



EMPLOYMENT TRIBUNALS

Claimant: Miss Ajiga

Respondents: (1) The Chimneys Ltd
(2) Elysium Healthcare Ltd
(3) Tafara Care Services Ltd

Heard at: Bury St. Edmunds Employment Tribunal (remote via CVP)

On: 15 February 2023

Before: Employment Judge H. Mason

Appearances

Claimant: In person
First and Second Respondent: Ms. Meenan, counsel
Third Respondent: No attendance

JUDGMENT

1. The following claims are dismissed upon withdrawal by the Claimant on the basis the Tribunal has no jurisdiction:
 - 1.1 claim of alleged negligence arising out of an eye injury sustained on 1 March 2021; and
 - 1.2 claim of alleged misrepresentation against the Third Respondent arising out of a conversation on 28 February 2021.
2. The Claimant's claim of discrimination/victimisation on the grounds of being an agency worker is struck out pursuant to Rule 37(1) of the Tribunal Rules.
3. The Claimant's claim of religious discrimination is not struck out or subject to a deposit order.
4. The Claimant's remaining claims will continue.

REASONS

Background

1. I have set out below my understanding of the key facts asserted by the Claimant in this case. A number of these facts are in dispute. However, by rehearsing my understanding of the facts below this is not an indication that these facts are accepted by the Tribunal. It will be for the full Tribunal at the final hearing to make findings of fact having considered all the evidence from all parties.
2. The Claimant was employed by the Third Respondent from 12 December 2020. On 14 December 2020 she started an assignment as an agency worker with the First/Second Respondent as a Mental Health Support Worker
3. The Claimant alleges that during the period 9 to 12 February 2021, she was consistently abandoned on one to one observations with a service user who subsequently committed suicide.
4. She alleges that on 20 February 2021, a co-worker (L) unlocked and opened the toilet door whilst she was in there and that on 21 February 2021 another worker (A) smacked her left buttock.
5. On 1 March 2021, the Claimant says she met with the Second Respondent and reported these incidents. At that meeting she says she told the Second Respondent that she was a Christian. On the same day she incurred an eye injury whilst assisting with a patient.
6. The Claimant says that on 5 March 2021, employee A revealed her identity to a female 3rd party and continued to disparage her to other workers.
7. On 7 March 2021, the Claimant says the Third Respondent questioned the veracity and authenticity of the alleged assaults.
8. On 13 March 202, The Claimant says the Respondents failed to respond to her email informing them of her willingness to report the matter to the police.
9. On 16 March 2021, the Claimant says employee A attempted to assault her again.
10. On 21 March 2021, the First/Second Respondent terminated her assignment.
11. On 2 April 2021, the Claimant says she reported the alleged assaults to the police
12. The Claimant says the Third Respondent ceased to assign shifts to her following this report.
13. On 22 April 2021, she emailed the Respondents asking about the status of her employment but did not receive a reply.

14. On 24 May 2021, the Claimant says she raised concerns about the eye injury and assaults in an email to the Second and Third Respondents. She says Donal of the Third Respondent call her the same day and told her to look for other agencies to work with.
15. The Claimant contacted Acas in respect of the First Respondent on 27 May 2021 and in respect of the Second and Third Respondents on 1 June 2021. Acas certificates were issued on 29 June and 2 July 2021 and she presented this claim on 28 July 2021.
16. The Third Respondent says (ET3) that the Claimant's employment with them was ended at her instigation on 6 October 2021 when she asked for her P45.
17. The Claimant says that in addition to her duties as a Mental Health Care Worker, she was required to carry out the work of a janitor. This is not referred to in her original claim and is the subject of an ongoing amendment application.

The claims

18. The Claimant brought a number of claims. Her claims of unfair dismissal and a redundancy payment were not accepted as she has less than 2 years' service. She has now withdrawn her claims for negligence and misrepresentation as these fall outside the Tribunal's jurisdiction. Her claims are direct sex discrimination, harassment related to sex, sexual harassment and I have allowed her to amend her claim to add a claim of religious discrimination. She has also brought a claim of discrimination/victimisation on grounds of being an agency worker.

The issues for the Preliminary Hearing

19. This hearing was listed by EJ Laidler on 18 October 2022 to decide whether or not to make strike-out or deposit orders in respect of any of the claims.

Procedure at the Hearing

20. The Claimant attended and was not represented. She told me she is a qualified lawyer in Nigeria. Ms. Meenan, counsel, represented the First and Second Respondents. The Third Respondent did not attend. The clerk attempted to contact the Third Respondent but without success. I concluded that it was in the interest of justice and the overriding objective (Rule 2 Tribunal Rules) to continue with the hearing in their absence.
21. The Second Respondent provided (electronically) a bundle of documents which the Claimant confirmed she had received and had access to.
22. Ms. Meenan only pursued a strike-out/deposit application in respect of the Claimant's claims of religious discrimination and discrimination/victimisation as an agency worker.
23. Having listened to both sides, I gave my decision at the hearing and which I now give with reasons.

The relevant law

24. Rule 37 Tribunal Rules: 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

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.”

consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of Dolby the test for striking out under the Employment Appeal Tribunal Rules 1993 was interpreted as requiring a two-stage approach.”

25. Rule 39 Tribunal Rules: 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.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.”

26. Agency Worker Regulations 2010 SI 2010/93 (“2010 Regs):

26.1 Regulation 5 provides that once a temporary agency worker has completed 12 weeks with a hirer, he or she is entitled to the same basic working and employment conditions as he or she would be entitled to for doing the same job had he or she been recruited by the hirer.

26.2 Regulation 6 defines the “relevant terms and conditions” as relating to pay; the duration of working time; night work; rest periods; rest breaks and annual leave.

27. Equality Act 2010:

27.1 Protected characteristics: s4

The protected characteristics are as follows:

- Age

- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion or belief
- Sex
- Sexual orientation

27.2 Direct Discrimination: s13(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.”

Claim of Discrimination/victimisation as an agency worker

28. In her claim form (ET1) the Claimant states:
“Discrimination and victimisation because of being an agency staff with regard to my health”. She gives no further details.
29. At the hearing, the Claimant told me this relates to:
(i) her alleged treatment between 9 and 12 February 2021; and
(ii) being required to carry out janitorial duties.
30. Ms. Meenan says this claim is not a legal claim which falls within the ambit of the Agency Worker regulations or the Equality Act discrimination provisions.
31. Applying the relevant law to the findings of fact to determine the issues, I have concluded that this claim has no reasonable prospect of success and must be struck out:
- 31.1 Agency Worker status is not a “protected characteristic” as set out in s4 of the Equality Act 2010 and therefore a claim of discrimination on this basis cannot succeed.
- 31.2 With regard to an alleged breach of the Agency Worker Regulations:
(i) The Tribunal does not have jurisdiction to hear a claim based on alleged treatment between 9 and 12 February 2021 as the Claimant did not contact Acas in respect of the First Respondent until 27 May 2021 and in respect of the Second and Third Respondents until 1 June 2021. Therefore by the time she contacted Acas the primary time limit for bringing a claim had already expired. Although time may be extended to allow for ACAS EC (Section 48(4A)(a) and Section 207B of the ERA) this is only be possible where the reference to ACAS takes place during the primary limitation period. That was not so in this case.
(ii) The treatment she complains of relating to janitorial duties does not fall within the protection provided by the Agency Worker Regulations.
32. However, subject to the Claimant being allowed to amend her claim (see Case Management Orders), she is not precluded from relying on these allegation in support of her other claims.

Claim of direct discrimination because of religion

33. Having allowed the Claimant to amend her claim to add a claim of direct religious discrimination it would arguably be perverse to then immediately strike it out.
34. Ms Meenan says there are no facts pleaded by the Claimant (whether in the ET1 or subsequently) from which it can be inferred that the Claimant was discriminated against because of her religion. This is no more than a bald assertion
35. The Claimant says that she told the Second Respondent she was a Christian on 1 March 2021 and that everything she complains about subsequent to this was direct religious discrimination.
36. I am unable to say that this claim has no reasonable prospect of success;
 - 36.1 The question of whether this claim has reasonable prospects of success turns on factual issues that are disputed and which require full examination by the full tribunal at a final hearing having consider all the evidence in relation to those facts (**Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL**).
 - 36.2 Whilst she has not shown a causal link between her declaration that she was a Christian on 1 March 2021 and subsequent events, it is wrong to expect her to do so at a preliminary stage given that she is a litigant in person. Whether or not there is a causal link will turn on the evidence at the full hearing.
 - 36.3 Strike-out cannot therefore be justified as it cannot properly be said that this claim has no reasonable prospect of success.
37. I am also not making a deposit order as this claim is very fact specific and it will be for the full tribunal at the final merits hearing to find relevant facts and until that has been done, I cannot say that this claim has “little prospect of success”.

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Employment Judge H. Mason
Date: 17 February 2023

Judgment sent to the parties on:
20 February 2023

For the Tribunal Office:

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