



EMPLOYMENT TRIBUNALS

Claimant:

Mrs S Lowther

v

Respondent:

John Nike Leisuresport Ltd

Heard at:

Reading

On: 1 November 2019

Before:

Employment Judge Finlay (sitting alone)

Appearances

For the Claimant:

Mr G Black (Husband of claimant)

For the Respondent:

Mr T Gillie of Counsel

JUDGMENT

1. The complaint of discrimination is dismissed following its withdrawal by the claimant.
2. The Tribunal does not reject the claim due to the name of the respondent on the claim form being different to that of the name of the prospective respondent on the early conciliation certificate, on the basis that the claimant made a minor error and it would not be in the interests of justice to reject the claim.
3. The name of the respondent is amended to John Nike Leisuresport Ltd.

REASONS

The claim

1. The claimant says that she provided work over many years to a company called John Nike Leisuresport Limited ("the company"). She did so through a succession of intermediary companies, latterly through a company named Catering by Sally Ltd. In September 2018, the company terminated its arrangement with Catering by Sally Ltd, apparently bringing the services "in house". The claimant was not offered employment or engagement by the company - in contrast, so she says, to others who had worked through Catering by Sally Ltd.

2. The claimant brings two complaints. The first is a complaint of unfair dismissal, either under section 98 Employment Rights Act 1996 (“the ERA”); or as automatically unfair dismissal under the TUPE rules. To succeed in such claims, she would need to show that she was an employee (under section 230 ERA) in respect of the ordinary unfair dismissal claim and within the extended definition of employee (rule 2(1) of TUPE) in respect of the automatically unfair dismissal complaint.
3. Her second complaint is discrimination on the grounds of marital status. In essence, she alleges that she was “dismissed” as an act of malice because her husband had himself presented a claim of unfair dismissal against the company. Again, the issue of status will be relevant to this complaint.

The claim form

4. There is a box on the claim form for the claimant to “give the name of your employer or the person or organisation you are claiming against”. The name given is Sue Nike. After issuing proceedings, the claimant had obtained an early conciliation certificate from ACAS on which the name of the prospective respondent is the company.

Applications

5. The following applications were brought before me:
 - (1) An application by the claimant to amend the claim form to correct the name of the respondent to that of the company.
 - (2) An application by the respondent for the claim to be struck out or rejected on the basis of the error – specifically that the name of the respondent in the claim form and the name of the prospective respondent on the ACAS certificate are not the same.
 - (3) Assuming the claim is to proceed, an application by the respondent that the complaint of discrimination be struck out under rule 37 or, at the very least, a deposit order made under rule 39. Sensibly and pragmatically, Mr Gillie was not relying on the status issues in relation to his application for a strike out or deposit. These are complex legal issues which will no doubt require significant consideration at a final hearing.

The law

6. Both the complaints of unfair dismissal and discrimination are complaints to which the early conciliation regime applies.
7. Rule 12 of the Employment Tribunals Rules of Procedure provides that:

Where the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate, the claim shall be rejected unless the tribunal considers the claimant made a minor error and also that it would not be in the interests of justice to reject the claim.

8. There are a number of decided cases on similar facts but the case law is clear that these are essentially questions of fact and judgment for the employment tribunal to be made weighing up all relevant factors and in particular, the overriding objective of the tribunal.

Conclusions

9. I note that the rest of the claim form seems to have been prepared on assumption that the claimant was indeed employed by the company. Mr Black explained the error was his error and that he had inserted Sue Nike's details in the relevant box on the claim form because he believed that he needed to put down the person who controlled the company.
10. Mr Gillie argued that this was not a minor error as it changes the entire basis of the claim. Indeed, he argued, correctly in my view, that there is no sustainable cause of action against Sue Nike.
11. On balance, I consider that this was a minor error. Whether or not Sue Nike is indeed the controller of the company, she is clearly connected with it.
12. Turning then to whether it is in the interests of justice, I have noted the prejudice to each party. There is certainly prejudice to the respondent as if the claim is not rejected, it will be faced with defending a claim which it would not otherwise have to face. This can be balanced against the prejudice to the claimant who would not be able to pursue her complaint at all.
13. I also note that there does not appear to have been any really significant delay, or at least any delay which would prejudice the ability to have a fair hearing of these complaints. On balance, I consider that the balance of prejudice is in favour of the claimant.
14. I do, however, have significant concerns about the merits of the complaints, which do not appear to be particularly strong. Nevertheless, I believe it is within the overriding objective and the interests of justice to not to reject the claim and to allow it to go forward.
15. Turning then to the application to strike out, I am asked by the respondent to conclude that the complaint of discrimination has no reasonable chance of success. There are certainly significant difficulties. The complaint, in my view, cannot succeed as an allegation of victimisation, primarily because the claimant has not done a protected act. As a complaint of direct discrimination (or even harassment), the treatment or conduct has to relate to the claimant's marital status rather than to the person to whom she was

married. Put another way, the claimant could not succeed if she would have been treated in the same way and not been married to Mr Black (for example, had she been his long-term partner). I asked the claimant whether she considered she would have been treated the same had she and Mr Black been partners and not spouses. On her behalf, Mr Black replied that it was not possible to say.

16. Considering all these factors, I cannot say that this complaint has no reasonable chance of success, but I do consider that it has little reasonable chance of success. The application for a strike out is therefore refused.
17. I then went on to consider whether or not a deposit should be awarded, taking into account a reasonable enquiry into the claimant's means. Mr Black asked what the costs consequences of my findings were today. I suggested that whether or not a deposit is awarded, the tribunal has given an indication that it considers the discrimination complaint to have little reasonable chance of success, based on the information available to it at this point in time. That is not to say that other information might come to light and the evidence may come out totally differently. Mr Black asked whether, if the claimant continued and did not succeed, an award of costs would be made against her. I replied by stating that the claimant had received an indication from the employment tribunal based on evidence available to it as at 1 November 2019, that is the complaint of discrimination had little reasonable chance of success. If she proceeded to a final hearing and the tribunal found against her for reasons similar to those explained above, the respondent would then be in a position to apply for costs. Whether the tribunal then awarded costs would be a matter for that tribunal to determine.
18. At this point, Mr Black requested a brief adjournment in order to consult with the claimant. When the hearing reconvened, he explained that the claimant wished to withdraw her complaint of discrimination. He consented to that complaint being dismissed.

Employment Judge Finlay

Date: 12 November 2019

Judgment and Reasons sent to the
parties on:

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