



EMPLOYMENT TRIBUNALS

Claimant: Mr G Jones

Respondent: Betsi Cadwaladr University Local Health Board

Heard at: Welshpool **On:** 14 February 2020

Before: Employment Judge Emery

Representation: Claimant: In person
Respondent: Ms J Williams
(counsel)

PRELIMINARY HEARING JUDGMENT

All the claims in these proceedings of sex and disability discrimination stand no reasonable prospects of success and are struck out.

REASONS

The Issues

1. This was a preliminary hearing listed to determine whether the claims brought in these proceedings - of sex discrimination and disability discrimination - should be struck out in all or in part, on the ground that the claims stand no reasonable prospects of success; alternatively whether a deposit should be ordered on the ground that the claims stand little reasonable prospects of success.
2. At the outset of the hearing and after discussion, the claimant confirmed that his claims were of 'direct discrimination' only.
3. The claimant relies on the following disabilities – autism and a speech impediment. The respondent disputes that the claimant is disabled, however the issue of whether the claimant is a disabled person was not to be considered at this hearing. It was accordingly agreed that for the purposes of this hearing it was assumed that the claimant was disabled by reason of autism and a speech impediment.

The Evidence

4. I heard from Mr John Martin, the respondent's Head of HR and from the claimant. I received two bundles of documents, one from the claimant and one from the respondent. I read the statements and most of the documents within the bundles before hearing evidence.
5. I do not recite all of the evidence I heard, instead the evidence and facts as found is confined to the relevant issues in the case. The quotes set out below are not verbatim quotes of the witnesses but are taken from my typewritten notes of the evidence. This judgment and reasons for it were given at the Hearing.

The Facts

6. The claimant is a long-serving employee of the respondent. It appears that he became friendly with a colleague (called 'A' for the purposes of this judgment), but that their friendship soured. The claimant believed that he was being made fun of by staff including A, and the claimant and A participated in an informal mediation process at work in April 2018 following a complaint he raised. After this mediation, the claimant confirms that the adverse treatment he was experiencing at work ceased.
7. An issue then arose between the claimant and A, including formal allegations raised by A in August 2018 that he had harassed and targeted A and members of her family, including attending her parent's house while she was on holiday and by way of Facebook messages. The respondent met with the claimant on an 'initial assessment' under its disciplinary policy. Following this meeting it commenced a formal investigation into allegations which were specified as: (a) personal conduct away from work; (b) failure to respond to a previous warning after mediation; (c) unacceptable behaviour towards staff in the course of work on the respondent's premises; (d) harassment and unwanted communication via social media, and (e) unacceptable behaviour in the workplace.
8. In the end allegations (a) and (d) were considered. Allegation (b) was dropped at an early stage, and at the outset of the disciplinary hearing allegations (c) and (e) were dropped on the grounds that there was not enough evidence to determine them.
9. During the disciplinary process the claimant raised two grievances. One at page 31-32 dated 2 September 2018 restates the disciplinary allegations against him as grievance allegations against A. On 23 September 2018 he raised another grievance (page 27-30) which references A targeting him on Facebook, that his Facebook account was hacked by someone he believed was connected to A. The claimant complains that his grievances were unreasonably not considered. The respondent says that the issues within the grievances were relevant to the disciplinary issue and could not be determined until the conclusion of the disciplinary process. For example, one of his requests for resolution was for the disciplinary process to be stopped. The respondent did not consider this was an appropriate solution whilst the disciplinary issue was being investigated. The respondent's case is that all issues within the grievances were to be determined

in the disciplinary process. The respondent wrote to the claimant on 31 October 2018 pointing this out (page 40). The claimant also complained about A's conduct to the Nursing and Midwifery Council, who determined that no action was required (page 41a).

10. The outcome of the disciplinary process was that disciplinary panel found that the claimant had engaged in unacceptable personal conduct during and away from work and had engaged in harassment and unwanted communications via social media. The disciplinary panel concluded that this conduct had caused significant distress to A. The panel considered this conduct to amount to serious misconduct. The tribunal accepted the mitigating evidence of the claimant, including an underlying health problem, and the report noted that "*you may have some difficulty at times in perceiving the most appropriate course of action*". As a consequence of the mitigating factors, the sanction was reduced from a final written warning, live for 24 months, to a first written warning, live for 12 months (pages 57-8).
11. The claimant appealed the disciplinary sanction. The claimant sought a wider investigation into A's conduct. The appeal panel concluded that the respondent acted fairly and reasonably in its investigation and that the sanction was reasonable.
12. The claimant continued to raise issues, for example on 10 January 2020 he sought an investigation into A for fabricating lies about him and in relation to what he argued was Facebook hacking. The claimant has made complaints to national authorities about what he considers was his Facebook page being hacked, on which there has been no outcome.
13. On 1 October 2019 the respondent wrote to the tribunal stating that the claimant had been made the subject of a Restraining Order by Llandudno Magistrates Court on 24 July 2019 which stated that for one year he was not to contact A directly or indirectly or by means of social media (page 49). The claimant says that a Restraining Order is not a criminal sanction, that he agreed to this voluntarily to avoid the risk of a trial, but this is not evidence of 'guilt' on his part – he rejects the premise on which the restraining order was made.
14. The essence of the claimant's case in these proceedings was that he was treated less favourably than A. This was the tenor of his argument throughout this hearing. It was the tenor of his documents during the disciplinary and grievance processes. As stated by his union rep on 4 October 2018 – "*he thinks that the investigation is unfair as he is the only one being investigated and not both of them*" (page 38). His case is that he was treated less favourably throughout the disciplinary and grievance process than A, a woman against whom he had made allegations, and that this treatment is because he is a man and is disabled. During the hearing the claimant questioned why A was "*given immunity*", to which the answer of Mr Martin was she was not, that all the issues raised, including his defence as set out in his grievance, were investigated and that there were no grounds to investigate the actions of A. A was given an offer of counselling because she was, the respondent considered, the potential victim of the claimant's conduct and this did not amount to less favourable treatment of the

claimant; as he repeatedly alleged during the hearing it was less favourable treatment as he was not offered counselling.

15. The claimant also complained that a risk assessment was made on A's behalf, that this constituted less favourable treatment as none was made on his behalf. The respondent's position was that the risk assessment was required because a restraining order had been granted, and that this assessment was required to ensure that the claimant and A did not come into contact with each other at work.
16. Throughout the hearing I made clear the definition of 'less favourable treatment' – that the claimant must compare himself with a woman, or a non-disabled employee, in the same or similar circumstances. E.g. how would a woman be treated against whom the same disciplinary allegations were made by a fellow employee? The claimant was unable to adduce any argument or evidence that this comparator would be treated any more favourably. Similarly, a non-disabled employee – the claimant was unable to adduce any argument that he was treated any less favourably than a real or hypothetical comparator.
17. The claimant argued that various aspects of the process showed discrimination. For example, the risk assessment: however the claimant was unable to show that a real or hypothetical comparator would, as he asserted have had a risk assessment conducted on their behalf. His case remained that A had a risk assessment, he had complained about A and therefore should also have had a risk assessment; that the "general approach" of the respondent was discriminatory. He complained that he told he could not contact witnesses (page 51 claimant's bundle); the respondent points to the fact that he was told not to have contact with staff about this issue (claimant's bundle 11 and 12) and that this would have been the case had the comparator been a woman and/or non-disabled. The claimant made the case that the respondent went "*the extra mile*" against him because he was a man. Again, the claimant could produce no evidence of this being a possibly legitimate argument in tribunal. He argued that the wellbeing training of the respondent is about "*the protection of women*". The respondent disagreed, also pointing out that its wellbeing training consists of national training modules. The claimant argued that had he been a woman, instead of being asked into a disciplinary investigation meeting he would have been "treated differently" and there would have been an attempt "to find out my side". He argued that a woman would not have had allegations of "*outside issues*" raised against her. He also argued that the disciplinary allegations were not properly put to him, that he was not told what they were, contrary to how a woman would have been treated. In cross-examination he said that "*as a male I was ignored ... because I was a male they put out a red carpet because a woman complained.*"

Submissions

18. Ms Williams stated that to strike-out the claim, I must be satisfied that there are no reasonable prospects of success – that I have to be satisfied that the facts do not give rise to a prima facie case of sex discrimination or disability discrimination. She references the case of *Ahir v BA PLC* – para 12 – 16 that strike-out must only be exercised in rare circumstances, that where there is serious factual dispute it is not the function of a preliminary hearing to determine these disputes.

The Court of Appeal in Ahir accepted that tribunal should not be deterred from striking out claims where there is a factual dispute, if the tribunal is satisfied that there is no reasonable prospects of the claim succeeding, also being fully aware of the danger of reaching such a conclusion where the full evidence has yet to be heard.

19. Ms Williams argued that it was not possible to glean all of the claimant's allegations, but from the evidence his claim relates to the disciplinary allegations, but in respect of all allegations there is no evidence of differential treatment on grounds of sex or disability. The running theme of the claimant's evidence and his cross-examination was assertions as to how he feels he was treated differently compared to A, but there was no evidence at all to support his allegations that he was treated differently. There is no evidence on which to base any of his allegations, ergo there is no basis to say he has any prospect of succeeding in his claims. Alternatively, there are little reasonable prospects, and a deposit order should be made.
20. The claimant argued that at an initial assessment he would have been allowed a colleague present. The respondent says that their policy says that he could have requested a colleague to be present, and in any event that he was allowed a colleague present at the investigation meeting. He says that he was denied all the way through information, including on the nature of the allegations and policies followed and he felt that he not treated as an equal. He argued that a female comparator would have had their grievances heard. He says that a woman producing the evidence he did would have been listened to, and would have been protected with more help, counselling and understanding. He says that had he been a woman or non-disabled he would have had a risk assessment conducted. He says that he was given a written warning because he was a male; that he had provided evidence to show that A's allegations were untrue.

The Law

21. Equality Act 2010: s.13 **Direct discrimination**

- (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.

22. Equality Act 2010: s.23 Comparison by reference to circumstances

- (1) On a comparison of cases for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case.

23. Employment Tribunals Rules of Procedure 2013: Reg 37 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
- (2) ...
- (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.

24. Employment Tribunals Rules of Procedure 2013: Reg 39 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.

25. The claimant's comparator: Section 23(1) Equality Act states that there must be no material differences between the circumstances of the claimant and his comparator. What are the relevant "circumstances"? *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 states:

"...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

26. I noted that only those characteristics which the employer has taken into account in deciding to treat the claimant in a particular way, with the exception of the alleged discriminatory characteristic, are relevant (*Shamoon*). In other words, what matters is that the circumstances which are relevant to the treatment of the claimant are the same, or nearly the same, for the claimant and the comparator. In practice this means that the claimant must compare himself with a real or hypothetical female or non-disabled employee in the same position as him – i.e. who has the same history with A, against whom the same allegations have been made and who put in the same grievance against A: would this comparator be treated differently by the respondent?

Conclusion on the facts and the law

27. As stated above, the claimant's main complaint was that he had been treated differently from A, who had "*the red carpet put out*" in comparison to him. Despite repeatedly being informed of the correct legal test – a direct discrimination

comparator must be in the same or similar circumstances to that of the claimant, he kept on relating his treatment to that of A.

28. However it was quite apparent that, despite the claimant's complaints against A throughout the process, she was not in the same position as he. She raised serious allegations which constituted, if proven, serious misconduct against the claimant. While the claimant raised allegations against A, they were not the same allegations, and they were raised in response to her allegations. They were considered in the processes that followed. Throughout the hearing, as summarised above, the claimant repeatedly raised unfairness, but was complaining that A was treated better than he was, ergo he was discriminated against.
29. I concluded that the claimant had no prospects of showing that he had been treated less favourably than a female employee subject to the same or similar allegations with the same or similar historical context, or a non-disabled employee subject to the same or similar allegations with the same or similar historical context. It was the respondent's case that a woman or a non-disabled employee would have been treated as the claimant was; the claimant could not produce any evidence that a female or non-disabled comparator would have been treated more favourably than he was in the same circumstances.
30. I concluded therefore that all of the claimant's claims stood no reasonable prospects of success, and struck out all of the claimant's claims.
31. If I am wrong, I considered whether or not the claims stood little reasonable prospects of success. , and on this basis I would have made a deposit order subject to an assessment of the claimant's means.

Employment Judge Emery
Dated: 27 February 2020

UDGMENT SENT TO THE PARTIES ON 2 March 2020
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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS