



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Lopacinska

Respondent: Nottinghamshire Healthcare NHS Foundation Trust

Heard at: Nottingham **On:** 17 December 2020

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: In person

Respondent: Mr P Keith of Counsel

JUDGMENT

The Employment Tribunal Judge gave judgment as follows: -

1. The Claimant's claims of age discrimination, discrimination on grounds of religion or belief, race discrimination, sex discrimination and whistleblowing detriment are struck out.
2. The hearing listed for 27 – 29 September 2021 is cancelled.

REASONS

Background to this hearing

1. The Claimant presented her claim to the Tribunal on 1 July 2020. The Early Conciliation ("EC") certificate shows that she notified ACAS on 25 May 2020 and the EC certificate was issued on 26th of May 2020. She had been employed by the Respondent as a Junior Physiotherapist from April 2019. She worked at the Oakfield School in Bilborough.
2. Her claims were of: -
 - Age discrimination
 - Discrimination on grounds of religion or belief
 - Race discrimination
 - Discrimination on grounds of marriage or civil partnership
 - Sex discrimination
 - Whistleblowing detriment
3. The Claimant had not provided any detail of the basis upon which she

maintained that she had been discriminated against in respect of any of the protected characteristics.

4. The claims related to her time working with the specialist children's services (Paediatrics) from 27 August 2019 until 29 February 2020.

5. The Claimant had originally presented her claim on 27 May 2020 but her claim was not accepted. My colleague Employment Judge Adkinson reviewed the file when the claim had been received and directed the Claimant that her claim did not appear to raise any legal dispute the Tribunal could deal with. The Claimant was told that she must by 16 June 2020 provide details of the claim she makes that she says the Tribunal can deal with.

6. On 12 June 2020 the Claimant responded to that correspondence saying that she had contracted Covid19 and was unwell now and that she would send details by 2 July 2020.

7. The Claimant then submitted a further claim form on 1 July 2020. Again, the Claimant had not provided any further detail of her claim. No further details were provided as promised by the Claimant by 2 July 2020.

8. The claim was nevertheless accepted and served on the Respondent and the case listed for hearing on 27, 28 and 29 September 2021.

9. A case management Preliminary Hearing was due to take place on 29 September 2020.

10. The Respondents filed their response insofar as they could on 5 August 2020.

11. In respect of the allegations they were not able to respond to them because they were not in a form which the Respondent could properly respond to. The Claimant had failed to provide proper particulars of her discrimination complaint or her complaints of whistleblowing detriments.

12. My colleague Employment Judge Ahmed reviewed the file under Rule 26 of the Employment Tribunal Rules of Procedure 2013. He decided there should be a hearing to determine whether any or all of the complaints should be struck out as having no reasonable prospect of success or whether a deposit order should be made as an alternative.

13. The Preliminary Hearing was relisted for an attended Preliminary Hearing.

14. The Respondent requested further and better particulars by a letter dated 15 September 2020. To date no such particulars have been provided.

15. After being chased by the Respondent's solicitors the Claimant stated on 2 November 2020 that she was unable to do so because she was suffering from severe depression and that she would provide further and better particulars after the Preliminary Hearing had taken place.

The hearing today

16. I am to consider in this case whether the claims or any of them should be struck out under Rule 37 of the Employment Tribunal Rules of Procedure 2013.

17. Rule 37 provides:

“(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds: -

(a) that it is scandalous or vexatious or has no reasonable prospect of success.”

18. I heard representation from both the Claimant and the Respondent and I had an agreed bundle of documents and where I refer to page numbers it is from that bundle.

Undisputed facts

19. The Claimant was employed by the Respondents from 29 April 2019. She remains employed but she has been on sick leave since 8 June 2020. The Claimant’s claims concern a six-month rotation to “Specialist Children’s Services” which took place between 27 August 2019 and 29 February 2020.

20. The Respondents have a grievance procedure and discrimination policies. At no time has the Claimant complained of discrimination until she made her claim to the Employment Tribunal.

21. On 25 November 2019 concerns were raised by her line manager in a supervision meeting between the Claimant and Louisa Clough, Specialist Paediatric Physiotherapist. The notes are at pages 70-73. It included a concern that a child may have been very unwell and that the Claimant had not felt she needed to tell the physio whose case load included that child.

22. On 20 December 2019 the Claimant wrote to Allison Miah, Advance Practitioner Physiotherapist and thanked her for her support and giving her the opportunity to discuss her work in paediatrics. She also expressed gratitude for the support given by Karen Thomas. There was no mention that she had been unfavourably treated in any way.

23. On 14 February 2020 towards the end of her rotation there was a review. The review document is at page 107-108.

24. The review document details several criticisms that the Claimant made about the behaviour of her colleagues. Towards the end of that document she complains:

“I would describe team leader’s attitude to me – B7 Lis, B6 Antony and B6 Louisa, as highly inappropriate, professionally disrespectful and unapproachable, to the point of being toxic.

I did not manage to achieve any professional goals in this rotation and not been given opportunity to fully experience paediatric placement, while most of my initiatives, plans and ideas were continually suppressed.”

25. It is notable that the Claimant makes no mention that the reason that she received this treatment related in any way to the protected characteristics she appears to rely on in her claim form. From 1 March 2020 until 10 May 2020 the Claimant was on another rotation based elsewhere and does not make any complaint in respect of that.

26. On 10 May 2020 the Claimant contracted Covid19 and was off work until 17 May 2020. She returned to work on 17 May until 10 June 2020 when she then went off sick again initially with Covid19 and then suffering from anxiety and depression.

27. She was discharged from her Cognitive Behaviour Therapist on 3 August 2020 (pages 112-124). It can be seen from the discharge document that there is no mention of the Claimant suffering from discrimination.

The law

Striking out discrimination claims

28. Mr Keith referred me to the case of **Anyanwu v Southbank University and Southbank Student Union** [2001] IRCR 391. In that well-known case Lord Hope said:

“Discrimination issues (where “a question of law that have to be determined are often highly fact sensitive”) should as a general rule be decided only after hearing the evidence.”

29. He went on to say though that:

“The time and resource of the Employment Tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail.”

30. I was also referred to the case of **Chaddock and Another v Turkey UK** EAT/0190/14/KN which reminded us that there is no blanket ban on strike out applications succeeding in discrimination claims.

Reverse burden of proof

31. Mr Keith reminded me of the contents of section 136 of the Equality Act 2010 which provides:

“(2) If there are facts from which the Court could decide, in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

32. He referred me to the case of **Madarassy v Nomura International Plc** [2007] ICR 867 which confirmed that it is for the Claimant to show and establish a prima facie case of discrimination and must show more than simply a difference in status and a difference in treatment to establish a case.

My Conclusion

33. In this case the Claimant has had ample opportunity to put her case of discrimination but has failed to do so.

34. At no stage has she said to her employer that she believed that she had suffered discrimination.

35. When she submitted her claim to the Tribunal there were no details provided other than vague allegations of mistreatment. She ticked a number of protected characteristics but provided no details of why she said her treatment was because of one of those protected characteristics.

36. The Claimant has had six months since the claim was presented and three months since the request for further and better particulars was requested but has failed to provide any particulars of her claim.

37. The Claimant has been aware since August that the Tribunal was considering striking out the claim but has done nothing. Whilst the Claimant has received therapy she was discharged from her CBT therapy in August and there is no evidence provided by her to suggest that she has not been able to provide the details.

38. Claims of discrimination take up a huge amount of time for both parties and Tribunal and I am satisfied that the Respondent should not be put to further expense in respect of this matter and the Tribunal's time should not be taken up when the Claimant does not set out the basis of her claim.

39. I am satisfied also that there would be considerable prejudice to the Respondent's in this case. The events appear to have happened almost twelve months ago and no details had been provided for the Respondent's witnesses to respond to.

40. On the face of it the claims when presented were out of time and the Tribunal has time limits for a good reason. Allegation must be made within time so that parties can respond to them properly and fairly.

41. I am satisfied that in this case the claim as pleaded has no reasonable prospect of success and it should be struck out and the hearing listed should be cancelled.

Employment Judge Hutchinson

Date 29 January 2021

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