



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE BALOGUN

BETWEEN:

Ms E Tincu-Straton

Claimant

And

The Network (Field Marketing and Promotions) Company Limited
T/A JYL Hand to Hand

Respondent

ON: 2 December 2020

Appearances:

For the Claimant: In Person

For the Respondent: Mr N Caiden, Counsel

JUDGMENT ON PRELIMINARY ISSUE

1. The race discrimination claim is struck out.
2. The claimant has leave to amend her claim to include a complaint of victimisation.
3. The claims of age discrimination, victimisation and unfair dismissal claims are the only claims that can proceed.

REASONS

1. By a claim form presented on 6/9/19, the claimant brought complaints of unfair dismissal, race discrimination and age discrimination. As the claim form did not clearly set out the legal and factual complaints, the claimant was ordered at an earlier preliminary hearing to provide further particulars of her claim. Those were provided on 20 April 2020 but as well as not properly clarify the existing claim, they included new claims, some of which were not within the jurisdiction of the Tribunal. For those reasons, in its amended grounds of resistance, the respondent made an application to strike out the claims. That application was considered at this hearing. The application did not extend to the unfair dismissal claim, which the respondent accepted should proceed. There is an issue as the claimant's employment status, but that will be dealt with at the final hearing.
2. Mr Caiden provided a written skeleton argument for the hearing, which he spoke to. The claimant was given an opportunity to respond immediately on each point, which she did. After considering the parties arguments, I reached the following conclusions:

Age Discrimination

3. At the relevant time the claimant was aged 58. The claimant contends that in or around June/July 2019, she was refused promotion work. She said that promotion jobs were on 2 consecutive days and the day before each, she was texted by the respondent and told that they were cancelled. The claimant says that she phoned the respondent on the second occasion and was told by a Debbie McPhillips, that the reason for the cancellation was that the job was double booked. The claimant does not accept this as an explanation. She contends that it was age discrimination because she had done promotion work for 9 years but as the company grew, she was no longer the right image for the company and they gave the work to people in their 20s and below.
4. Mr Caiden submitted on behalf of the respondent that age claim had no reasonable prospect of success and should be struck out. 'The respondent's position is that the claimant did not do promotion work. There is therefore a dispute of fact, which cannot be resolved at this hearing. This dispute is material because if the claimant is right and she has done promotional work for the last 9 years, that is something that might be sufficient to shift the evidential burden to the respondent to explain the reason for cancelling the promotion work, if that is found as a fact. As I don't know what explanation will be given, I am not in a position to say either that the claim has no reasonable prospects or that it has little reasonable prospects of success. That claim will be allowed to proceed.
5. Although the above details of the age complaint were not set out in the claim form, I do not consider that there is a need for a formal amendment. The claimant made reference to not being given promotion work because of ageism in the claim form and was ordered to provide further clarification. I consider the above details to amount to that clarification. However, if I am wrong about that, I have considered the various factors in the Selkent v Moore case, including the balance of prejudice between the parties and have concluded that the claimant will be more prejudiced by me refusing the amendment than the

respondent would be in me allowing it. The age discrimination claim as clarified will be allowed to proceed.

Race Discrimination

6. The claimant describes herself as white European of Romanian origin. She says that in the summer of 2018, she came back from abroad and found that her normal work location – Crystal Palace railway station – had been given to another employee, Paul, who is white British.
7. The claim was presented on 6 January 2019. The alleged act took place in Summer 2018 and therefore the claim is significantly out of time. Also, all that is being asserted is a difference in treatment and a difference in race. The case of Madarassy v Nomura International PLC [2007] IRLR 246 makes clear that this is not enough to discharge the evidential burden on the claimant to show a prima facie case of discrimination. The claim has no reasonable prospect of success and is struck out.

Victimisation

8. The claimant contends that she did 2 protected act. The first was on 30 July 2019 when during her disciplinary hearing, she complained to Debbie McPhillips about being discriminated against on grounds of age and race. The second was at her disciplinary appeal hearing when she made the same allegation. The claimant contends that she was subjected to the detriment of dismissal because of the said protected acts.
9. This is an entirely new claim which does not appear in the original claim form. It therefore requires leave to amend. In considering whether to allow the claimant to amend her claim, I have looked at the potential merits of the case. To succeed, the Tribunal will have to be satisfied that there is a causal link between the protected acts and the dismissal. The claimant was invited to a disciplinary hearing to answer allegations of being away from her position without permission and the dumping copies of Time Out magazine. She was told that these matters were serious and that a potential outcome could be dismissal. This all pre-dated the protected acts. However, the claimant says that around the same time, one of her colleagues, Delroy, was investigated by the respondent for the same or similar allegations and was not dismissed. She says that he did not do a protected act.
10. Mr Caiden was not able to put the respondent position on this as the claimant was raising this allegation for the first time and he did not have an opportunity to take instructions. Therefore, I could only take what was said on face value. However, if the claimant is right about Delroy, that might be sufficient to give rise to an inference of victimisation, therefore requiring the respondent to give an explanation. Taking the claimant' allegations at their highest, I felt that there might be an arguable case. Turning to the balance of prejudice, I considered that the respondent would not be unduly prejudiced by the addition of this complaint as evidence as to the reason for dismissal would have to be given, in any event, in relation to the unfair dismissal claim. The respondent is therefore unlikely to be put to any significant cost or inconvenience as a result of this claim. The amendment is therefore allowed.

Disability Discrimination

11. This is a new claim which is not referred to in the original claim form. No proper particulars of the claim have been provided so permission to amend the claim is not granted.

Working Time Regulations

12. The allegation is that the respondent did not allow the claimant toilet breaks. This is not in the claim form but in any event, it is not a recognisable working time regulation complaint. No particulars of which statutory provisions are relied upon or when and how they were breached. Leave to amend to add this claim is refused.

Detriment for raising Health and Safety complaints

13. This was a completely new complaint. The claimant relies on emails she sent to the respondent dated 26.7.19 and 29.7.19 as evidence of her having raised health and safety issues. However, having read those emails, I consider it unlikely that a final Tribunal would consider that they raise health and safety issues as envisaged by section 100(1) of the Employment Rights Act 1996 (ERA). The detriment the claimant seeks to rely on is dismissal yet she told the Tribunal that she did not believe that the raising of health and safety concerns was the main reason for her dismissal. For section 100 to apply, these must be the principal reason for dismissal. In the circumstances, I consider that this claim has no reasonable prospect of success therefore leave to add it to the proceedings is refused.

Other matters

14. The claimant makes allegations of stalking, being followed, photographed and monitored at work. She refers to breaches of the Protection from Harassment Act 1997; GDPR regulations; Article 8 of the European Convention of Human Rights; Health and Safety at Work Act 1974 and the Management of Health and Safety at Work Regulations 1999. The Tribunal has no jurisdiction to deal with matters under these various provisions and accordingly, these complaints cannot proceed.

Employment Judge Balogun
Date: 3 December 2020

