



EMPLOYMENT TRIBUNALS

Claimant: Ms I Andreescu

Respondent: Samworth Brothers Limited t/a SBSC

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 1 July 2021

Before: Employment Judge Brewer

Representation

Claimant: In person

Respondent: Mr C Finlay Solicitor

JUDGMENT

1. The claimant's claim for sex discrimination is struck out as having no reasonable prospect of success.
2. The claimant's claim for race discrimination is struck out as having no reasonable prospect of success.

REASONS

Introduction

1. By a claim form presented on 14 October 2020 the claimant alleged that her services as an agency worker for the respondent had been terminated because of her sex and/or her race. The respondent denied the claims and argued that the claims had no or had little reasonable prospects of success.
2. This case came before EJ (*Employment Judge*) Heap at a closed preliminary hearing. Having listened to the parties EJ Heap decided that the respondent's application that the claimant's claims be struck out or, in the alternative that she be required to pay a deposit as a condition of continuing her claims be the

subject of a public preliminary hearing. That hearing came before me to determine the respondent's applications. At the hearing the claimant represented herself and the respondent was represented by Mr Finlay.

3. I was provided with a bundle of documents prepared by the respondent and a skeleton argument drafted by Mr Finaly which the claimant had seen in advance of today's hearing.
4. I heard submissions from both parties. Given the nature of the application, at the end of the hearing I reserved my decision which I now set out below.

The issues

5. Put simply the application raises two points to consider:
 - a. Should either or both of the claimant's claims be struck out as having no reasonable prospect of success; if not
 - b. Should the claimant be required to pay a deposit as a condition of continuing to pursue each of her allegations because any such allegation has little reasonable prospect of success.

The law

6. In relation to **direct sex discrimination**, for present purposes the following are the key principles.
7. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).
8. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be 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" (**Shamoon** above).
9. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.
10. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.
11. In **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. This merely gives rise to the possibility of

discrimination. Something more is needed. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

12. The material parts of the Tribunal Rules are as follows:

“Striking out

37.—*(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...

Deposit orders

39.—*(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...”*

13. I note that claims of discrimination are rarely struck out where there is a factual dispute between the parties (**Anyanwu v South Bank Student Union** 2001 UKHL 14, and also see **Mechkraov v Citibank NA** 2006 ICR 1121). However, the test is of course whether there is no reasonable prospect of success, even if there are factual disputes.

14. Having said that, I note that I should, when considering strike out, take the claimant’s pleaded case at its highest however, I do not lose sight of the fact that in many, indeed almost certainly in most claims of discrimination the Tribunal will need to draw inferences from disputed findings of fact which I am not in a position to, and indeed nor should I, do. Those inference may be critical in many cases.

Findings of fact

15. In brief, the claimant was engaged by the respondent through an agency to undertake work as a warehouse operative from October 2019 until her assignment was terminated with effect from 29 August 2020.

16. The claimant commenced early conciliation on 1 September 2020 and was issued her early conciliation certificate on 1 October 2020. She presented her claim on 14 October 2020. The claimant alleges that the termination of her assignment was because of her sex and/or her race and that this amounted to direct sex discrimination and/or direct race discrimination. The race discrimination claim is based on the claimant’s nationality. She is a Romanian national.

17. The respondent says in its response that it had evidence from a witness that the claimant had been in breach of the respondent's strict hygiene rules and this was the sole reason for the termination of the claimant's assignment. The hygiene rules are contained in a document entitled "Oak Meadow Warehouse Induction" which starts at page 44 of the bundle.
18. On 30 August 2020, the day after the termination, the respondent sent an email to the agency [49] which explained the termination. It said:

"We had an incident on site...it was alleged that a member of staffing had used the ladies toilets without following the strict Covid 19 guidelines...this person was [the claimant] who...was informed that this was a serious breach of health and safety and she could no longer work at SBSC...can you please replace her..."
19. The claimant sent a number of text messages to the agency about the termination none of which appear to mention either sex or race discrimination [51 – 55].
20. The respondent employs employees and engages agency workers both male and female, and of British and non-British nationality.

Discussion and conclusion

21. Mr Finaly's submissions were that beyond a mere assertion that she had been treated unfairly, that she was female and from Romania, the claimant gives no explanation as to why she says her termination was because of either sex or race. He pointed out that discrimination had not been raised at the time of the termination. He also pointed out that the respondent has terminated the assignment of male agency workers and of British agency workers and that there was simply no evidence of or facts from which one could infer discrimination.
22. The claimant's submissions were very clear. She undoubtedly feels very strongly that her treatment was unfair. I explained in detail the difference between claiming that something was unfair and the allegation of less favourable treatment because of race or sex. Despite this, each time the claimant made a submission it was around how unfairly she had been treated. She explained that the witness was mistaken in what or rather who she says she was in the toilets.
23. The claimant did accept that the respondent engaged male and female agency workers, and British and non-British agency workers. She could not challenge Mr Finaly's assertion that the respondent has terminated the assignments of male and British agency workers. The claimant merely asserted that she knew of no-one British who "*had encountered this problem*" by which she meant termination for the hygiene reason.
24. However, the claimant then began talking about her initial contact with ACAS pre-early conciliation. She said that she had gone to ACAS to ask about claiming for the unfairness of her treatment. She was told about the two-year qualifying period to claim unfair dismissal. The claimant confirmed that she did not suggest to ACAS that she had been discriminated against. Rather, she said, that tis

suggestion came from ACAS. Given my knowledge of the careful way ACAS work I am inclined to believe that in her discussions with ACAS it was suggested that the only way she could seek redress via the tribunal system was if she claimed some form of discrimination and it was that which triggered the claims now before us.

25. I repeatedly asked the claimant to explain why she makes the connection between her termination and her sex and/or race. She said, *"I can't find justice...I was dismissed due to a lie"*. The last comment arose because I suggested to the claimant that if the respondent had a witness, and relied on what that witness said as the reason for dismissal, then that was the reason and not race or sex. The claimant agreed and reiterated that the witness relied on by the respondent *"was lying to her employer"*.
26. I find that the allegations of discrimination only arose because the claimant was unable to claim unfair dismissal, a matter which she found out about only after she sought advice from ACAS. Nothing in the contemporaneous documents and nothing in what the claimant has said subsequently, including at this hearing, leads me to conclude she has any prospect of shifting the burden of proof to the respondent. She is in the difficult position of feeling badly treated and being unable to pursue the unfairness sought to label what happened to her as discrimination without, in my view, either really believing that to be the case or without any reasonable prospect of shifting the burden of proof as required by s.136 Equality Act 2010.
27. For those reasons both claims are struck out.

Employment Judge Brewer

Date: 1 July 2021

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