Case Number: 2208102/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Miss M Keens-Betts	**v**	**The Anthony Gregg Partnership Limited**

Heard at: London Central **On**: 3 May 2017

Before: Employment Judge Lewis

Representation

For the Claimant: In person

For the Respondents: Mr Brotherton, consultant

PRELIMINARY HEARING JUDGMENT

1. The religious discrimination claim is struck out as having no reasonable prospect of success.

2. The age discrimination claims are struck out as having no reasonable prospect of success apart from one claim (see below)

3. The age discrimination claim which is not struck out is that the claimant was harassed for reasons related to age by Mr Greg refusing to put forward older candidates to clients; by him forcing the claimant and her colleagues not to do so, and by lambasting the claimant when she in fact did so. To the extent that leave to amend is required to encompass this allegation, it is given.

4. Leave to amend is otherwise refused.

REASONS

1. The claimant has brought claims for age, religious and disability related harassment, and holiday pay. The disability claim has already been withdrawn. The preliminary hearing was fixed for today to decide (i) whether the claimant should be allowed to amend her claim in accordance with a document she presented on 4 April 2017 (ii) whether any or all the claims should be struck out as having no reasonable prospect of success, and (ii) whether a deposit should be ordered in respect of all or any of the claims on the basis that they have little reasonable prospect of success.

2. The claimant produced for today's preliminary hearing a lengthy document headed 'Equalitics', which attached a schedule of 73 items. The parties agreed that the amendment request related exclusively to the matters in this Schedule.

3. We went through the Schedule together. It was agreed that all the items were referred to, to some extent, in the original ET1 save for those numbered 8, 11, 16-17, 36, 42, 61 – 62 and 65-73.

4. I considered that items 34, 45, 46, 56, 57 and 57A were only background evidence or reflecting of the claimant's state of mind, and did not sensibly amount to conduct by the respondents.

Law

Harassment

5. Under s26, EqA 2010, a person harasses the claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

6. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, Mr Justice Underhill (as he then was) gave this guidance:

> 'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so……..Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

Burden of proof

7. Under Equality Act 2010, s136, if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred unless A can show that A did not contravene the provision.

Strike out

8. Under Schedule 1, rule 37(a) of the ET Rules of Procedure 2013, the tribunal can strike out all or part of a claim on the grounds that it is scandalous or vexatious or has no reasonable prospect of success. However, the case law is very clear that a tribunal must be extremely slow to strike out a discrimination claim at a preliminary hearing on grounds that it has no reasonable prospect of success.

Deposit orders

9. Under Schedule 1, rule 39 of the ET Rules of Procedure 2013, if a tribunal at a preliminary hearing considers that any allegation or argument in a claim has little reasonable prospect of success, it can order the claimant to pay a deposit up to £1000 as a condition of continuing to advance that allegation or argument. The tribunal must make reasonable enquiries into the claimant's ability to pay and take account of any information obtained in that respect when deciding the amount of the deposit.

Amendment

10. The principles relevant to the granting of an amendment are set out in particular in Selkent Bus Co Ltd v Moore [1996] ICR 386. As confirmed and expanded by subsequent cases, these essentially are as follows. In exercising its discretion whether to allow an amendment, the employment tribunal should take into account all the circumstances and balance the injustice / hardship to each party of allowing or refusing the amendment. The relevant circumstances include

    10.1 The nature of amendment, ie whether it is a minor relabelling or, on other hand, new facts and a new cause of action are involved.

    10.2 The timing of application and why it was not made earlier, particularly if the claimant knew all the relevant facts.

    10.3 Where a new complaint or cause of action is proposed, the tribunal must consider whether the complaint is out of time and if so, whether the time-limit should be extended under the applicable statutory provisions. This is not the only consideration, but it is important in respect of a new cause of action. It is far less important where only a minor relabeling is involved.

10.4 The balance of hardship from the viewpoint of the respondents could entail, for example, more costs, especially if these are unlikely to be recovered; witnesses having disappeared or documents disposed of; faded memories and concessions made on the basis of the case as previously pleaded.

Conclusions

Overview

11. Reading the ET1, the gist of the claimant's complaints is the general unprincipled behaviour of Mr and Mrs Gregg, and their bullying and controlling manner towards her and indeed towards all their employees. In her 'Equalitics' document, the claimant states:

> 'I have a natural right to leverage any Protected Characteristic to progress a claim against the Greggs because a. their behaviour is clearly abnormal in both content and form b. there is no scientific equipment available to map their motivational trajectories and c. it is impossible to understand and engage with this type of individual due to their devious attitudes and behaviour ….. Therefore suspected cases in relation to which claims under Protected Characteristics are made must ultimately be addressed in the formal setting of a Tribunal. The risk of harm to others must outweigh the risk of losing the case as holding the beast up to the light must take precedence over Tribunal costs at all times.'

12. As the claimant knows, the law does not give a right to claim in respect of unfair treatment alone for employees without two years' service unless it is related to a protected characteristic under the Equality Act 2010 or certain other prescribed causes such as trade union activities. The claimant finds this disappointing in principle. She says that it is hard to know the cause of sociopathic behaviour and she cannot read the motivations of the respondents. She therefore feels it is for them to prove that their actions were not based on, in this case, religion or age. I explained to the claimant how the burden of proof under the Equality Act 2010 works. I also explained that the fact that there is discrimination based on age, religion and other protected characteristics generally in our society, does not mean it has occurred in a particular case. In a court of law, there needs to be sufficient evidence from which it can be inferred that it has occurred in that particular case.

13. In her previous experience, the claimant says she has been treated well in the workplace. I explained to her that an employer's failure to carry out best practice does not mean he or she has necessarily carried out unlawful actions. A tribunal is constrained by the law and legal definitions and causes of action.

Religious harassment

14. Apart from a generalised statement that she does not know why she was treated as she was, the claimant does not assert that she was treated any

differently or worse than a non-Christian or non-religious person would have been treated. Her point is that the respondents' poor behaviour was in itself inconsistent with religious values. She felt this was particularly unacceptable from Mr Gregg because he knew of her religious background and values, which made her particularly vulnerable to such unethical treatment, especially as she feels she has to 'turn the other cheek'. To quote from her 'Equalitics' document:

> 'An environment of abuse and positive reciprocation is mutually exclusive. In fact, the only expression of reciprocation that could exist here is 'an eye for an eye'. Therefore Christian life and life at the Anthony Gregg Partnership are catastrophically incompatible.'
>
> 'I have the right to raise the Christian standard as a recognisable and fundamental benchmark of common morality/decency in the UK.'
>
> She concludes:
>
> 'By way of offering the Protected Characteristic of religion and in absence of any other lever of protest for employees with less than 2 years' service, I believe the value of the Golden Rule of 'Love They Neighbour' is inherent in Government's Policy. Therefore, it is directly relevant to employee treatment.'

15. I do not believe this concept fits within any of the definitions in the Equality Act 2010. For harassment, which is what has been claimed, the respondents' conduct must be 'related to' religion. The conduct in this case was neutral. The fact that it might have particular adverse impact on a Christian or Catholic person does not mean the *conduct* was related to religion. In any event, I do not accept that the type of conduct alleged in this case would have any more adverse impact on a Christian/Catholic person than anyone else. Sadly employees of all faiths and of no faith are likely to be distressed by poor employment practices and bullying behaviour.

16. For similar reasons, I do not believe the definitions of direct discrimination or indirect discrimination would apply. It is not direct discrimination because there is no evidence whatsoever that the respondents would have treated the claimant any differently if she had not been Christian/Catholic. It is not indirect discrimination, because there is no evidence – and I do not accept – that generalised bullying would put Christian/Catholic employees at a particular disadvantage compared with non-Christian/non-Catholic employees.

17. I therefore strike out all the religious discrimination claims as having no reasonable prospects of success.

Age discrimination

The 'point 40' claim

18. I allow the claim at point 40 of the claimant's schedule to proceed, ie that she was harassed for a reason related to the age of others by being prevented on occasions from putting forward older candidates to clients and being lambasted if she did so. This claim also appeared in the original ET1, albeit there are minor differences between the wording in each location. For convenience, I call this the 'point 40' claim.

The non-'point 40' claims

19. The remaining claims for age-related harassment relate to the treatment of the respondents' employees, ie the claimant and the two secretaries, all of whom were over 45. The claimant also refers to the age-related treatment of a 26 year old former office junior, James. She says he was treated differently but also adversely because of his age.

20. For the purposes of my decision, I am working on the assumption that the claimant can prove the incidents she refers to and that they amount to bullying. The only evidence which the claimant can put forward that such bullying was age-related is speculative. She says it is well-known that society is ageist and that older workers are particularly vulnerable to bullying because it is harder for them to find a new job. She points to the fact that all four of the employees were bullied, but that James told her Mr Gregg would never dare to speak to him 'in that way', ie in an aggressive and short-tempered manner. The claimant also believes Mr Gregg's reference to her being paid too much and to the secretaries being required to work to earn their money were also age-related comments. She said this was because older employees are more expensive, although she did not know how much the secretaries were paid.

21. I have asked myself whether there is any reasonable prospect of the claimant succeeding on this argument. To strike out, there must be 'no' such prospect. I also note the wording is 'no *reasonable* prospect'. Setting aside the 'point 40' claim, is there sufficient evidence to shift the burden of proof. I cannot see that there is. It is entirely speculation based on the fact that we have an ageist society. That does not mean age discrimination was occurring in the particular instance. Nor does the fact that the claimant and other employees found it difficult to leave mean that the respondents' conduct was because of or related to age. It is perfectly conceivable that this was a small employer who had very poor employment practices and indeed acted like a bully. What is there to indicate that it had anything to do with age?

22. Further, the incidents themselves are not in any way inherently suggestive of age discrimination. For example, matters like misleading the claimant on recruitment that there was a London office; getting annoyed when she took time off for medical reasons; withholding expenses; being uncooperative about IT matters; coercing her into taking holidays at a particular time; holding an appraisal meeting in a public room at Mr Gregg's club; and seeking to buy a house a few streets away from where the claimant lived.

23. There were only four staff members apart from Mr and Mrs Greggs. Three of the four members of staff were over 45. One was 26. The claimant says all four were bullied, but the 26 year old was sufficiently psychologically robust to be able to leave. When I suggested to the claimant that this indicated the bullying was not age-related, she said that the 26 year old was bullied because of his youth. I find this difficult, as a 26 year old is not an obvious target because of his youth in a way that, say, an 18 year old would be. It is also a pure assumption. It is more likely that he was also bullied simply because the respondents were people who bullied all their staff, regardless of age. There were no employees between 26 and 45 in respect of whom one could look for non-bullying treatment. I add that the claimant virtually never visited the respondents' offices and gained all her impressions regarding the treatment of the other employees from telephone conversations. I do not consider a statement from the 26 year old that 'Mr Gregg wouldn't dare treat me like that' to amount to any kind of substantial evidence, let alone that it was related to age.

24. Therefore considering all the evidence apart from that involved in the 'point 40' claim, I can see no reasonable prospects of success on proving that the harassment was related to age. I have then asked myself whether there are any reasonable prospects of success on the non - 'point 40' claims if it was proved that Mr Gregg was instructing the claimant not to put forward older candidates to clients. I do not believe that there are. The claimant accepts that the recruitment market is ageist. Quite rightly she says recruitment agencies should resist the temptation to kowtow to employers' demands by sending only younger applicants. The claimant said Mr Gregg did not want to put in the time if clients were not going to be interested.

25. This is a quite different type of discrimination in a different context to the other 60 or 70 incidents of alleged bullying of the claimant and her colleagues. The respondents had themselves chosen to take on the claimant knowing her age and had retained two older secretaries for some years. Looking at the overall picture (on the assumption the claimant proves the facts), ie that Mr and Mrs Gregg bullied all their employees, one of whom was 26, and the type of poor practices and unsympathetic behaviour involved, I do not feel the issue regarding older job candidates is of any assistance on analysing the type of age-related harassment alleged in the rest of the claims.

26. In conclusion, I see no reasonable prospects of a tribunal finding age-related harassment on non-point 40 related matters.

Amendment

27. The application for amendment was not put to me in any coherent way. The claimant simply wished her schedule of 73 items to be part of her claim. She had not identified which of those items were not already in the ET1; nor had the respondents. As stated above, on going through the documents together, we agreed those items not already in the ET1 were

numbered 8, 11, 16-17, 36, 42, 61 – 62 and 65-73. The claimant did not feel very strongly about adding every single item as she felt she already had so many incidents covered.

28. In general, the additional items concerned direct treatment of the claimant. However, item 36 was that James (the 26 year old) was also a victim of harassment). The last few items (I was unable to establish exact dates) concerned conduct of the respondents subsequent to the issue of the ET1.

29. The ET1 was presented on 12 October 2016. The ACAS notification was made on 5 September 2016 and certificate issued on 28 September 2016. No dates were set out, and the claimant was unable at the preliminary hearing before me today to give any precision. However, an earlier schedule on the tribunal file indicates that item 69 took place in October 2016 and the previously numbered incidents before that. It is therefore highly likely that items 70 – 73 are also substantially out of time.

30. In most instances, the incidents are merely further examples of the general complaint of bullying and harassment which has already been made. The claimant would be at liberty to raise those matters as supporting evidence for any matters pleaded in the ET1 (had they not been struck out). Whether they should be allowed as a self-standing claim is a different matter.

31. The claimant had no particular reason for the lateness of the additional items, except that more had come to mind as she thought about her case.

32. I have considered these factors and also the balance of hardship in allowing or refusing the amendments.

33. The claimant is a litigant in person, which I take fully into account. However, she is an intelligent and articulate person, well able to identify the conduct which she objected to, albeit understandably not an expert in legal causes of action. She wrote a very full ET1 with numerous small incidents of alleged harassment. I do not consider it appropriate to allow her to keep adding in further incidents as she thinks of them or as they arise. Regarding any post ET1 incidents, the claimant had the option of going again to ACAS for conciliation and then issuing a further ET1. I am not saying that as a matter of law she was required to go down that route, but it was an option, as opposed to incrementally adding to the present claim as time goes on. It would have the advantage of focusing everyone's mind on what the post ET1 claims were and their merits.

34. Further, my views as to the weakness of the evidence of any religious or age-related harassment also extend to the new items. If I allowed the amendment to add further harassment claims, it would not benefit the claimant, as she has no reasonable prospects of success. On the other hand, the respondents would find themselves fighting proceedings which had no merits.

35. Regarding any victimisation claims for actions post the ET1, my observations above again apply regarding the previous option of issuing new proceedings.

36. For all these reasons, I do not allow any amendment of the claims.

Employment Judge Lewis
5 May 2017