EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Kaur	**v**	**Welcome Break Holdings Ltd**

Heard at: Watford **On**: 11 January 2023
Before: Employment Judge Andrew Clarke KC

Appearances
For the Claimant: Ms F Stehrenberger, counsel
For the Respondent: Mr K Wilson, counsel

JUDGMENT

1. All claims brought by the claimant (being those for direct sex discrimination and harassment) are struck out pursuant to Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that neither claim has any reasonable prospect of success.

REASONS

1. The claimant was employed by the respondent from 11 September 2019 as a member of its Sales Team at the South Mimms motorway services. She worked nights at the WH Smith store on site.

2. In September 2020 an incident took place concerning another employee which led to that employee's dismissal on 21 September 2020. That employee had been regularly contacting the claimant by email and when she did not respond as he wished, he physically barred her way when she sought to leave at the end of her shift. She complained about his conduct and, after investigation, he was summarily dismissed.

3. The claimant never returned to work and in late 2020 through to mid 2021 the respondent received fit notes describing her as unfit to work due to anxiety. The respondent does not dispute the claimant was very disturbed by the employee's conduct, felt unable to return to work for some time and needed counselling.

4. In April 2021 the claimant issued these proceedings. She ticked the box in paragraph 8.1 to indicate a claim of sex discrimination on the grounds of sexual orientation and a claim for “other payments”. No mention of the claimant’s sexual orientation or discrimination on the grounds of sex was made in the text at paragraph 8.2 of the ET1. It also made no reference to monies said to have been owed to her, which claim I need say no more about as when (see later) the clams were clarified, that claim was not included. There was no suggestion today that this had been an error.

5. The ET3 proceeded on the basis that the claim was for harassment on the grounds of sex, the acts relied upon being those of the dismissed employee.

6. When the matter came before Employment Judge Alliott at a preliminary hearing on 6 July 2022 the claimant’s case was clarified. She had hitherto been representing herself but now had solicitors instructed. They explained that her claim was one of direct sex discrimination and/or harassment related to her sex. In each instance the same six matters were relied upon and these are listed in paragraph 11.1 of the Summary of that case management hearing. They are:

    6.1 Insisting that the claimant return to work without any proper arrangements in place for a phased return to work.

    6.2 Whilst the claimant was off sick, insisting that the claimant attend meetings.

    6.3 Not permitting the claimant flexible working arrangements but constantly making contact with the claimant whilst of sick.

    6.4 Not pursuing the claimant’s (informal) grievance and not addressing her concerns.

    6.5 Not carrying out Occupational Health recommendations.

    6.6 Not acting on the claimant’s grievances and concerns

7. Hence, no issues arise as to the liability of the respondent for the acts of its former employee. The claimant’s case is now entirely focussed on the respondent’s behaviour towards the claimant in the period after the incident in September 2020.

8. The respondent (with the permission of Employment Judge Alliott) produced a revised ET3 to answer the claimant’s case as then clarified. The respondent also sought to strike out the claim on the basis (see Rule 37) that it had no reasonable prospect of success, alternatively it alleged that it had little reasonable prospect of success (Rule 39(1)) such that a deposit order should be made.

9. It is convenient at this point to deal with the law relating to strike out applications (and applications for deposit orders) and to set out my conclusions on two points relied upon by the claimant in those regards.

10. Striking out a claim as having no reasonable prospect of success before any hearing of the evidence on matters of fact is a draconian remedy. The higher courts have commented on the meaning of the phrase "no reasonable prospect of success" in various well-known cases. They stress that the bar is set high such that only plain and obvious cases should be struck out. That means that where the central facts are in dispute, the successful strike out application will be exceptional: see Anyanvu v Southbank Students Union [2001] ICR 391 and Ezias v North Glamorgan NHS Trust [2007] ICR 1126.

11. In most cases it will be appropriate to proceed on the basis that the claimant can make out the factual basis of the claim that she advances. However, that may not be appropriate where the claimant's assertions are contradictory of clear contemporaneous documents, especially those from apparently reliable third parties, or agreed maters of fact. Furthermore, it is important for a judge to keep in mind that the use of the word "reasonable" indicates that the claimant may need to do more than merely make an assertion about the respondent's conduct. Any such assertion can properly be looked at in the light of contemporaneous documents and agreed facts and an Employment Judge is expected to apply a measure of common sense to what is alleged.

12. I was also reminded by Mr Wilson, on behalf of the respondent, of what was said by Underhill LJ at paragraph 16 in Ahir v British Airways Plc [2017] EWCA Civ 1392:

    > "Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established and also provided they are aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment."

13. I also note that the case was one in which Lord Justice Underhill observed that the claimant's case theory was "not only speculative, but highly implausible".

14. The test for the making of a deposit order allows for the bar to be set a little lower and enquiries must be undertaken as to the claimant's ability to pay before any particular sum is ordered. In the light of my conclusions on the strike out issue, I need not deal with this in any greater detail.

15. The claimant laid great stress in written communications sent prior to the hearing on a series of authorities with regard to the following propositions:

    15.1 Imperfect pleading is not a basis for a strike out (or a deposit order) where the defects could be cured by amendment. This is especially so where the pleading was composed by a litigant in person (see, but in very different circumstances, Kim v Park [2011] EWHC 1781).

15.2 A litigant in person may need help to tease out their case from an unfocussed pleading. Merely pointing to defects which such a litigant is unable to remedy (especially "on their feet") is a dangerous basis from which to proceed to a strike out of the case (see EG Cox v Adecco [2021] ICR 1307).

15.3 Where an Employment Judge has already assessed the claim and let it go forward, the respondent cannot make a strike out application as the fact that the case has a reasonable prospect of success has already been determined.

16. I can deal with the three points in the last paragraph without looking at the state of the evidence on the six matters relied upon. None has any merit on the facts of this case. Dealing with each in turn:

16.1 The claimant's ET1 suffered from a familiar defect where those composed by litigants in person are concerned. It set out certain facts but did not explain how they were said to support the claims made. However, Employment Judge Alliott helped the claimant (then legally represented) to set out her claims and the basis on which they were advanced. It is that formulation which the respondent seeks to strike out. Whether or not the claims should have been the subject of a formal written amendment is immaterial as the Judge carefully recorded the case as advanced in the note of the case management hearing and there is no suggestion that his formulation was inaccurate. However (see below), I have examined each of those matters in detail in order to understand the claimant's case.

16.2 The Judge did not then move to consider a strike out application without seeking clarification of the case advanced by both parties. On the contrary, he first clarified the claimant's case and then gave the opportunity for the respondent to set out its position in response to that case.

16.3 Employment Judge Alliott did not make any assessment of the merits of the claim as reformulated. When an application to strike out was made it was he who directed that it should be considered at this preliminary hearing. He was in no position to consider the possibility of a strike out at his preliminary hearing because there was no application before him and the respondent had yet to set out its case on the claims now advanced.

17. Hence, I now need to consider the strike out and, in the alternative, the deposit order applications. In so doing, I need to consider the direct discrimination and harassment claims separately having regard to the constituent elements of each such claim. I also need to bear in mind the provisions of s.136 of the Equality Act 2010 and, in particular, the analysis of the true impact of that section by the Supreme Court in the case of Royal Mail Group Limited v Efobi [2021] UKSC 33. I need to keep in mind that in deciding whether the conduct complained of had the forbidden effect for the purposes of the harassment claim, an employment tribunal at a full merits

hearing would need to look not only at the perception of the claimant but at the reasonableness of any such perception.

18. An appropriate starting point is to look in turn at each of the matters relied upon by the claimant to found the two claims. I was struck by how vague some of the matters were and the likelihood of some overlap between them. Hence, with the help of Ms Stehrenberger I have sought to establish precisely what the claimant's case is in each regard.

19. I turn first to consider the conduct of "Insisting that the claimant return to work without any proper arrangements in place for a phased return to work."

20. The contemporaneous documents reveal no such insistence on their face. The notes of the meeting on 17 March 2021 between the claimant and a manager show that the respondent had carefully considered what the (then recent) Occupational Health Report had to say about a phased return to work in due course and about the possibility of a move (at least on a temporary basis) to daytime working. According to the notes both were discussed and the claimant's manager was to revert to her having considered what could be accommodated by the respondent's business. It was not disputed before me that those notes reflected what was discussed at the meeting.

21. The manager sent to the claimant an email on 26 March 2021 which recorded that she had failed to respond to certain efforts on his part to contact her and that he would like a further meeting to discuss "How we can make your return as comfortable as possible."

22. Her response on 29 March dealt with the following:

    22.1 She noted that she did not feel well enough to return to work. The subsequent emails show that this view was respected. She was not pressed to return, but the respondent promised to contact her periodically to review the situation.

    22.2 She stated that Occupational Health advice had been ignored. She did not explain in her email which advice and I return to this below as it forms the basis of a separate complaint.

    22.3 She stated that she did not feel that the respondent understood the impact of the events in September 2020 on her and that her manager (called Hanah) had not been supportive. By way of explanation (and no other has been provided to me) of what she said, she noted that all she had received were messages about a return to work. From the bundle of documents, it is clear that the respondent had followed its absence procedure and that the communications from Hanah I have seen had been sympathetic and asked the claimant to contact her to discuss how the respondent could help her whilst absent (for example, see the letter of 16 January 2021 with regard to a reference to Occupational Health).

22.4 Ms Stehrenberger told me that the claimant perceived these emails as amounting to a demand that she return to work, even though they do not say so and, on the contrary, repeatedly accepted that the claimant was not presently fit to return. Her complaint is apparently that she felt that she was being "bombarded" by emails. Ms Stehrenberger reminded me that disclosure had yet to take place, but no documents have been produced by the claimant to me to make good any claim of "bombardment" and I note that the ET1 gives no further details in this regard.

23. I consider that there is no reasonable prospect of the claimant making good this first factual allegation. The contemporaneous documents show an employer seeking to facilitate a return to work, acting on Occupational Health advice and respecting the claimant's insistence that she felt unable to return. It is true that arrangements for a phased return were never put in place, but that is because of the claimant's assertion that she was not yet ready to return. The respondent demonstrated a willingness to put such arrangements in place at the appropriate time. None of those matters appear to me to be in dispute. Hence, there is no reasonable prospect of her establishing the treatment complained of for the purposes of her direct discrimination claim, or that it was a detriment. As regards the required comparison exercise, no actual comparator was relied upon and I do not consider there to be any reasonable prospect of satisfying a tribunal that she was treated worse than an appropriately defined hypothetical comparator would have been treated.

24. It is possible that an employment tribunal could find that the claimant felt that the respondent contacting her regularly, referring her to Occupational Health and asking what it could do to help her was pressuring her to return. That is, indeed, the case as advanced on her behalf by counsel. However, I do not consider that there is any reasonable prospect of an employment tribunal finding that it was reasonable for such conduct to have the forbidden effect found in s.26(b) of the 2010 Act.

25. I next turn to consider the assertion that "Whilst the claimant was off sick, insisting that the claimant attend meetings."

26. This complaint was explained in the following way. It was said that the respondent was asking for her to attend meetings (or have calls) with Occupational Health and with her managers far too often. The word "insistence" was not relied upon and does not appear to me to capture the essence of the claimant's case as it was explained to me.

27. I therefore proceed to examine the case as now advanced. I note that each request to deal with Occupational Health was carefully explained in a letter and that the claimant did attend, apparently without protest, either by telephone or in person. It was not suggested that she had been unwilling to attend the March meeting (referred to above) which was to discuss the possibility of a phased return and a flexible working arrangement, which are the very matters that are the subject of the complaints at 1.1.3 and 11.1.5; those complaints being to the effect that those matters were not addressed.

When a further meeting was suggested, the claimant noted that she was still unwell and not ready to return. This was respected and the respondent did not insist on, or (in any document that I have been shown) even request, a further meeting, but instead agreed to contact her periodically to see how she was.

28. Hence, it is not now asserted that the respondent insisted that the claimant attend meetings. There is no material before me to suggest that she was asked to attend meetings more often than would be reasonable. On the contrary, the respondent appears to have followed a standard procedure for dealing with those on long-term ill-health absence. Once again, there is no reasonable prospect of her establishing the treatment complained of for the purposes of her direct discrimination claim, or that it was a detriment. As regards the required comparison exercise, no actual comparator was relied upon and, as for the previous allegation, I do not consider there to be any reasonable prospect of satisfying a tribunal that she was treated worse than an appropriately defined hypothetical comparator would have been treated.

29. I assume, for these present purposes, that the claimant would say that she felt that she was being asked to meet too frequently. Even if (as I will assume to be the case) the claimant could persuade a tribunal that she perceived that this gave rise to a violation of her dignity, or the creation of an intimidating, hostile, degrading, humiliating or offensive environment, I do not consider that there is any reasonable prospect of such a tribunal being persuaded that it was reasonable for such conduct to have that effect and, hence, there is no reasonable prospect of an employment tribunal finding that the conduct had the forbidden purpose of effect required for making out a claim for harassment under s.26.

30. Next, I turn to the assertion that the respondent did not permit "The claimant's flexible working arrangements but constantly [made] contact with the claimant whilst off sick."

31. The second aspect of this complaint was agreed by Ms Stehrenberger to amount to another way of putting the matters dealt with in 11.1.1 and 11.1.2. These I have dealt with above. As to the first aspect, it was agreed that the respondent had indicated a willingness to consider flexible working (in the short or longer term). The claimant had never made a request for it (or for particular hours of work) because she had never felt well enough to consider the terms of her return in that kind of detail.

32. The direct discrimination claim has no reasonable prospect of success. My analysis is materially the same as in respect of the previous two allegations.

33. It also follows that no unwanted conduct on the part of the respondent could be established in this regard. The claimant never sought any detailed proposals and the respondent never offered any precisely because the claimant consistently maintained that she was not ready to return at any time in the foreseeable future despite the hope expressed by Occupational Health in its second report that this might be so. Furthermore, the

respondent made clear to the claimant its willingness to consider flexible working as soon as she felt able to return.

34. I next turn to the allegation concerning "Not pursuing the claimant's (informal) grievance and not addressing her concerns." Once again, Ms Stehrenberger helpfully clarified that this referred to an informal grievance raised in September 2020 which the claimant says was not dealt with until she raised a more formal grievance a short time later. I note that this grievance was dealt with and the person of whom she complained was dismissed summarily on 21 September 2020.

35. I also note that this distinction between an informal first grievance and a more formal subsequent grievance seems somewhat at odds with the narrative in the claim form which states:

> "…I was assaulted and harassed by another colleague. This happened around September time 2020. Which I then reported to my manager, who then started an investigation and eventually the other guy… was dismissed."

There is no distinction there drawn between an informal first grievance and a more formal second grievance. On the contrary, what is said is that when the matter was raised with the manager an investigation was started.

36. If there was a failure to act on an informal grievance which she raised that could amount to a detriment. Could it be that a tribunal might be persuaded that she was treated less favourably than a hypothetical comparator would have been treated. Against the background of the undisputed facts referred to above, including what would have to have been a very short interval between the two grievances and applying a measure of common sense, I consider this highly unlikely. Whilst I do not consider there to be no prospect of this being established, I do consider that there is no reasonable prospect of this.

37. Of course, without hearing the evidence I cannot exclude the possibility that there was such a brief period between a first (less formal) complaint and a more formal one in which nothing was done by the respondent and which delay had the forbidden effect set out in s.26(b). Without hearing from both parties, I cannot say whether it would have been reasonable for such conduct to have had that effect. If there was a failure to respond appropriately to an initial grievance, that was soon corrected, but that would not prevent there being an instance of discrimination resulting from the initial failure.

38. I now turn to the allegation of "Not carrying out Occupational Health recommendations." Again, this allegation was helpfully clarified. It is not so much the recommendations contained in the Occupational Health reports to which the claimant intends to refer, but the finding that she was not yet fit to return to work. It was accepted that, as a result, this was another way of stating the point made at paragraph 11.1.1. Hence, I have already dealt with the matter.

39. Finally, I turn to the allegation of “Not acting on the claimant’s grievances and concerns”. This was said to be the same point as that made in paragraph 11.1.4 and, hence, I have already dealt with it.

40. In summary, I have found that the claimant has no reasonable prospect of making out the factual and legal aspects of her sex discrimination claims considered above, save in one regard.

41. Against that background I turn to consider the possible link between those factual allegations and the claimant’s sex. Is there any reasonable prospect that an employment tribunal could find that the conduct related to the relevant protected characteristic (the claimant’s sex) for s.26 purposes, or was the treatment because of the claimant’s sex for s.13 purposes? I have considered this matter in the round, although, unless any aspect of my reasoning and conclusions set out above is incorrect, it is material as regards only one part of one claim.

42. In this context (and with s.136 in mind) I remind myself that the claimant bears the initial burden to show facts from which a tribunal could decide that the Equality Act had been contravened in the material respects, or one of them. This requires something more than a difference in treatment or apparently unacceptable treatment and the presence of a protected characteristic.

43. Ms Stehrenberger was invited by Mr Wilson to explain to me what this ‘something more’ might be. She did not attempt to do so directly. Rather, she pointed to the fact that disclosure had yet to take place and stated that if the respondent considered that the claimant’s case lacked particularity, then it should ask for further particulars. Neither point advances the claimant’s case in my view.

44. What I am confronted with is an employer which acted swiftly to deal with allegations made against a fellow employee. It investigated them and found them made out to a sufficient extent to summarily dismiss that employee within some three weeks of the event in question. Thereafter, the employer followed its written procedures for dealing with ill-health absences. It is not disputed that it remained in contact with the claimant and obtained Occupational Health reports. The ET1 does not suggest that any actual (or hypothetical) male comparator was, or would have been, treated differently. Indeed, it simply does not address the point.

45. If the responded did delay in dealing with an informal grievance from the claimant (who was then and thereafter absent sick) for a few days, there must be a possibility that this was because of, or related to, her sex. However, I was not taken to any act or omission of the respondent or to any other material which might provide facts from which a tribunal could conclude that this respondent had treated the claimant in the way alleged because of her sex. Hence, as regards the alleged failure to action the informal grievance, I find there to be no reasonable prospect of a claim for harassment succeeding. The mere fact that the claimant is female is not enough for such purposes. The same would have applied to such a claim

relying n any of the other matters relied upon should my analysis in respect of them have been otherwise.

46. In the circumstances, I consider that these claims must be and are struck out pursuant to Rule 37

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Employment Judge Andrew Clarke KC

Date:6 February 2023

Sent to the parties on: 11/2/2023

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For the Tribunal Office