



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Philips

**Respondent:** Department for Work and Pensions

**Heard at:** Bristol (in public, by telephone)      **On:** 16 July 2021

**Before:** Employment Judge C H O'Rourke

## Appearances

For the Claimant: In person

For the Respondent: Ms S Garner - counsel

## PRELIMINARY HEARING JUDGMENT

1. The Claimant's claims of sex and age discrimination are struck out, as having no reasonable prospects of success.
2. The Claimant's claims of detriment and automatic unfair dismissal in relation to the making of protected disclosures and breach of contract (wrongful dismissal) will proceed to final hearing.

## REASONS

1. The Respondent applied for orders either striking out the Claimant's claims of sex and age discrimination, protected disclosure and breach of contract, on the grounds that, subject to Rule 37 of the Tribunal's Rules of Procedure, they had no reasonable prospects of success, or that, in the alternative, deposit orders be made, subject to Rule 39, on the basis that they had little reasonable prospects of success.
2. The Tribunal's jurisdiction was also challenged in respect of the discrimination and protected disclosure detriment claims, on the basis that they had been brought out of time.
3. I read a detailed skeleton argument from the Respondent, heard evidence from the Claimant, who had also provided a witness statement and heard submissions from both parties.

### The Law

4. I have referred already to the relevant Rules, in respect of strike out/deposit.

5. In respect of limitation for the protected disclosure detriment claim, s.48(3) to (4) Employment Rights Act 1996 ('ERA') states:

*'(3) An employment tribunal shall not consider a complaint under this section unless it is presented—*

*(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*

*(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*

*(4) For the purposes of subsection (3)—*

*(a) where an act extends over a period, the "date of the act" means the last day of that period, and ...*

6. Ms Garner referred to various authorities in her skeleton argument, which I shall reference below, as I consider relevant.

### **Claim of Sex and Age Discrimination**

7. I note the guidance in **Malik v Birmingham City Council UKEAT 0027/19/BA** and related judgments, as to not striking out discrimination claims except in the most obvious and plain case, but, however, in this case before me, it is such an '*obvious and plain*' case. Having heard evidence and submissions from the Claimant, I struck out those claims, as having no reasonable prospects of success, for the following reasons:

- a. The Claimant herself clearly didn't believe the claims had such prospects. She stated that she had a 'suspicion' that her then manager, Mr Carter, who, she alleged, had carried out or instigated the alleged acts of detriment against her, would not have treated an older person, or a man in that way, but accepted that she had little or no evidence to back up such an allegation, beyond rumours that female employees had previously, at some unknown time, left Mr Carter's team. I note also that it was Mr Carter who suggested she join his team;
- b. This is particularly so, when, on her own evidence, it was her protected disclosures that were the 'main' reason for the detriments she claims to have suffered and that they had angered and frustrated Mr Carter, leading to him shouting at her;
- c. She made no reference to the discrimination claims in her statement for this Hearing, concentrating entirely on the protected disclosure claim and having to be prompted to make submissions in respect of them. When challenged on the merits of these claims, she offered little by way of justification, again referring to effectively, in reality, relying on her protected disclosures and seemed, at one point, close to withdrawing the discrimination claims, but stating instead that she '*would leave the decision to the judge*';
- d. She has failed, despite previous orders, to really address the issue of comparators, failing to identify any specific comparators, seeming to

seek to rely only on notional comparators of an older employee, or men. I consider that she would be in real difficulties persuading a Tribunal that, in particular with the background of her protected disclosures that any comparator would have been treated more favourably. On her evidence, Mr Carter was angry with her for that reason (having, she asserted that he said she '*called the fraud team*') and if true, it seems inherently unlikely that he would not also have felt that way towards older persons, or men.

- e. I don't consider, therefore that the Claimant could get to the point of establishing a *prima facie* case of discrimination, but even if she did and the burden of proof shifted to the Respondent to show a non-discriminatory reason for the treatment, they would be able to provide extensive evidence as to performance and disciplinary concerns.

### **Claim of Detriment and Automatic Unfair Dismissal on grounds of Protected Disclosures**

8. I refused the Respondent's application to either strike out or to make a deposit order in respect of these claims, or to rule them out of time and refuse to extend time, for the following reasons:
  - a. Unlike with her discrimination claims, she has relatively extensive documentary evidence to support these claims.
  - b. While I heard some evidence from her, it was quickly clear to me that there would be a level of detail in her allegations, with references to documents and policies that was beyond the scope of the time available for me to hear and determine the issues in this claim. She is also likely to call other witnesses, whose evidence I have obviously not heard.
  - c. Also, to some extent, the merits of the claim are dependent on the quality of evidence from the Respondent witnesses, of which I heard none.
  - d. This was certainly not a case where I could conclude, on the evidence before me that the claim had no reasonable prospects of success. Nor, on balance, did I consider a finding of little reasonable prospects of success appropriate, bearing in mind my comments already as to the likely extent of evidence in this case and the stultifying effect a deposit order may have on an unrepresented litigant up against a large organisation. The Claimant is cautioned, however, in viewing this decision as indicating that her claim has real merit, when the balance to be struck in such matters is a delicate one (a comment I extend also to the extent of her schedule of loss – only seen following the Hearing).
  - e. Finally, I concluded that without hearing the totality of the evidence, to include from the Respondent, it was difficult for me to conclude that, the act of dismissal being in time that there was not a link from that act to a '*series of similar acts*', thus extending jurisdiction to the detriments claimed. It was common evidence, it seemed that the instigation of disciplinary proceedings and the alleged detriments were proximate in time, with the Claimant very shortly afterwards being suspended and thus at least allowing the possibility of there being a link between the detriments and the dismissal. I therefore leave this matter to be determined at the final hearing.

**Breach of Contract in relation to Wrongful Dismissal**

9. The Claimant contended that as she was engaged on a two-year fixed-term contract, the Respondent was not contractually entitled to dismiss her, short of the expiry of that term (December 2020). Contrary to my initial finding at the Hearing, I do not strike out this claim, as having no reasonable prospects of success, or order a deposit. I do so because, while it was an express term of the Claimant's contract of employment that the Respondent would be entitled to dismiss her, without notice, in the event of gross misconduct and Section 86(6) ERA permits such dismissal, the tribunal must be satisfied, on the balance of probabilities, that there was an *actual* repudiation of the contract by the Claimant. It is not enough for the Respondent to prove that it had a reasonable belief that the Claimant was guilty of gross misconduct, it must satisfy the Tribunal that such misconduct took place. Clearly, therefore, if the Tribunal concludes that the real reason for the Claimant's dismissal was her protected disclosures, not any alleged gross misconduct, then there is at least an argument that there has been wrongful dismissal.

**Employment Judge O'Rourke  
Dated 19 July 2021**

Judgment and Reasons sent to the Parties: 22 July 2021

FOR THE TRIBUNAL OFFICE