



EMPLOYMENT TRIBUNALS  
London Central Region

Heard by CVP on 20/8/2021

Claimant: Mr D Murtagh

Respondent: London Borough of Hammersmith and Fulham

Before: Employment Judge Mr J S Burns

Representation

Claimant: In person

Respondent: Mr S Harding (Counsel)

JUDGMENT

1. The claims contained or referred to in paragraphs 1.2.2, 1.2.3, and in 2.1 to 2.4 of the Schedule are struck out.
2. The Respondent's application to strike out or for a deposit order in relation to the remainder of the claims (ie those contained or referred to in paragraphs 1.1, 1.2.1, 1.2.1.1, 1.3, 1.4, 1.5 and 3.1-3.6 inclusive of the Schedule) is refused, and these remaining claims will continue to trial on an unconditional basis.
3. To the extent necessary the Claimant is granted leave to amend and an extension of time under the just and equitable basis to bring these claims.

REASONS

1. I conducted an Open Preliminary hearing pursuant to the order of EJ Stout of 15 June 2021 to determine issues of amendment, timeliness, deposit orders and strike-out. The documents were in an OPH bundle. I received a witness statement and oral evidence from the Claimant and a skeleton argument drafted by Mr Harding .

Overview of Proceedings

2. The claim centres around the appointment by Mr D Dyer, a black man, of 3 black females on 16 June 2020 to interim appointments without following any open competitive processes, and the non-appointment of the Claimant.
3. The Claimant who is a white man, remains in the employment of the Respondent, and has worked there since 16 October 2016.
4. The Claimant complained on several occasions (the first being by email dated 19/6/2020 to Mr Dyer) that he had suffered sex and race discrimination and he pursued this complaint internally by way of formal grievance and grievance appeal. The appeal outcome was issued on 4/12/2020 after which the Claimant tried to pursue the matter further with HR, pointing out mistakes in the appeal letter etc, until about 21/12/20 when Mr Rogers in HR stated the matter was finalised.

5. The Claimant felt that as a consequence of his complaints he had suffered victimisation from Mr Dyer from the 28 September 2020 onwards (when the Claimants extended paternity leave ended) as particularised in paragraphs 3.3.1 and 3.3.2 of the Schedule. (He has clarified that for purposes of 3.3.1 the feedback which he claims Mr Dyer had promised but then withheld should have been provided over the period ending in early November 2020.)
6. The Claimant contacted ACAS on 2 January 2021, and the certificate was issued on 25 January 2021. The ET1 form was presented on 25 February 2021.
7. On the ET1 form the Claimant ticked the boxes in section 8 indicating that he claimed race and sex discrimination and in section 8.2 he stated baldly "*I consider that I've been discriminated in relation to employment opportunities training and promotion due to sex and or race, which includes being discriminated against due to taking paternity leave. Full details and grounds to follow*"
8. The Respondent acknowledged the claim on 22 April 2021 and on 12 May 2021, wrote to the tribunal asking for further time to respond and complaining about the lack of particulars.
9. On 17 May 2021, the Claimant wrote in response to this request sending full particulars including a timeline and making specific reference to direct and indirect sex discrimination and victimisation.
10. On 11 June 2021 the Claimant filed an application to amend, presenting a document which in substance is the same as the particulars he had provided on 17/5/2021.
11. On 15/6/21 EJ Stout identified the claims made or proposed to be made in a schedule to her Order (this is the material set out in the Schedule to the instant Judgment, with the insertion by me of the words "*failed to appoint the claimant while appointing*" into paragraph 1.2.1, and the correction by me of the spelling of Mr Dyer's name) and set up the OPH for today 20/8/21.

#### Amendment/time issues

12. It would have been preferable and more reasonable for the Claimant to have provided proper particulars when he presented his claim, but many litigants-in-person do not.
13. I find that he did identify and present claims of sex and or race discrimination in his original ET1 and that the documents he has presented subsequently are properly to be construed as further particulars of those claims, rather than the presentation of new claims.
14. Equally I do not find that any permission to amend is required for the admission of further particulars, but if I am wrong about that I find it would be appropriate to grant permission to amend in any event.
15. The proper approach to limitation issues is therefore to consider the period up to the presentation of the ET1 and not any later period.
16. In the circumstances any act or omission before 3 October 2020 is out of time unless it is part of a continuing act which extended after that date.

#### Lack of merit of the struck-out claims

17. I regard the claim in paragraph 1.2.2 of the Schedule as having no reasonable prospect of success. In this paragraph the Claimant alleges as direct discrimination that he was disadvantaged in the interview for the Homeless Team Manager role because it was arranged to coincide with his paternity leave. It transpires that the interview date was for everyone who was interested in the role and not designed specifically for the Claimant. There is nothing to show that the date was picked to try to exclude the Claimant. He did not complain at the time or request Mr Dyer to change the interview date and in any event it turned out that the date did suit the Claimant and he attended the interview.
18. I regard the claim in paragraph 1.2.3 of the Schedule as having no reasonable prospect of success. In this paragraph the Claimant alleges, as direct discrimination, failure by Mr Dyer to provide the Claimant with feedback in relation to his unsuccessful application for the

Homeless Team Manager role, as promised, following his return from paternity leave on 28 September and prior to his application for the Senior Housing Advisor role for which the interviews took place in early November 2020. The Claimant elsewhere attributes this failure to victimisation. There is no basis for a conclusion that Mr Dyer withheld feedback simply because of the Claimant's sex or gender.

19. I regard the claim in paragraphs 2.1-2.4 (the Indirect Discrimination claim) as having no reasonable prospect of success. The claimed PCP is invalid. There cannot have been a policy consisting in a single decision not to apply a policy. Even if such a policy disregard could be a PCP, if it was applied generally there no reasonable prospect of showing that it would disadvantage male and/or white employees more than any other category. This is really a direct discrimination claim dressed up as invalid indirect claim.
20. For these reasons I have struck out these hopeless claims.

The direct sex/race discrimination claim in paragraph 1.2.1

21. I disagree with the Respondent's submission that this claim has little or no reasonable prospect of success.
22. It is accepted that Mr Dyer, a black man, appointed three black women without consulting the Claimant, a white man in a similar position to the successful appointees.
23. The Claimant contends that he had at least as much or more line-management experience as at least one of the successful appointees.
24. Mr Dyer appears to have followed no procedure and the Claimant's early attempts to obtain a policy-based explanation for the way Mr Dyer had proceeded, were unsuccessful.
25. The matter was looked into subsequently in the internal grievance and appeal but retrospective attempts by the claimed discriminator and others to justify opaque decisions are less satisfactory or convincing than policy-based and transparent decisions being made in the first place.
26. The Respondent's main point of defence to this claim is the suggestion than Mr Dyer, before he allocated the roles to three black woman, offered one of them to James Mort, a white man, but that he had declined it. The Claimant took me to an email exchange in which Mr Mort does not appear to agree that this offer was made.
27. For these reasons I refuse to strike out or deposit this aspect of the direct claim.
28. The failure to appoint the Claimant on 16/6/2020 was an act which was complete on the same day and the claim about it is therefore about 3 and a half months out of time. I regard it as just and equitable to extend time for this claim because I think it has some reasonable prospect of success but also because until about 21/12/2020 the Claimant as an existing and continuing employee of the Respondent, with whom he wished to preserve a good relationship as much as possible, was trying to obtain a remedy by pursuing the protracted internal formal procedures and talking to HR. The Respondent has been on notice throughout of the substance of this claim and there is no forensic prejudice arising out of the modest delay.

The victimisation claim.

29. This is a matter to be decided on the evidence. I have no basis for concluding that it has little or no prospect of success.
30. I find that this claim has not been brought out of time, but rather within time, because on a proper construction the claim is about a continuing state of affairs which lasted from when the Claimant returned from paternity leave in September until shortly before or perhaps when he presented his claims. The claimed specific detriments both occurred or continued after 3/10/2020.

Schedule

Direct sex and/or race discrimination (Equality Act 2010 section 13)

1.1 The Claimant is a white male.

1.2 Did the Respondent do the following things:

1.2.1 On 16 June 2020 failed to appoint the Claimant while appointing three black females (Madeline Cato, Sophia Viechweg and Courtney Ann Lawrence) to interim appointments without following any open competitive process. The specific appointments about which the Claimant complains are: 1.2.1.1 Homeless Team Manager (Grade PO6) and

1.2.1.2 Housing Solutions Team Leader (Grade PO3);

1.2.2 When the Homeless Team Manager role was subsequently advertised, the Claimant expressed an interest in that role on 3 August 2020. He alleges he was disadvantaged in the interview for that role because it was arranged to coincide with his paternity leave (i.e. sex discrimination). (The Claimant also alleges that the prior failure to appoint him to the interim role(s) disadvantaged him in relation to the substantive role, but the failure to appoint, of which he was informed on 24 August 2020, is not relied on as a separate act of discrimination.)

1.2.3 Failure by Mr D Dyer to provide the Claimant feedback in relation to that role as promised following his return from paternity leave on 28 September and prior to his application for the Senior Housing Advisor role for which the interviews took place in early November 2020. (The Claimant again alleges that the prior failure to appoint him to the interim role(s) disadvantaged him in relation to the Senior Housing Advisor role, but the failure to appoint, of which he was informed on 6 November 2020, is not relied on as a separate act of discrimination.)

1.3 Did the Respondent's treatment amount to a detriment?

1.4 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The Claimant says he was treated worse than Madeline Cato, Sophia Viechweg and Courtney Ann Lawrence. He says that his circumstances were materially the same as Ms Cato and Ms Viechweg because (among other things) he has line management experience.

1.5 If so, was it because of race or sex?

Indirect discrimination (Equality Act 2010 section 19)

2.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

2.1.1 Deciding not to follow its policy in relation to competitive appointments when deciding to appoint the three interim roles on 16 June 2020

2.2 Did the PCP put white people or men at a particular disadvantage when compared with other persons?

2.3 Did the PCP put the Claimant at that disadvantage?

2.4 Was the PCP a proportionate means of achieving a legitimate aim?

Victimisation (Equality Act 2010 section 27)

3.1 Did the Claimant do a protected act as follows:

3.1.1 Raising a formal discrimination complaint on 30 June 2020; 3.1.2 Appealing the Stage 1 grievance decision on 20 August 2020.

3.2 Did the Respondent believe that the Claimant had done or might do a protected act?

3.3 Did the Respondent do the following things:

3.3.1 Mr D Dyer's failure to give him feedback regarding the Homeless Team Manager interview as promised on 24 August 2020, but not provided on return from paternity leave on 28 September 2020 and which he believes would have been helpful for the interviews in November 2020;

3.3.2 Leaving the Claimant to chase Mr D Dyer for information given to other colleagues on 26 January 2021 when he had to chase for a copy of a draft policy for consideration at a meeting.

3.4 By doing so, did it subject the Claimant to detriment?

3.5 If so, was it because the Claimant did a protected act?

3.6 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

J S Burns Employment Judge  
London Central  
20/8/2021  
For Secretary of the Tribunals  
Date sent to parties : 21/08/2021