



EMPLOYMENT TRIBUNALS

Claimant: Mr C Wilde

Respondent: OCS Group Limited

Heard at: Manchester (remotely, by CVP)

On: 27 July 2021

Before: Employment Judge Whittaker

REPRESENTATION:

Claimant: In person

Respondent: Ms Niaz-Dickinson, Counsel

JUDGMENT

The respondent's application for an order pursuant to rule 39 of the Rules of Procedure Regulations 2013 that the claimant should be ordered to pay a deposit as a condition of continuing to advance claims of discrimination because they have little reasonable prospects of success is refused and dismissed.

REASONS

1. When making the application on behalf of the respondent, counsel for the respondent indicated that the "primary reason" why the Tribunal should make a deposit order against the claimant was that although the claimant had not been offered shifts as a cleaner at the Manchester Central Exhibition Centre between 13 November 2019 and 27 February 2020, the claimant had, on the evidence of the respondent, nevertheless been offered alternative work as a cleaner at the Arndale Centre. Counsel argued that the contract of employment between the claimant and the respondent was a zero hours contract, and that on that basis the respondent was not in any event under any legal obligation to provide any work to the claimant. Counsel also suggested that if the respondent was genuinely prepared to discriminate against the claimant on the grounds of his disability, that they would simply have not offered the claimant any work at all anywhere.. Counsel went on to further suggest that the

decision which had been taken about whether to offer the claimant work and where to offer the claimant work had not been taken by employees of the respondent company but had been taken by the managers at the place of work-the clients of the Respondent-where the claimant had been engaged. However, in reflection counsel withdrew that allegation once both the Tribunal and counsel had heard evidence from the claimant as to the manner in which instructions were given to him about the availability of days and hours of work.

2. The Tribunal concluded from evidence which was given by the claimant that the alternative work which the claimant had found temporarily to work as a cleaner at the Arndale Centre in Manchester had not been obtained or offered to him as a result of any efforts of the managers responsible for the cleaning contract at the Manchester Central Exhibition Centre. The Tribunal was of the view that it was directly as a result of the personal efforts and personal approaches which the claimant had made to alternative managers who were responsible for the Arndale Centre contract that the claimant had been offered work there. The Tribunal did not believe therefore that the respondent could rely on an argument that if it intended to discriminate against the claimant then the respondent, as a whole, would have ensured that no work was offered to the claimant. The Tribunal will be required to look at the steps taken by the particular managers named by the claimant and not at the respondent as a whole especially in view of the size of that company. All the evidence pointed to the fact that the claimant was offered alternative work at the Arndale Centre during the relevant period in any event but by different managers than those the claimant complains about.

3. So far as the claimant being engaged under a zero hours contract is concerned, that did not appear to the Employment Tribunal to be a relevant argument. The claimant was alleging that he had actually been offered hours and shifts of work up to and including 13 November and he had therefore attended for work on 13 November in accordance with that schedule. He alleges that Mr Furlough and/or Mr Scrimbarella cancelled those agreed shifts and then ensured that the claimant was not offered any further work at the Manchester Central Exhibition Centre up to and including 27 February. The respondent does not allege that there was no cleaning work available at that venue. They appear to accept that work was available for other employees. The claimant says that he was excluded from that work by the actions of Mr Furlough and/or Mr Scrimbarella. The fact that the claimant was therefore engaged under a zero hours contract appeared to the claimant to be irrelevant and an argument of no real assistance to the respondent.

4. At a separate preliminary hearing by way of case management which I conducted in November as the Employment Judge, I sought, during lengthy discussions with the claimant who at all times was unrepresented, to identify the nature of the claims which he was pursuing and to seek to identify how the facts relied upon by the claimant could be fitted within the language of one or more sections of the Equality Act 2010. The claimant at that hearing indicated that another employee by the name of Ero had been offered work and that the claimant had not, and he made it clear to me that he believed that the reason for the difference in treatment was the disability of the claimant. From discussions today it also transpires that there were other employees who were engaged at the Manchester Central Exhibition Centre as cleaners during the relevant dates that the claimant complains of, and it appears therefore that they are equally relevant comparators. An order has now been made

for a schedule of the employees and the hours that they worked at that venue to be prepared and filed by the respondent. It seems therefore appropriate that the claimant is entitled to compare himself to each of those employees who were offered work during the period between 13 November 2019 and 27 February 2020 if the claimant is able to say that they were **not** disabled and yet the claimant was disabled. The names and details of those comparators will be available to the Tribunal at the final hearing once the schedule which has been ordered has been prepared by the respondent.

5. In my opinion it did not seem to be disputed by the respondent that the claimant was not offered work in the period that he complains about. It will be for the Tribunal to decide the reason why he was not offered work during that period when it appears that others were. In my opinion that will therefore require the Tribunal to examine the schedule of employees and hours worked during the period in question, and then to examine carefully the explanations which are offered by the respondent as to why those employees were offered work and the claimant was not. I believe that to be something which can only be properly decided once the Tribunal has at the final hearing heard from the relevant witnesses, most particularly Mr Furlough and Mr Scrimbarella, and examined the schedule of employees which is to be prepared by the respondent and considered the reasons which are put forward by the respondent as to why they were offered work and why the claimant was not.

6. I also took into account that the claimant alleges that there is in existence an email which the respondent said to the claimant on the 13 November 2019 had been prepared and sent by the respondent to the claimant cancelling the shifts of work which had earlier been offered to the claimant and which he says he had accepted. In my opinion the Tribunal will need to carefully consider the wording of that email. If the allegation of the claimant about cancellation of agreed shifts is proven then the Tribunal will need to carefully examine the reasons which are put forward for that cancellation. That can only occur after a Tribunal has seen all the relevant evidence, both by reference to documentation and the evidence of relevant witnesses. Orders have been made for the preparation of a bundle and for the preparation and exchange of relevant witness statements.

7. The claimant today made it clear that in his opinion it was his behaviour in the presence of Mr Furlough when raising issues about the working standards of other employees that led Mr Furlough to complain to his superior, Mr Scrimbarella. The claimant says that his behaviour, which he may have exhibited towards and was in the presence of Mr Furlough, was related to his disability of ADHD. He also says that he believes that his behaviour, to which he believes Mr Furlough took objection, was the reason why Mr Furlough, in conjunction with Mr Scrimbarella, cancelled shifts which had been made available to the claimant as from 13 November, and then both managers agreed to ensure that up to and including 27 February 2020 the claimant was not offered any further shifts as a cleaner at the Manchester Central Exhibition Centre. Again, in the opinion of the Tribunal, it is only possible to ascertain the strength and/or weaknesses of the claimant's arguments and those of the respondent by a Tribunal hearing all the evidence and making relevant findings of fact.

8. In all the circumstances, therefore, the Tribunal was not able or prepared to come to any conclusion that the claims of the claimant had little prospects of success at the final hearing which has now been set for April 2022. In all the circumstances,

therefore, the Tribunal refused to order the claimant to pay a deposit as a condition of continuing with his claims of disability discrimination.

Employment Judge Whittaker
Date: 28th July 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 July 2021

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