



EMPLOYMENT TRIBUNALS

Claimant: Miss M Cavanagh

Respondents: 1. Northern Care Alliance NHS Foundation Trust
2. Greater Manchester Mental Health NHS Foundation Trust

HELD AT: Manchester

ON: 27 May 2022 and 9
June 2022 (in
chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: In person

First Respondent: Mr J Upton, solicitor

Second Respondent: Mr A Sugarman, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims of direct race discrimination, harassment and victimisation against the first and second respondents are not struck out.
2. No deposit orders are made as a condition of proceeding with any allegation.
3. The complaints of sex discrimination are dismissed on withdrawal by the claimant.
4. The complaint of constructive unfair dismissal against the second respondent only is dismissed on withdrawal by the claimant. The complaint of constructive unfair dismissal against the first respondent will proceed to the final hearing.

REASONS

Issues

1. This was a preliminary hearing to determine the respondents' applications to strike out the claimant claims of direct race discrimination, harassment and victimisation against them on the grounds that they had no reasonable prospect of success, to include consideration of whether the claimant had no reasonable prospect of success in establishing that the tribunal has jurisdiction to consider the complaints, having regard to the relevant time limits. In the written application dated 9 March 2022, the second respondent had also argued that the claim should be struck out on the grounds that they were scandalous or vexatious but the second respondent did not rely on these grounds at the hearing.

2. The hearing was also to consider whether, in the alternative, the claimant should be ordered to pay one or more deposits as a condition of continuing with any specific allegation or argument on the grounds that it had little reasonable prospect of success.

3. The hearing was not listed to consider whether the tribunal did have jurisdiction to consider the complaints, having regard to the relevant time limits.

4. The hearing had been listed to consider the application made by the second respondent. The first respondent subsequently also made an application for a strike out or deposit order. The parties were informed prior to the hearing that this hearing would deal with the first respondent's application if there was time.

5. Following discussion with the parties at the outset of the hearing, and with the agreement of the parties, I decided to hear both applications at the same time. If time permitted, after hearing submissions from all parties on the applications, I would hear evidence from the claimant as to her financial means. It appeared likely from the outset that I would not have time to make and deliver judgement but would have to reserve my decision. In the event, there was not sufficient time to hear evidence as to financial means. I informed the parties that, if I was minded to order the payment of a deposit, subject to financial means, I would invite the claimant to provide information in writing about her financial means and give the respondent an opportunity to comment on this in writing, with the possibility of a further hearing to hear oral evidence from the claimant as to financial means if the parties requested this and/or I considered this appropriate.

6. The preliminary hearing had also been listed with the intention that, at this hearing, the judge would case manage the case to a final hearing. Since time did not permit me to make and deliver a decision on the strike out and deposit applications and then make case management orders, I informed the parties that I would make case management orders on paper after I had made my reserved decision. These orders are set out in a separate document.

7. I had an electronic bundle of documents of 188 pages. Both respondents had prepared written skeleton arguments. I read the skeleton arguments and documents in the bundle which the parties asked me to read, before hearing oral submissions

from both respondents and the claimant. The documents I read included the respondents' applications (second respondent's application dated 9 March 2022 and first respondent's application dated 12 April 2022) and written responses prepared by the claimant to these applications (dated 18 March 2022 in respect of the second respondent's application and 18 April 2022 in respect of the first respondent's application).

8. I was also provided with a copy of the claimant's email to David Chambers, copied to Jayne Smith, dated 18 March 2020, which is one of the alleged protected acts relied upon.

The claimant's claims

9. The claimant's claims had been clarified at two previous private preliminary hearings. The claimant agreed that all her complaints were set out in the table included in the record of the preliminary hearing held on 15 December 2021. References to issue numbers in these reasons are to the numbered complaints in this table.

10. The complaints in relation to which the applications were made, are the claimant's complaints under the Equality Act 2010 of direct race discrimination (section 13), harassment related to race (section 26) and victimisation (section 27). The claimant confirmed that she is not bringing any complaints of sex discrimination and reference to this in her claim form was a mistake. The claimant withdrew the complaints of sex discrimination and this judgment dismisses those complaints.

11. The claimant also brings a complaint of constructive unfair dismissal against the first respondent. This was not the subject of any application at this hearing and was to be determined at a final hearing whatever the outcome of the applications in relation to the Equality Act complaints. The claimant agreed that her employer was the first respondent and withdrew the complaint of constructive unfair dismissal against the second respondent. This judgment dismisses the complaint of constructive unfair dismissal as against the second respondent.

12. The claimant is a social worker. She was employed by the first respondent but was based in a service under the provision of the second respondent and was managed by the second respondent.

13. The complaints of discrimination begin with an incident in March 2020 when the claimant alleges that a white colleague, DD, shouted at her following a challenge about COVID safety. The claimant complained to her manager. The claimant alleges that DD's treatment of her and the way the respondents dealt with her following the claimant's complaint, including treatment in relation to a formal grievance presented in August 2020, were acts of direct race discrimination, harassment and victimisation.

The Law

14. The relevant law was not in dispute. Rule 37 of the Employment Tribunals' Rules of Procedure 2013 provide that all or part of the claim may be struck out on the grounds that it has no reasonable prospect of success. Rule 39 allows the Tribunal,

if it considers that any specific allegation or argument in a claim has little reasonable prospect of success, to make an order requiring the claimant to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument. Rule 39(2) provides that 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.

15. For the purposes of making an assessment of the merits of the claims, the claimant's claims are to be taken at their highest where there are factual disputes i.e. on the assumption that the claimant will be able to prove the facts on which she relies.

16. Case law recognises that proving discrimination may often depend on the drawing of inferences and that there may be unconscious motivation for discrimination. The threshold for striking out discrimination cases is high. Discrimination cases should not be struck out for having no reasonable prospect of success, except in the plainest and most obvious cases: **Anyanwu v South Bank Students Union and South Bank University** [2001] IRLR 305.

The relevant time line

17. The last pleaded act of discrimination against both respondents is the complaint identified at number 18 of the table: failure to provide support during sick leave. The claimant began sick leave on 27 July 2020. The claimant alleges that the lack of support continued until her resignation on 20 August 2021. The table identifies John Fenby, Head of Social Work and an employee of the first respondent. However, the claimant, in her submissions, explained that he was tasked to work with Emma Hinchcliffe, an employee of the second respondent, to produce a return to work plan for the claimant and that Emma Hinchcliffe was tasked with overseeing the claimant's long term sickness, including having monthly meetings (which did not happen). The claimant alleges that John Fenby and Emma Hinchcliffe were supposed to support the claimant jointly, but failed to do so.

18. Aside from the complaint at number 18, the last specific pleaded act of discrimination against the first respondent is in relation to the grievance stage 3 outcome, on 10 May 2021 and the last specific pleaded act of discrimination against the second respondent is, on 12 October 2020, Emma Hinchcliffe suggesting the claimant look for alternative employment.

19. Notification to ACAS in relation to the first respondent was made on 11 June 2021, with the early conciliation certificate being issued on 23 July 2021.

20. Notification to ACAS in relation to the second respondent was made on 13 August 2021, with the early conciliation certificate being issued on 16 August 2021.

21. The claim against both respondents was presented on 21 August 2021.

22. Disclosure of documents had not taken place at the date of this hearing. The claimant has obtained some documents through making a Subject Access Request but told me that there were ongoing issues in relation to her requests and the Information Commissioner was involved.

The Second Respondent's Application

23. Mr Sugarman produced a written skeleton argument. The argument that the claims had no or little reasonable prospect of success was on the basis:

23.1. The claims are out of time;

23.2. the claimant has advanced no basis on which the tribunal could probably conclude that the overwhelming majority of the treatment she complains about, and certainly the most recent treatment, was because of her race.

24. In addition, in relation to complaints of victimisation, Mr Sugarman submitted that the email dated 18 March 2020 was not a protected act.

25. I do not seek to summarise the remainder of the skeleton argument, which can be read if required.

26. Mr Sugarman also made oral submissions supplementing the skeleton argument.

27. Mr Sugarman submitted that the claims against the second respondent were very significantly out of time. In relation to number 18, he submitted that it was an allegation of a failure to do something so section 123(4) applied; time must have started to run shortly after sick leave began and the claimant was aware that things were not provided which she said should be provided. In the alternative, if this was a continuing act flowing into the in time period, he submitted that there was no reasonable prospect of arguing that earlier acts were part of a continuing act with this act. Later acts were very different to earlier acts; there was no continuum of personnel and themes. He submitted that there was no reasonable prospect or little reasonable prospect of time being extended. Complaints about earlier matters were very significantly out of time. The claimant had not provided a good reason for not complaining in time. She waited for the grievance to be concluded. This was concluded in May 2021 but she did not contact ACAS until three months afterwards. The ongoing grievance was a relevant factor but likely prejudice to the respondent had to be balanced against this. It was likely that recollections would decay. The second respondent was being dragged into a 10 day trial by some stale allegations against it.

28. Mr Sugarman submitted that the claims the claimant was advancing would fail; she was asserting a difference in status without a causative link. Mr Sugarman submitted that the height of the claimant's case was in relation to the very earliest allegations. At paragraph 10.6 of the claim form, it appeared the claimant was asking the tribunal to draw an inference of a connection to race because DD referred to the claimant as having intimidated her, which the claimant says is because of her race and size. Even if there is some link, DD is not an employee of the second respondent. The claimant said she was moved and DD was not. They are not of the same race. This is an assertion where there is an alleged difference of treatment and status but it does not necessarily establish a causative link. Mr Sugarman submitted that none of the claims have merit.

29. In relation to complaints of victimisation, Mr Sugarman made a discrete point, arguing that the claimant had no reasonable prospect of success or little reasonable

prospect of success in establishing that the email of 18 March 2020 was a protected act. This is a complaint about treatment but not of a matter within the Equality Act. If there was no prospect of it being held to be a protected act, this would cause a number of the victimisation complaints to fall. He submitted that the email is said to reflect the oral complaint of the same day. Complaint number 17 also relied as a protected act on the grievance of 3 August 2020. Mr Sugarman acknowledged that the second respondent was not in a position to say that there was no prospect of that being considered a protected act. However, the complaint would fail for lack of a connection with race or a protected act.

30. Mr Sugarman submitted that the claim should be struck out or deposit orders made, one for each allegation with little prospect of success, subject to the claimant's means.

The first respondent's submissions

31. Mr Upton also provided a written skeleton argument. Mr Upton submitted that the core of the case was issues 4-7. He acknowledged that the tribunal might determine the actions of the second respondent at issues 4 to 7 provide the claimant with a limited but arguable case. In essence, the claimant claims that DD was the aggressor in an argument, but the claimant was subject to the disciplinary process and required to move work location whilst investigation was ongoing. The claimant was also allegedly referred to as intimidating. Mr Upton acknowledged that, if this was the case, the first respondent would struggle to argue that the actions of its staff, as set out in issues eight and nine do not also provide the claimant with an arguable case as they appear to flow from issues 4 to 7, albeit they involve managers employed by separate organisations. He submitted that if the tribunal decided issues 4 to 7 do not give rise to an arguable case, the remainder of the discrimination case must be struck out on the same basis. He submitted that it was highly improbable that issues 18 to 30 had anything to do with the claimant's race.

32. Mr Upton submitted that time points were only relevant to the first respondent's application if issues 18 to 30 were held to have no reasonable prospect of success. Earlier complaints were significantly out of time. He submitted there was no good reason to extend time.

33. In the alternative to strike out, Mr Upton submitted that the tribunal should consider a deposit order, if the tribunal considered the case to be weak. He submitted that the claim offended the guidance provided by the ET in **Cox v Adecco and others** EAT/0339/19 by not focusing on core allegations but seeking to argue every conceivable point and categorise every incident of perceived poor treatment as a separate allegation of discrimination. Mr Upton submitted the deposit order in relation to some of the weaker allegations would be an appropriate course of action.

34. Mr Upton made brief additional oral submissions.

The claimant's submissions

35. The claimant made oral submissions. She said that as a social worker, her practice was evidence based. She would not have made the claims had she not believed she could evidence them. She said there was a raft of inconsistencies in the

respondent's investigations. No one scrutinised the clear evidence she produced. DD was given the opportunity to speak to her own manager and Emma Hinchcliffe. The claimant said she was not given the opportunity to speak about the DD incident until the stage 2 grievance. The claimant alleged that there are lots of factual inaccuracies in the grounds of resistance. The claimant said she had obtained some of the information provided by DD by means of a subject access request. In an email sent the same day, DD said the claimant was ranting, on the attack, on the bounce, with a bad attitude. The claimant says this was not factual and, in an interview, DD says there was no shouting. There are anomalies and inconsistencies.

36. I asked the claimant to explain why she had not put her claim form in earlier. The claimant said there was a difficulty in knowing which policy to implement since she was employed by the first respondent but managed by the second respondent. The claimant's mother-in-law was unwell and died on 4 July 2020 so there was a period to deal with that. The claimant relied on advice from the respondents as to how to submit a grievance and she lodged a grievance on 3 August 2020. The claimant said she emailed for updates for 2 ½ months but most emails were ignored. People were unsure how to implement their own processes. A grievance hearing finally took place on 17 November 2020 with an outcome on 4 January 2021. The stage 3 hearing took place on 10 March 2021 with an outcome on 10 May 2021. The claimant said she followed the process, guided by the people undertaking those processes. When she got the stage 3 outcome, it was clear to her they had not scrutinised her evidence. She did not accept the outcome but was told that it was final. A friend asked if she had contacted ACAS. She contacted ACAS who told her that she had potential grounds to lodge a claim. She learnt that early conciliation "stopped the clock" and started proceedings once this was concluded.

37. I asked the claimant to explain why she thought various matters were linked to her race. The claimant said that following the incident with DD, DD was given the opportunity to speak to 3 people but the claimant was told, without anyone speaking to her about the incident, that she was to be subjected to disciplinary proceedings. The descriptors DD used about her, such as "angry" were not true. The claimant says she was labelled as an aggressor and perpetrator with no conversation having taken place with her. The claimant said she believed assumptions had been made based on her physical characteristics and race. Ann Brooking, in the stage 2 grievance outcome, commented that it was clear the claimant felt she had been treated differently and discriminated against because of race and that having a heightened appreciation of the importance of unconscious bias was an outcome. Ann Brooking recommended equality and diversity training for all managers. The claimant asked why, if she had not been discriminated against, such training would be a recommendation and why Ann Brooking would say that unconscious bias was an important thing to take from the claimant's grievance.

38. The claimant clarified that issue number 18 applied throughout the whole period of her sick leave until her resignation. John Fenby was tasked to work with Emma Hinchcliffe on a return to work plan for the claimant. He never contacted her. Emma Hinchcliffe did not hold the meetings which were supposed to have been held every four weeks during long-term sickness.

39. The claimant said that the second respondent had admitted to acting illegally in not disclosing material in response to a subject access request. The claimant said

she was having to return to the Information Commissioner's Office because of failures and there is an ongoing SAR process.

Conclusions

40. Discrimination cases should not be struck out for having no reasonable prospect of success, except in the plainest and most obvious cases. I have to consider whether this is one of those cases.

41. The respondents' arguments (leaving aside the discrete point about a protected act and victimisation) relate to the prospects of success on the merits of the complaints and the prospects of success on the jurisdiction issue. I will deal first with the merits since this has an impact on jurisdiction.

42. In relation to the deposit applications, I have to consider whether the complaints have little reasonable prospect of success. I comment on whether this test is met at the same time as considering whether the complaints have no reasonable prospect of success.

Merits

43. I am considering the merits at a stage where I am unable to examine the evidence of each party. If I needed to examine evidence to assess the merits of the claims, then this would not be a suitable case for striking out claims. Discrimination is hard to prove. Often it requires the drawing of inferences based on all the evidence; both documentary and witness evidence.

44. For the purposes of my assessment, I take the facts to be as alleged by the claimant.

45. The origin of this case is the incident between DD and the claimant. Other complaints flow from this: the actions of the respondents following the incident and in relation to the claimant's subsequent grievance. The claimant believes that DD's reaction to her was influenced by the claimant's race, relying on descriptions of the claimant's behaviour (which the claimant says were untrue) which are consistent with stereotypical characterisations of black women's behaviour. The subsequent difference in treatment of DD and the claimant (DD being given an opportunity to give her account of events, whilst the claimant was told she would be subjected to disciplinary action and being told to move to another location and attend the office to work, when she had been working from home) could be attributable to race. I am not in a position to assess whether the claimant will be able to prove facts from which the Tribunal at the final hearing could conclude that this treatment at issues 1-9 was because of race. I conclude, however, that this is not a case where it is clear that the complaints at issues 1-9 have no reasonable prospect of success or little reasonable prospect of success.

46. In relation to issues 10-30, looking at some of the complaints in isolation, it could be difficult to see how the claimant would establish facts from which the Tribunal could conclude that the treatment was less favourable treatment because of race. However, in deciding whether there is discrimination in relation to a particular incident, an overall view may need to be taken and inferences may be drawn which

assist conclusions in relation to a particular complaint, from a wide range of matters including evidence of discrimination in relation to other complaints. I do not consider, therefore, that I can conclude, without consideration of evidence, that the complaints at issues 10-30 have no reasonable prospect of success, or little reasonable prospect of success, based on the merits of the complaints.

Jurisdiction

47. I am not determining whether or not the Tribunal has jurisdiction to consider the claimant's complaints. If the complaints are not struck out, jurisdiction will be an issue considered at the final hearing, when the Tribunal will hear evidence relevant to this. I am considering whether there is no reasonable prospect of success of the Tribunal concluding that it does have jurisdiction.

48. The positions of the two respondents are somewhat different on the jurisdiction issue. It is clear that some of the complaints against the first respondent were presented in time but complaints about earlier matters were presented out of time if the earlier acts do not form part of a continuing act with later acts of discrimination.

49. Only the complaint at issue 18 against the second respondent was arguably presented in time, and complaints about earlier matters were only presented in time if they form part of a continuing act of discrimination with the act at issue 18.

50. I do not consider, on the information available to me, that I can conclude that the claimant has no reasonable prospect of success, or little reasonable prospect of success, in arguing that the complaint at issue 18 was not an act which continued until the claimant's resignation. There are some obstacles to overcome in persuading a Tribunal that all earlier acts formed part of a continuing act of discrimination with this final act (if the final act is found to be an act of discrimination), given the number of different people involved in the various acts alleged. However, on the information available to me, I do not consider I can conclude that the claimant has no, or little, reasonable prospect of success, in the continuing course of conduct argument or, alternatively, in persuading a Tribunal that it would be just and equitable to consider complaints out of time. In relation to the just and equitable argument, the claimant has reasons which she will put forward for the delay in starting proceedings, relating to use of the internal processes, including complications with those processes given the situation of being employed by the first respondent but managed by the second respondent, and the illness and death of her mother in law. The claimant waited longer to start early conciliation about the second respondent. However, she had started early conciliation with the first respondent within a month of the stage 3 outcome. I consider the complaints against the first and second respondent are inextricably linked, given the complexity of the claimant's employment situation, being employed by the first respondent but managed by the second respondent. I consider that the claimant has at least a reasonable prospect of persuading a Tribunal that it would be just and equitable to consider complaints out of time, if the claim in relation to those complaints are found to have been presented out of time.

The protected act point

51. Having read the claimant's email of 18 March 2020, I agree with the second respondent's submission that there is no or little reasonable prospect of the Tribunal

concluding that this was a protected act. There is no requirement to use technical language, but the reader must be able to understand that race discrimination is being alleged. I do not consider that a reader of the email could reasonably understand that the claimant was making a complaint of discrimination under the Equality Act 2010. The complaints of victimisation rely on protected acts on 18 March 2020, said to be a call to Jayne Smith as well as the email, other than issue 17, which relies also on the grievance of August 2020. Mr Sugarman submitted that the email of 18 March is said to reflect the oral complaint of the same day. This may well be correct, but I have not seen any detailed account as to what was said. I cannot assess, therefore, whether Jayne Smith could reasonably have been expected to understand from the phone call that the claimant was making a complaint of race discrimination. I do not, therefore, conclude that there is no, or little, reasonable prospect of success in the claimant succeeding in complaints of victimisation which rely on a phone call on 18 March 2020 as well as the email of that date as the relevant protected acts.

Conclusions on strike out applications

52. I have not concluded that any of the claims have no reasonable prospect of success, having regard to the merits of the claims and jurisdiction. I, therefore, refuse the applications from both respondents to strike out any of the complaints of direct race discrimination, harassment and victimisation.

53. If I had concluded that there was no reasonable prospect of success in arguing that the phone call on 18 March 2020 was a protected act, I would have decided not to strike out the complaints of victimisation relying on the call and email of 18 March 2020 as protected acts. These complaints are also pleaded as other forms of discrimination, so striking out the victimisation complaint would have little practical effect on the case.

Conclusions on deposit applications

54. Leaving aside the victimisation complaints relying on the email of 18 March 2020 as a protected act, I have not concluded that the complaints under the Equality Act 2010 have no, or little, reasonable prospect of success. I, therefore, refuse the applications for deposit orders in relation to these complaints.

55. The requirements are met for me to be able to issue a deposit order in respect of the argument that the email of 18 March 2020 was a protected act. However, I have a discretion as to whether to make such an order. Since the complaints of victimisation which rely on the email as a protected act rely also on a conversation on the same day, in respect of which I have not concluded that there is no, or little, reasonable prospect of success of succeeding in an argument that the phone call was a protected act, I do not consider that a deposit order in relation to the contention about the email would serve any practical purpose. I decline, therefore, to exercise my discretion to make a deposit order in respect of that contention.

56. If I had concluded that there was no reasonable prospect of success in arguing that the phone call on 18 March 2020 was a protected act, I would have exercised my discretion not to make a deposit order in respect of complaints of victimisation relying on protected acts of the phone call and email of 18 March 2020. These

complaints are also pleaded as other forms of discrimination, so making a deposit order would have little practical effect on the case.

Employment Judge Slater

Date: 9 June 2022

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

27 June 2022

FOR THE TRIBUNAL OFFICE

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