



EMPLOYMENT TRIBUNALS

Claimant: Mr T Dimitrov

Respondent: Hippo Inns Ltd

Heard at: London Central Employment Tribunal

On: 10 July 2020

Before: Employment Judge Adkin

Representation

For the Claimant: In person

For the Respondent: Mr Perry, of Counsel

JUDGMENT

1) The following claims are struck out on the basis that there is no reasonable prospect of success pursuant to rule 37(a) of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1:

- a) Claim of direct marriage/civil partnership discrimination under section 13 of the Equality Act 2010 ("EqA");
- b) Claim of direct sex discrimination under section 13 of the EqA;
- c) Claim of victimisation pursuant to section 27 of the EqA;

2) The following claims are not struck out, nor are they subject to a deposit order:

- a) Claims of direct age discrimination and/or harassment under sections 13 or 26(1) of EqA;
- b) Claims of direct disability discrimination and/or harassment under sections 13 or 26(1) EqA;
- c) Claim of harassment relating to the Claimant's sex under section 26(1) EqA;
- d) Claim of sexual harassment under section 26(2) EqA;

- e) Claim of automatic unfair dismissal under section 103A of the Employment Rights Act 2010 (i.e. dismissal for the sole or principal reason that the claimant made a protected disclosure).

REASONS

- 3) Today's hearing has been listed to deal with what was described as an application to strike out and/or deposit and an application on the part of the Claimant to amend his claim.
- 4) I have been provided with a bundle of documents of some sixty seven pages and I have heard extensive submissions from both parties.

Amendment

5) If I deal first with the application to amend I have concluded that in fact no amendment is required in the sense of bringing a new claim. I have decided to treat documents that have been introduced as further particulars of the claim. It is probably helpful to recite the history. The claim form itself was presented on 17 January 2020, there was a preliminary hearing which took place on 15 April 2020 which took place by telephone during which I summarised the claims as being those of age discrimination or harassment; disability discrimination or harassment; marriage or civil partnership discrimination or harassment; sex discrimination; victimisation and automatic unfair dismissal because of a protected disclosure under Section 103A of the Employment Rights Act 1996. Some additional clarity has been provided to those claims, first by answers that were given by the Claimant in response to particular questions that I posed at the hearing on 15 April. The Claimant on 13 May 2020 provided further particulars of his various claims in numbered paragraphs, this appears at page 37 and 38 of the bundle for this hearing. He also provided a letter dated 27 August 2019 of relevance for both his claims of victimisation and whistleblowing dismissal.

6) Additionally, the Claimant has provided an amended claim form on 27 April 2020 which provides additional details of his claims in narrative form and appears in the bundle at pages 33-36. Finally, there is a further document which assists in understanding the Claimant's claim which is a letter that the Claimant sent applying to object to the Respondent's applications by letter of 10 June 2020 which is at pages 50-55 of the bundle. To reiterate, looked at fairly these additional documents provide further particulars of the Claimant's claim form and are not new heads of claim so looked at in that respect I grant that application to amend.

Strike out/Deposit order

7) With regard to strike out and deposit I have had regard to two legal authorities the case of Mbuisa and Cygnet Health Care UK EAT/0119/18/BA. In that case it said particular caution should be exercised if a case is badly pleaded for example by a litigant in person, especially one whose first language is not English or to who does not

come from a background such that he is familiar with articulating complex arguments in written form. That obviously applies in this case. Mr Dimitrov's first language is not English and he is trying to articulate some complex claims. There is also the case of Anyanuu and another v Southbank Student Union 2001 ICR 391 House of Lords in that case the House of Lords highlighted the importance of not striking out discrimination cases except in the most obvious cases, given that these claims are generally fact sensitive and require full examination to make a proper determination.

8) Those cases both apply to strike out. With regard to deposit orders the authorities are clear that there must be a proper basis for making a deposit order and a proper basis for believing that a Claimant will struggle to establish the allegations which are part of his or her claim.

9) I should say that the Claimant may think it is harsh that these measures are being considered but it is in the interests of both parties that claims that do not have a merit are not allowed to proceed to trial because there are costs on both sides and the risk to the Claimant someone in Mr Dimitrov's position is that if he fights a lengthy trial who may face a costs application if he pursues claims that do not have a good basis.

Age Discrimination/harassment

10) The allegation here is that a co-worker made a comment to the Claimant on 31 August 2019 suggesting that he would be ashamed to be in the Claimant's role at his age. I noted in the hearing in April that the Claimant needed to provide details of the co-worker, the Claimant has some reluctance and belatedly provided details of the co-worker, the co-worker was male, a chef, he was slim in build, close to the Claimant's height which is about 5 feet 5 inches or something like that and thought by Mr Dimitrov to be a native English speaker although he is not entirely sure about that. So, he has provided details, it seems to me looking at this allegation that certainly looking at this through the prism of harassment this does relate to the Claimant's age, the allegation is that someone referred to it, so taking this allegation at its highest it seems to be that someone made a reference to the Claimant's age in a way that obviously made the Claimant feel uncomfortable, it seems to me that if the Claimant's allegation is made out that it meets the statutory language. I do not consider therefore that there is little reasonable prospect of success and it is not appropriate either to make a strike out order or a deposit order and that allegation can proceed to a hearing.

Disability Discrimination/Disability Harassment

11) We have discussed this at length because the pleadings were not entirely clear but it seems clear that the head chef Martin or Marcin made a suggestion that the Claimant had a mental problem. The Claimant believed that he perceived that he would not be suitable for the job and the Claimant says that this influenced his dismissal. The Respondent's case is that the Claimant did not pass his probation. Again, taking the Claimant's case at its highest and assuming that he is able to establish this, this would certainly be enough to satisfy the initial burden of proof on the Claimant and therefore I do not consider it would be appropriate either to make a strike out or a deposit order and again this claim can proceed.

Marriage/Civil Partnership Discrimination or Harassment

12) The basis of this claim is that the Claimant was asked about his marital status on 29 August 2019. He thinks this is unfair and inappropriate to be asked in a work place. It was noted when this was discussed at the Case Management hearing in April that the Assistant Manager Lauren had then addressed him romantically, it seems in fact that that is part of a different claim which I will consider further down. The Claimant has so far refused to disclose his marriage or civil partnership status, he has intimated in this hearing that it may be that he was single but he has not confirmed clearly either way, he simply thinks it is inappropriate. I have considered this matter carefully and I accept the submission of Mr Perry that the purpose of this legislation is to protect individuals who are married who are in civil partnership, the Claimant if he cannot establish or even allege that he had protected characteristic of either being married or in a civil partnership if he cannot establish those things then he cannot succeed and since he is not even alleging them it seems to me that this claim cannot succeed. Additionally, if I am wrong about that it seems to me that simply being asked about his marital status whereas this might be somewhat old fashioned is difficult for me to see in the circumstances that this is either discrimination or that of harassment. I conclude that it is appropriate to strike out this claim.

Sex Discrimination

13) This claim seems to overlap factually with harassment and/or sexual harassment which I shall deal with under a separate heading below. This allegation appears to relate to the waiting staff treating him detrimentally by calling him “lovely” or “sweetheart” he says that they were predominately female and the Respondent makes the points that these comments are bland and are no more than platitudes. I asked the Claimant to explain why these comments which seemed to be on the face of them positive could be negative and he could only refer to what he described as a general work place hostility. What he did not do however, is to identify that the comments “lovely” or “sweetheart” were being said in a hostile way. Perhaps of most significant relevance on page 37 as part of the numbered particulars comment at 2.5.2 the Claimant states in terms that he did not allege that he only suffered this treatment because he is a man. It seems to me therefore that the Claimant’s claim of direct sex discrimination must fail or cannot succeed and on that basis there is no reasonable prospect of success and that claim must be struck out.

Harassment

14) The same facts i.e. being called “lovely” or sweetheart” are relied upon by the Claimant for claims under Section 26(1) and Section 26(2) of the Equality Act 2010, I explored with the Claimant which sub-section this claim was being brought under, whether this was straight forward harassment or whether this was unwanted conduct of a sexual nature falling under Section 26(2)(a). The Claimant found it quite difficult to answer this question but the conclusion was that this may be a claim falling under both of those sub-sections. Again the Respondent’s position may be that these are bland or platitudes, I concluded though that because the Claimant was finding it very difficult to answer this it may have been that this was because sometimes what I would describe as sexual context is very difficult for people to describe without alluding to it in rather imprecise terms and in those circumstances I think this is a case where the

Claimant needs to articulate exactly what was said and what were the circumstances but at this stage it seems to me taking account of Mbuisa and the other authorities I ought not to strike this out or make a deposit at this stage, so this claim can proceed.

Victimisation

15) The claim of victimisation is brought under Section 27 of the Equality Act 2010. The Claimant relies upon a letter dated 27 August 2019 that is at page 39 of the bundle of documents, that letter is worth setting out in full:

Dear Lauren/Hiring Manager

I have passed my trial shift and have successfully finished shift yesterday. However, I was told by the chef Marcin and the Manager Lauren that I would be signing paperwork and had already prepared the relevant documents however, this discussion did not occur and I had several things I wanted to ask today upon the start of my phone conversation with Chef Marcin I initiated the conversation about the working conditions in the kitchen at which point he said he was busy and proceeded to end the conversation. He followed up stating he was available to send messages but was unresponsive when I tried to call a second time, I requested the phone number of the Manager but did not hear back from him. I therefore encouraged the management team to get in touch with me and let my word go first before discussion or involvement with any third party.

Regards, Todor Dimitrov

16) The Claimant has particularised his claim of victimisation at some length, page 38 of the bundle in response to the questions that I posed back in April at paragraph 2.6. He refers in those particulars to the working conditions of the kitchen, the high temperature and the absence of proper ventilation, he refers to the Health and Safety Work Act 1974, Section 43B of the Employment Rights Act 1996, which is of relevance to the whistleblowing. There is however no reference either to discrimination or to matters which would fall under the ambit of the Equality Act. I therefore conclude that even taking the case at its highest there does not appear to be a protected act falling within the definition at Section 27(2) and I conclude that this claim is misconceived although the facts that I have set out are relevant to the whistleblowing claim below but in summary the victimisation claim is misconceived and I consider that this should be struck out.

Automatic unfair dismissal because of a protected disclosure Section 103A of the Employment Rights Act 1996

17) The Claimant relies upon the letter on 27 August 2019 which I have already set out above but also crucially he explains in his particulars documents at page 38 that there was private communication with the Chef Marcin or Martin. It is clear that that conversation is referred to in the wording of the letter of 27 August 2019. If that letter is taken at face value i.e. working conditions in the kitchen it seems to me that this might reasonably relate to a health and safety concern and belief in a wider public interest given that there are plainly other people working in the kitchen and given also

the fairly low threshold for establishing public interest following the case of Chestertons and others.

18) In those circumstances it seems to me that there is potentially a claim under Section 103A and I consider that this claim should proceed, should not be struck out, nor subject to a deposit order.

Employment Judge Adkin

Dated:04/08/2020

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Sent to the parties on:

04/08/2020.....

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For the Tribunal:

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