered a detriment because the uniform was uncomfortable and it went on to find it indicated a lower status than that of male employees.
26. In *Wilson v Royal Bank of Scotland* ET Case No. 27869/86, the Bank introduced a requirement that men had to wear a suit instead of a uniform. The employee refused to wear his suit and claimed sex discrimination because the women could wear what they liked provided they were smartly dressed. The Tribunal held that the employee suffered no detriment.

#### **19 and 20 August 2020 allegations - harassment**

27. The Respondent submits that the Claimant never made the Respondent aware that her undergarments were revealed by the wearing of the top. She referred to the top being uncomfortable but not revealing and hence there is little reasonable prospect of the Claimant succeeding in a harassment claim.
28. The Claimant, however, submits that she did make the Respondent aware. She complains that in a meeting with Mr Wing and a colleague called Mel (who made the top she was required to wear), she had set out in detail that her bra and bust area under her armpit were visible because the material the top was made from was stiff and ill-fitting but that she was told in an aggressive manner by Mr Wing that she must wear it regardless.
29. Taking her case at its highest, was the conduct unwanted? The Claimant complains that it was; that she did not want to wear the uncomfortable revealing top. Was it related to a relevant characteristic? The Claimant complains that it was because it revealed her bust and bra and only women were required to wear it. Did it violate her dignity or create the sort working environment set out under section 26? The Claimant's description of how it made her feel indicates that there are reasonable prospects of such a finding,

again taking her claim at its highest. A Tribunal will need to determine whether or not it was reasonable for it to have that effect however I do not consider that the prospects of finding that it did have that effect have little reasonable prospect of success.

30. I have also taken into consideration in relation to the harassment complaints, the ECHR Code, which indicates that a one-off act may be serious enough in itself to amount to harassment; it depends on the circumstances including whether the individual has explained the effect the conduct has on them. The Claimant's case, taking it at its highest, is that she had made it clear in the meeting on 20 August how she felt but regardless of that she was still put under pressure by Mr Wing to wear the top.
31. in ***Lemes v Spring and Greene Ltd ET Case No.2201943/08*** The employment tribunal found that the change to the dress code was unwanted, was related to sex and had the effect of violating the employee's dignity where the change to the dress code included a low neckline.

### **Conclusion**

32. Taking all the above into account and taking the Claimant's case at its highest, I am not persuaded that the claims have little reasonable prospect of success on the documents and submissions before me today and therefore the application for a deposit order in relation to the allegations and complaints relating to the events of 19 and 20 August 2020, is refused.

### **Time limits**

33. It was agreed today with the parties that whether the claims which relate to events which predate 19 and 20 August 2020 were presented in time, will be reserved to the final hearing when the Tribunal will be in a position to hear all the evidence and make findings of fact and then determine whether the claims amount to conduct extending over a period and if so, which period.

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Employment Judge R Broughton

Date: 7 March 2022

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