EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102113/20 (P)

Held on 30 November 2020

Employment Judge N M Hosie

Miss T Lorraine	**Claimant** **In Person**
University of Aberdeen	**Respondent** **Represented by** **Mr P J Sharp,** **Solicitor and** **Principal** **Employment** **Lawyer**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the various complaints comprising the claim have "no reasonable prospect of success" and the claim is struck out in its entirety, in terms of Rule 37(1)(a), in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

Introduction

The claim

1. The claim comprises complaints of wrongful dismissal and various discrimination complaints in respect of the "protected characteristics" of, disability, race, religion or belief and age. The claim is denied in its entirety by the respondent. I conducted a preliminary hearing to consider case management on 11 August 2020. The Note which I issued following that hearing is referred to for its terms.

Claimants further and better particulars

2. In response to the directions in my Note, the claimant submitted further and better particulars of the complaints comprising her claim, by way of an attachment to her e-mail on 1 September 2020 at 10:22.

Respondent's response

3. The respondent's solicitor responded to the claimant's further and better particulars by way of an attachment to his e-mail on 9 September 2020 at 15:04.

Strike out application by the respondent

4. In his e-mail on 9 September, the respondent's solicitor applied for the claim to be struck out "in terms of Rule 37". By e-mail on 22 September the claimant intimated that she objected to the claim being struck out.

"**Prospects**"

5. It was agreed, having regard to the "overriding objective" in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure"), and the "interests of justice", that I would consider the "prospects" of the various complaints comprising the claim succeeding "on the papers": on the basis of parties' written representations, without the need for a hearing. I would consider whether any of the complaints should be struck out as having, *"no reasonable prospect of success",* in terms of Rule 37(1)(a); or whether the claimant should be required to pay a deposit, as a condition of being allowed to continue to pursue her complaints, on the basis that they have, *"little reasonable prospect of success",* in terms of Rule 39. Both parties intimated that they did not wish to make further representations. Accordingly, I proceeded to consider the issue of the "prospects" of the various complaints succeeding, on the basis of the claim form, response form and the parties' written representations.

Discussion and decision

Employee status/wrongful dismissal complaint

6. It was common ground between the parties that the claimant was "employed" (using that term in a neutral sense) by the respondent from 23 November 2019 to 9 January 2020. An Employment Agency ("AAA") provided her services at the start. The respondent paid the Agency and the Agency paid the claimant. The claimant maintained that she became an employee of the respondent. This was disputed. The respondent maintained that she was, "*engaged as an agency worker*" and that continued throughout the period she worked for them..

7. For the avoidance of doubt, if the claimant is able to establish that she was an employee and that she was wrongfully dismissed, as she was not given notice of the termination of her "employment", she will be entitled to an award

of damages for the respondent's breach of contract. Absent any contractual notice provision, she will be entitled to "statutory notice". As she worked for the respondent for just over one month, that will amount to one week's net pay.

Claimant's submissions

8. The claimant accepted that initially she had been engaged by the respondent through an Agency. However, she maintained that there was a "*binding verbal agreement*" that her status would be that of employee. She maintained that on 25 November 2019, the first day of her "employment", she was advised by "Kenny Bruce", the respondent's HR Systems Manager, that he was going to make her an "*honorary member of staff, to enable IT access along with other things*" and that she accepted this offer verbally. She submitted that:-

"*I was then given my ID and logs **after** the acceptance. I was paid (e-mail confirmation available) under the fact that I was an Honorary HR Assistant – implied contractual agreement, as the oral contract became binding through words and deed.*

There was a common agreement. A new contract had been created and over rode the previous contract as through deed and speech Kenny and I entered a new agreement. This was accepted in good faith, as it was my university where I study. I accepted the role on the basis of it being my university and wanted to help out in the gap year I had taken away from studies."

Respondent's submissions

9. The respondent's solicitor responded as follows:-

"*The expression Honorary member of staff denotes something different from a member of staff. Otherwise the word "Honorary" is rendered redundant and devoid of content. The use of the expression Honorary is therefore consistent with the status of the claimant being something other than an employee.*

All exchanges said to have occurred between the claimant and Mr Bruce are consistent with the claimant being engaged as an agency worker. The claimant required access to the respondent's IT systems to allow the claimant

to perform the work for which she had been engaged in the capacity of agency worker. Access to systems has no bearing on the status of the claimant.

The claimant states that 'the initial (and superseded) AAA contract was for a period over 23 November 2019 – 25 May 2020 with possible extension'; [page 2 under the heading 'Termination of a fixed term contract before its expiry' appearing towards the foot of the page]. Access to sports facilities and the library reflected nothing more than the claimant as an agency worker being extended equivalent benefits to those provided to employees. This is a requirement of the law. The provision of benefits is consistent with the claimant having been engaged as an agency worker and therefore neither constitutes nor implies the existence of a contract of employment."

Claimant's response

10. The claimant responded by way of attachment to her e-mail of 22 September at00:08. She submitted that:-

"*Honorary is not redundant in the context of this case. The statement by the respondent's lawyer does not justify a lack of employment contract, nor member of staff status.*

Additionally, his statement is contrary to HR Policies and Guidelines: available under the official University of Aberdeen Public Website."

Decision

11. It is possible to create a contract of employment by verbal agreement. However, if a contract is not reduced to writing it can be difficult to prove. The only "evidence" before me that the claimant was an employee, rather than an agency worker, was the claimant's assertion that she was advised that she would be an "Honorary member of staff". She maintains that this gave her employee status when she accepted that "offer". The respondent has given a plausible explanation of why she would be so advised, which has nothing to do with offering employee status and there are no other averments whatsoever by the claimant or any documentation to support her contention. There is no written contract of employment; there is no evidence of anything being done to issue her with such a contract in the six weeks, or so, she

worked for the respondent; the claimant was engaged by the respondent through an Employment Agency; the respondent paid the Agency, "for all verified hours worked by the claimant" and the Agency paid the claimant; that arrangement subsisted throughout the period the claimant worked for the respondent, although the claimant maintains she became an employee on the day she started; it was not disputed that on 8 January 2020 the respondent advised the Agency that they no longer wanted the claimant to work for them and that they wanted to *"end the contract".*

12. No other facts are asserted by the claimant to support her contention, other than her own oral evidence and there is a considerable weight of undisputed evidence to the contrary.

13. I am of the view, therefore, that the complaint of "wrongful dismissal", which is predicated on the claimant being an employee, has *"no reasonable prospect of success".* Accordingly, this complaint is struck out in terms of Rule 37 (1) (a).

Discrimination complaints

14. The claimant does not have to be an employee to bring such complaints. Contract workers and agency workers are protected from discrimination under s.41 of the Equality Act 2010 (the "2010 Act"). The respondent did not dispute that the claimant was an agency worker.

Relevant law

Burden of proof

15. Each of the discrimination complaints requires the claimant first to establish facts that amount to a *prima facie* case. S.136 of the Equality Act ("the 2010 Act") provides that, once there are facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place, the

burden of proof "shifts" to the respondent to prove a non-discriminatory explanation.

16. ***Igen Ltd v. Wong*** [2005] IRLR 258 remains one of the leading cases in this area. In that case, the Court of Appeal established that the correct approach for an Employment Tribunal to take to the burden of proof entails a two-stage analysis. At the first stage, the claimant has to prove facts, from which the Tribunal could infer that discrimination has taken place. Only if such facts have been made out to the Tribunal's satisfaction (i.e. on the balance of probabilities), is the second stage engaged, whereby the burden then "shifts" to the respondent to prove – again on the balance of probabilities – that the treatment in question was, "*in no sense whatsoever*", on the protected ground.

17. The Court of Appeal in ***Igen*** explicitly endorses guidelines set down previously by the EAT in ***Barton v. Investec Henderson Crosthwaite Securities Ltd*** [2003] ICR 1205. Although these cases concern the application of s.63A of the Sex Discrimination Act 1976, the guidelines are equally applicable to all other forms of discrimination. They can be summarised as follows:-

- It is for the claimant to prove, on the balance of probabilities, facts from which the Employment Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
- In deciding whether the claimant has proved such facts, it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases, the discrimination will not be intentional but merely based on the assumption that "he or she would not have fitted in".

- The outcome at this stage will usually depend on what inferences it is proper to draw on the primary facts found by the Tribunal.
- The Tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination – it merely has to decide what inferences could be drawn.
- In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.
- Those inferences could include any that it is just and equitable to be drawn from an evasive or equivocal reply to a request for information.
- Inferences may also be drawn from any failure to comply with a relevant Code of Practice.
- When the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent.
- It is then for the respondent to prove that it did not commit or, as the case may be, it is not to be treated as having committed that act.
- To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that it's treatment of the claimant was in no sense whatsoever on the protected ground.
- Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment.
- Since the respondent would generally be in possession of the facts necessary to provide an explanation, the Tribunal would normally expect cogent evidence to discharge that burden – in particular, the Tribunal will need to examine carefully explanations where failure

to deal with the questionnaire procedure and/or any Code of Practice.

18. Further, in **Bahl v. The Law Society and others** [2004] IRLR 799, the Court of Appeal upheld the reasoning of the EAT and emphasised that unreasonable treatment of a claimant cannot in itself lead to an inference of discrimination, even if there is nothing else to explain it. Although that case proceeded under legislation prior to changes made to the burden of proof, the principal is still valid. In other words, unreasonable treatment is not sufficient in itself to raise a *prima facie* case requiring an answer. As the EAT said in ***Bahl*** at para. 89: "*……merely to identify detrimental conduct tells us nothing about whether it has resulted from discriminatory conduct.*"

19. In a more recent case, ***Chief Constable of Kent Constabulary v. Bowler*** UKEAT/0214/16/RN, the EAT held that the incompetent handling of a grievance and a lackadaisical attitude of the investigator was insufficient to give rise to an inference of discrimination. The EAT also reiterated the caution expressed in ***Igen*** against too readily inferring discrimination, merely from unreasonable conduct, where there is no evidence of other discriminatory behaviour.

20. The guidelines in ***Barton*** and other cases clearly require the claimant to establish more than simply the *possibility* of discrimination having occurred before the burden will shift to the employer.

21. That point was further emphasised by LJ Mummery, giving the Judgment of the Court of Appeal in ***Madarassy v. Nomura International Plc*** [2007] IRLR 246: -

"*For a prima facie case to be established it will not be enough for a claimant simply to prove facts from which the Tribunal could conclude that the respondent could have committed an act of discrimination. Such facts would only indicate a possibility of discrimination nothing more. So the bare facts of a difference in his status and a difference in treatment – for example, in a direct discrimination claim evidence that a female claimant had been treated*

less favourably than a male comparator which would not be sufficient material from which a Tribunal could conclude that, on the balance of probabilities, discrimination had occurred. In order to get to that stage, the claimant would also have to adduce evidence of the reason for the treatment complained of."

Present case

22. For the purposes of determining the issues with which I was concerned in the present case, I took the claimant's averments in her claim form as amended by her further and better particulars and other relevant documentation at their highest value. In other words, I proceeded on the basis that the claimant would be able to prove all the facts she avers. However, she is required to: "*set out with the utmost clarity the primary facts on which an inference of discrimination is drawn*"; and: "*it is the act complained of and no other that the Tribunal must consider and rule upon.*" (***Bahl***). I also remained mindful that the claimant is unrepresented and has no experience of Employment Tribunal proceedings and I had regard to the "overriding objective" in the Rules of Procedure.

23. I deal with each of the discrimination complaints, in turn. In doing so, I was mindful of the following passage from the Judgment of The Honourable Mr Justice Langstaff (President) in ***Chandhok v. Tirkey*** UKEAT/0190/14/KN:-

"16.……
The claim, as set out in the ET1, is not something just to set the ball rolling, as the initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only A useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, not a document but the claims made – meaning, under the Rules of Procedure 2013, the claim is set out in the ET1."

24. So far as the present case was concerned, those comments had to be tempered by the fact that the claimant was unrepresented. The details of the claim in the claim form were in a narrative style with a detailed explanation of factual events. They appeared to be little more than allegations that the claimant had been treated unreasonably and unfairly by the respondent.

However, she did not have the required two years' continuous service to bring an unfair dismissal complaint and it was impossible to identify the complaints she sought to advance and the facts she relied upon in support of each complaint. In light of the fact that the claimant was unrepresented and had no experience of Employment Tribunal proceedings, I afforded her the opportunity of submitting further and better particulars of her claim. These particulars were provided in response to the specific directions I gave the claimant in the Note which I issued following the case management preliminary hearing on 11 August 2020: -

"*I direct her, within 14 days from the date of this Note, to send to the Tribunal, copied to the respondent's solicitor, further and better written particulars. Each complaint should be set out, as concisely as possible but consistent with the requirement to provide "fair notice", under a separate heading with reference to the sections in the 2010 Act relied upon and the facts which support each complaint. Importantly, she should provide details of the basis upon which the less favourable/unfavourable treatment is said to have occurred because of the particular "protected characteristic"*.

25. I also referred the claimant to the Code of Practice on Employment (2011), the burden of proof provisions in s.136 of the 2010 Act and ***Igen***, ***Madarassy*** and ***Hewage v. Grampian Health Board*** [2012] ICR 1054.

Disability discrimination

26. The particulars of this complaint are set out on pages. 4 and 5 of the claimant's further and better particulars and at para 2 in the attachment to her e-mail of 22 September.

27. The respondent does not accept that the claimant was disabled, in terms of s.6 of the 2010 Act, but that is not an issue I can determine "on the papers". The issue can only properly be determined by hearing evidence from the claimant along with any relevant medical evidence, at a preliminary hearing.

28. The claimant has made the following averments in support of this complaint:-

"*Work was a place I enjoyed as it took me away from my depression. I believed I would be around positive people, team like spirit. Very early on, I saw many student interns applied and received contracts (which I drafted) two of which had depression and anxiety listed too. A physically disabled colleague worked with his care support assistant. It was comforting to see what I thought to be a considerate and caring place. But unfortunately, I was met with this discrimination harassment campaign led by Caroline which induced (and now significantly worsened) my mental health.*"

29. These averments and subsequent comment from the claimant at para 2 in the attachment to her e-mail of 22 September, are wholly lacking in specification. She has also failed to comply with my clear directions. She has failed to provide "fair notice" of this complaint.

30. Even if the claimant was able to prove the facts she avers, this will not establish a *prima facie* case, requiring an answer, as she is required to do in terms of the burden of proof provisions in the 2010 Act. All that appears to be averred is unreasonable treatment.

31. This complaint has no reasonable prospect of success. It is struck out, therefore, in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure.

Race discrimination

32. The particulars of this complaint are set out on pages 5 and 6 of the claimant's further and better particulars and at para. 3 in the attachment to her e-mail of 22 September.

33. The claimant has made the following averments in support of this complaint:-

"*I am a British citizen with African & mixed heritage born parents. Caroline discriminated against me because of my British nationality (by questioning the validity of my nationality in a conversation overhead by the rest of the team), my African ethnic origins (during that same conversation – for this conversation when the "people like you" and separatist language began to be used by her) and because of my profound melanin skin pigmentation) the way Kenny treated me when dismissing me, as explained in my ET1 form.*

Under the Equality Act 2010, race includes colour, ethnic or national origin, and nationality. Employers must not discriminate because of any of these protected characteristics.

Unfortunately the respondent did, they did so during their apparent disturbance of cleaning (accepted onus of burden on Jil) by blaming me and Kenny by saying this HR job was not for me as I was more suited to being a cleaner. Caroline's constant reference to "people like me" and her making me feel unworthy of my nationality because I call London and Africa home. All without knowing that I also call the countries of my white heritage home too. She did so in a publicly humiliating manner during the work day. It is against the law if someone discriminates against you because they think you belong to a certain racial group. Even though you do not. This is called ***discrimination by perception****. Caroline did this without knowing that I also have white blood in me due to my mother's family line. "People like you" – when me and her are more like than what she thinks.*

Direct discrimination

It is direct race discrimination to treat someone less favourably than someone else would be treated in the same circumstances, because of race. Progressive refusal to train me further as "people like me". Being the only one to blame for the cleaning disturbance when everyone took part and ***accepted onus of burden on Jil****.*

Harassment

Racial harassment is ***not limited to overly insulting remarks or behaviour****. They can include any unwanted conduct related to an employee's race especially when it violates their dignity or creates an offensive environment – Caroline did this when going to Tesco and smoking breaks with the ladies that ended up treating me badly. Feeling isolated, as on their return they had cold interactions with me, dismissive mannerisms towards me. No longer saying good morning when I came in. Feeling like I didn't belong to the team anymore. A member of staff gave me a written message to say 'strong and keep going'. Any conduct based on a "protected characteristic" (such as age) makes someone feel intimated, shamed, upset or humiliated – is harassment. This only got most when I managed to see Kenny in 2019.*

Victimisation

This is when you are treated badly, because you have made a complaint of race related discrimination under the Equality Act. Caroline mocked and teased my expressed cries for help to Mr Bruce, patronisingly saying I 'did not have a breakdown'. Coupled with their cruel comment about my headscarf and degrading ethnically stereotypical comments on the day I was dismissed, meant that the University had broken codes DRB and RRD from the Employment Tribunal jurisdiction codes."

34. The claimant provided further details at para. 3 of her attachment to her e-mail of 22 September 2019. However, she still failed to comply with my directions. She failed to provide "fair notice" of this claim.

35. The claim is wholly lacking in specification and the claimant has failed to *"provide details of the basis upon which the less favourable/unfavourable treatment is said to have occurred because of the claimant's race".* All that appears to be averred is unreasonable treatment.

36. This complaint has no reasonable prospect of success. It is struck out, therefore, in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure.

Religious belief discrimination

37. The particulars of this complaint are set out on pages 6 and 7 of the claimant's further and better particulars and at para. 4 in the attachment to her e-mail of 22 September.

38. The claimant has made the following averments in support of this complaint:-

"*I belong to the Abrahamic Religion. One of which I follow and believe. It does not infringe my ability to be a good citizen. On the contrary, it enhances my ability to be a good citizen. Good manners; politeness, respecting your elders, charity and almsgiving – to a list a few. The Human Rights Act 1998 gives a person a right to hold a religion or belief, and change their religion or belief. It also gives them a right to show that belief, but not if that display or expression interferes with public safety, public order, health or morals, or the rights and freedoms of others.*

……...

As expressed in my ET1 Form and throughout this document: my headscarf, way of modest dressing were all the subject of gossip and harassment led by Caroline and then later enabled and practiced by Kenny."

39. Once again, the claimant has failed to comply with my directions. She has failed to provide "fair notice" of the complaints she wishes to advance in

respect of this protected characteristic. The submission by the respondent's solicitor that "*in what manner these things are said to be a manifestation of the claimant's religion is unclear*" is well-founded. These complaints are wholly lacking in specification. Even if the claimant proves all the facts she avers she will not establish a *prima facie* case requiring an answer, as she is required to do in terms of the burden of proof provisions.

40. This complaint has no reasonable prospect of success. It is struck out, therefore, in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure.

Age discrimination

41. The particulars of this complaint are set out on pages 7 and 8 of the claimant's further and better particulars and at para. 5 in the attachment to her e-mail of 22 September.

42. The only averments relied upon in support of this complaint, which I can discern are:-

"*Being blamed for the noise and disturbance on the last day despite the other lady (Jil) confirming publicly that she was responsible……*

I was denied further training and support by Caroline on the basis that I was only just "the kid" to quote her words directly. This alongside my protected characteristics of religion and race (example – when she referred to me as "people like me" *and when she pointed at my headscarf whilst saying that I was "hard headed" implying my scarf was the cause) played the primary and principle part in her refusal to help or train me further."*

43. Once again, the claimant has failed to comply with my directions. She has failed to, *"set out each of the complaints under a separate heading with reference to the sections in the 2010 Act relied upon and the facts which support each complaint"*, as I directed her to do. She has failed to, *"provide details of the basis upon which the less favourable/unfavourable treatment is said to have occurred because of age",* as I directed her to do.

44. She has failed to provide "fair notice" of the complaints she wishes to advance under this section. The averments in support of this complaint are wholly lacking in specification. She has failed, for example, to make any reference to the particular age group upon which she relies.

45. Even if the claimant is able to prove the facts she avers she will not be able to establish a *prima facie* case, requiring an answer, as she is required to do in terms of the burden of proof provisions.

46. This complaint has no reasonable prospect of success. It is struck out, therefore, in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure.

47. I arrived at the view, therefore, and I am bound to say without a great deal of difficulty, that the claim should be struck out in its entirety. The various complaints advanced in respect of a number of different protected characteristics, without specifying why the claimant had been treated in a particular way because of a particular protected characteristic, suggested a somewhat scattergun approach.

48. Finally, I also wish to record, for the sake of completeness, I was satisfied, that, by and large, the submissions by the respondent's solicitor in support of his application to have the claim struck out were well-founded.

Employment Judge **Nick Hosie**
Date of Judgement **17 December 2020**
Date sent to parties **17 December 2020**