Case Number: 1600172/2016

EMPLOYMENT TRIBUNALS

Claimant: **Ms F K Carribine**

Respondent **British Medical Association**

Heard at: **Cardiff** **On: 18 April 2017**

Before: **Employment Judge P Cadney**
Members:
Representation:
Claimant: Kerry Gardiner (Counsel)
Respondent: Owain James (Counsel)

JUDGMENT

The unanimous Judgment of the Tribunal is:

i) Permission is given to the claimant to amend her claim form as set out in paragraph 12 below.

ii) No order is made on the respondent's application for strike out/deposit order in respect of any of the claimant's claims.

REASONS

1. The case come before the Tribunal today for determination of the Respondents application that the Claimant's claims of sex and/or disability discrimination/ victimisation should either be struck out as having no reasonable prospect of success, or that a deposit order should be made on the grounds they have little reasonable prospect of success.

2. The Claimant's claims have been whittled down to a much smaller number than was originally the case and are now set out in two Scott Schedules, one concerning discrimination which sets out allegations of direct discrimination and/or harassment on the grounds of sex and/or disability; and a separate schedule in respect of the allegations of victimisation. There was an earlier Preliminary Hearing at which the Claimant was held to be a disabled person within the meaning of the Equality Act 2010.

3. The very broad outline of the events which lie behind these claims, (although I should make it clear I have heard no evidence and I am making no findings of fact), are that the Claimant was employed by the Respondent from 1 June 2015. On or about 23 July 2015 she returned to discover an apparently offensive cartoon mocking her management style as a result of which she caused an investigation into the IM link messages of a number of her colleagues. These revealed that between April and August 2015 a number of comments had been made about her, unbeknownst to her at that stage, which were undoubtedly derogatory and in many cases offensive.

4. As a consequence of that the Respondent conducted an investigation which reported, and amongst other things concluded, that there was a disciplinary case to answer for the four other members of staff. Two were subsequently dismissed, one was given a final written warning and one resigned as I understand it. In November 2015 the Claimant was placed under a disciplinary investigation for allegations of fraud in respect of her expenses and she resigned before any conclusion to that investigation in January 2016.

5. Arising from that are the allegations and I will start with the allegations of discrimination as those are the first in time. The first relates to the allegation of direct sex discrimination or harassment on the grounds that in the messages the Claimant was described as "Fanny" but her name is Faith. The Claimant draws the conclusion that that is being used in its sense as a slang term for female genitalia and that it was being used to be derogatory of her and because she was female. The Respondent submits that those are all conclusions which cannot reasonably be drawn from the comments themselves and that therefore there is no basis for asserting that this is capable of being an act of discrimination.

6. In respect of the second, it is an allegation that in the messages there is criticism of her weight and appearance and the Claimant alleges that that is on the ground of sex as comments made about a persons weight and appearance in a derogatory sense are more likely to be made about a woman than a man. Again the Respondent submits that those are

conclusions which could not reasonably be drawn from the messages themselves.

7. The third allegation is an allegation of making comments of a sexual nature about her. The Claimant submits that those are self evidently discriminatory as they are comments about her sexual attractiveness or perceived lack of it and there are direct sexual references in the messages. Again the Respondent submits that those messages cannot bear the meaning that the Claimant seeks to place on them.

8. It appears to me that the messages have to be looked at in the round in the sense that they are a series of clearly derogatory comments about the Claimant. Dealing first with the third allegation of making comments of a sexual nature about her, self evidently the comments are comments which relate to her sexual attractiveness. It appears to me that they are capable of being acts of discrimination but in fact the earlier allegations should be read in the light of the overall tone of the messages. I accept that some of the allegations may be stronger than others but having been correctly reminded by Ms Gardiner of the strictures of the Appeal Courts as to the necessity of hearing evidence before determining discrimination claims it does appear to me that the Tribunal would need to hear evidence as to the context in which these comments were made in the messages to determine in the light of those findings of fact whether they were capable of bearing a discriminatory meaning; and therefore whether the first stage of the Igen v Wong test had been satisfied, and subject to that whether the Respondent had discharged the burden of proof in respect of it. Whilst I accept that the Respondent may have some good points to make about those, it doesn't appear to me that it can be said either that they have no reasonable prospect of success or little reasonable prospect of success.

9. The fourth allegation of discrimination is questioning whether her disability was genuine and the Respondent submits that that self evidently cannot be either direct discrimination or harassment on the basis it is calling into question whether she was in fact a disabled person. It appears to me again that this will turn very much on the evidence that is heard. Clearly if a person is disabled then questioning whether she suffers from the condition may in such certain circumstances amount to harassment will depend on the context it will depend on the evidence, but again it does not appear to me that it can be said that there is either little or no reasonable prospect of success in respect of that allegation.

10. The fifth allegation is in fact very similar to the allegations of victimisation in that it is said after the Claimant had brought the messages attention to the Respondent that the Respondent had supported the perpetrators by failing to suspend them, having meetings, telephone calls aimed at helping the perpetrators defend themselves, refusing to move or split the

perpetrators up in the office, providing first class travel, and colluding with Beatrice Drury. The Respondent submits that in respect of those matters all that is really being alleged is that the Respondent maintained the status quo during the period of the investigation. Nothing was done beyond allowing them to properly defend the allegations, which they were entitled to, and that in the circumstances there is little or no prospect of the Claimant being able to show, that the actions of the Respondent were themselves as the Claimant alleges, harassment on the grounds of disability and sex.

11. That links in with the allegations of victimisation. There is a specific issue about the allegations of victimisation in that it is not disputed, that the 2nd, 3rd and 4th protected acts are capable of being protected acts. It is said that in respect of the 1st alleged protected act which was presenting the typed copy of the link messages in early August of 2015 is not pleaded as a protected act and therefore if the Claimant is to rely on it she needs amendment. The basis of this is paragraph 50 of the ET1 which sets out the 2nd, 3rd and 4th protected acts specifically but does not specifically rely on the 1st protected act. The Claimant submits that no amendment is needed as that it is specifically pleaded at paragraphs 9 and 10 of the ET1 and is therefore set out in the document even though it is not set out as a protected act specifically. Alternatively if an amendment is needed then it is self evidently one which should be allowed on the ordinary Selkent principles since it is simply of a relabeling of a specific allegation which is already contained within the ET1 and indeed adds very little to what is already alleged. There are no new facts that will arise if the Claimant is allowed to rely on that.

12. It appears to me that in fact given that the document is specifically pleaded at paragraphs 9 and 10 but it probably does not require amendment in any event, but even if it does then clearly applying the Selkent principles the balance of prejudice entirely favours the Claimant and there is in truth very little prejudice to the Respondent if an amendment is allowed. It appears to me that to be sensible that the Claimant should be given permission to amend paragraph 50 of the ET1 to add the disclosure as the 1st protected act.

13. Dealing with the merits of the claims the Respondent as with the specific claim of discrimination at allegation 5 in the discrimination schedule effectively asserts that with one exception the Claimant's claims are merely allegations that she does not agree with the way that the Respondent conducted the investigation or dealt with those who were subject of the investigation. Protected act 1 alleges failing to protect the Claimant from further harassment by failing to suspend the perpetrators, refusing to move or split the perpetrators up in her office, forcing her to continue to sit close to the perpetrators and refusing to allow her to work

from home. Protected act 2 alleges supporting the perpetrators by failing to suspend them, having meetings, telephone calls and with helping the perpetrators defend themselves, refusing to move, split the perpetrators up in the office, providing first class travel to Beatrice Drury, the outcome of the grievance investigation and disciplinary action taken. Act 3 is the failure to support the Claimant by forcing her to continue to sit close to the perpetrators, refusing to allow her to work from home, not speaking to her and or sending abrupt and hectoring emails to her.

14. All of those, the Respondents submit, are effectively simply the fact that the Claimant is expressing her disagreement with the way they conducted the investigation. There is nothing from which a Tribunal properly conducting itself could conclude that those were acts of victimisation. Taking simply one example, the allegation of providing first class travel to Beatrice Drury, they say that when attending investigation meetings she was entitled to have representatives of her choice. Those were senior employees who were entitled to travel first class and therefore a decision was taken that she should be allowed to travel with them and that for the Claimant to allege that is an act of victimisation aimed against her is self evidently absurd and can't be on any basis relied upon as an act of victimisation. It is an example of the way the Claimant has taken the fact of her disagreement and has elevated it into an allegation of victimisation.

15. The Claimant submits that the starting point should be the fact that by August 2015 the Respondent knew that the Claimant's colleagues were sending deeply offensive messages and that that fact was now known to her, and yet they did nothing to separate any of those people in the work place, nothing to further protect the Claimant by allowing her to work from home, failed to suspend the perpetrators and that what would be necessary in this case is for the Tribunal to hear evidence as to why those decisions were taken. It is not self evident that the Tribunal could not take the view that something should have been done and that in the absence of doing something that an inference could be drawn that that was on the grounds of the Claimant's complaint and that therefore the burden would pass to the Respondent; therefore this is not a case in which it is possible to say at this stage that there was either no or little reasonable prospect of success.

16. In my Judgment this is probably one of the weaker elements of the Claimant's claims and I have thought carefully about whether either a deposit should be ordered or the claim struck out. However I am just about persuaded by Ms Gardiner that a Tribunal should hear the evidence and just persuaded that in this case those allegations should neither be struck out nor subject of a deposit order.

17. Dealing briefly with allegation 4, it appears to me that that self evidently contains allegations of fact which will need to be determined before any conclusion can be drawn and therefore no deposit or strike out is appropriate in respect of it.

18. In respect of allegation 5 which relates to delays in the grievance process, the Respondent has given an explanation of why that occurred but again it appears to me that that will probably need to be subject to evidence at a final Tribunal.

19. The final allegation is of victimisation in suspending the Claimant for allegations of fraud. The Claimant submits that if one looks at the allegations it is contended that three of the four acts said to amount at least potentially to fraud, were specifically authorised. If that is correct then a question must arise as to whether she was in fact being punished for having raised the earlier allegations. Once again I am just about persuaded by Ms Gardiner that it could not be said that there was no reasonable prospect of success or little reasonable prospect of success and therefore again in my Judgment at this stage all of the allegations are ones which will need to be determined by a Tribunal which has heard all of the evidence and can make the appropriate determinations including matters which are not before me today such as time questions which have been left in any event to the final Tribunal.

20. Following my earlier decision it has been agreed that there is simply one direction needed:-

    i) The parties shall agree a time estimate, draft directions and supply inconvenient dates for the period of 3 months beginning 14 days after the date for mutual exchange of Witness Statements within 14 days.

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Employment Judge
Dated: 8 May 2017

JUDGMENT SENT TO THE PARTIES ON

8 May 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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