EMPLOYMENT TRIBUNALS

Claimant: Ms C Israel

Respondents: [1] Capita Customer Management Ltd
[2] Department for Work and Pensions

RECORD OF A PRELIMINARY HEARING

Heard on 31 January 2022 (CVP)

Before: Employment Judge D N Jones

Appearances
For the claimant: In person
For the first respondent: Mr A Johnstone, counsel
For the second respondent: Mr C Khan, counsel

JUDGMENT

1. The claims against the second respondent are struck out on the ground they have no reasonable prospect of success.

2. The complaints of age, religion and belief, sex and disability discrimination against the first respondent are struck out as they have no reasonable prospect of success.

3. The remaining applications of the first respondent to strike out the complaints and/or to require the claimant to pay a deposit are dismissed.

REASONS

The rules relating to strike out and deposit

1. By rule 37
(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;

2. By rule 39:

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

No reasonable prospect of success

3. The President of the EAT, Choudhury J, summarised the approach a Tribunal should take with respect to an application to strike out on the ground that discrimination claims have no reasonable prospect of success in **Malik v Birmingham City Council UKEAT/0027/19**:

*"30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see **Anyanwu & Another v South Bank University and South Bank Student Union** **[2001] ICR 391**. The applicable principles were summarised more recently by the Court of Appeal in the case of **Mechkarov v Citibank N.A [2016] ICR 1121.***

*31. In **Mechkarov**, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:*

(1) only in the clearest case should a discrimination claim be struck out;

(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

(3) the claimant's case must ordinarily be taken at its highest;

(4) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and

(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

*32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In **Community Law Clinics Solicitors Ltd & Ors v Methuen UKEAT/0024/11**, it was stated that in appropriate cases, claims should be struck out and that "the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."*

*33. A similar point was made in the case of **ABN Amro Management Services Ltd & Anor v Hogben UKEAT/0266/09**, where it was stated that, 'If a case has indeed no reasonable prospect of success, it ought to be struck out.' "*

4. I have considered the applications to strike out by assuming that the factual complaints of fact in the claim forms, or the amendments I have allowed, are made out.

The claims against the second respondent

5. The second respondent entered into a contract with the first respondent in May 2020 to outsource its telephony service in relation to universal credit queries from its customers. The claimant worked on the contract from 20 May 2020. The claimant worked from home because of the restrictions arising from the pandemic, but had previously worked at the first respondent's offices in Leeds.

6. The claim against the second respondent, as expressed in box 8.2 of the claim form issued on 13 April 2021, is that she was racially abused and called vile racist names by DWP customers. The claimant says she was ignored when she asked for a recorded message which warned claimants against making such abusive comments. She says the second respondent ought to have known of the abusive conduct of these callers and it breached its duty of care to her to provide a safe working environment. She says her human rights were violated, her mental health has suffered and that the second respondent is jointly responsible with the first respondent.

7. The legal claims which the claimant has ticked in 8.1 of the claim form are age, religion or belief, race, disability and sex discrimination. In addition the claimant says she was unfairly dismissed and is owed holiday pay.

8. The employment tribunal does not have an inherent jurisdiction, that is a right to decide any legal claim known to the law of England and Wales. It is restricted to determining cases which have specifically been identified for that purpose in a number of statutes or statutory instruments. The claims for breaches of the duty of care and free-standing human rights challenges are not cases the employment tribunal have the right to determine.

9. The claims which the employment tribunal has jurisdiction to decide in box 8.1. are to be found in the Employment Rights Act 1996 (ERA), for the claims of unfair dismissal, the Working Time Regulations 1998 (WTR) and/or the ERA for holiday pay, and the Equality Act 2010 (EqA) for the discrimination claims.

10. The claim for unfair dismissal can only be made against the claimant's employer. Under section 230 of the ERA an employee is defined as an employee who has entered into or works under a contract of employment and a contract of employment is a contract of service whether express or implied and if it express whether oral or in writing. In her claim form the claimant says she joined the second respondent as *an outsourced employee* of the first respondent. Nothing in the documents suggests the claimant ceased to be employed by the first respondent. Her agreement to work was with them, they paid her, they provided the offices from which she worked until the pandemic led to her working from home, they provided her with work equipment, they retained responsibility for line management, direction and control. The claimant's telephony work on the DWP contract was for the first respondent. The second respondent was its client. In these circumstances, the claim for unfair dismissal against the second respondent is bound to fail. It was not the claimant's employer.

11. At the hearing the claimant queried whether she might be an employee of the second respondent and referred to her belief that she acquired the same rights as an

employee after working for a period of 12 weeks. It is probable that the claimant had read about the rights of an agency worker under the Agency Worker Regulations, to which this provision is relevant. They had no application to the arrangement in this case. The first respondent is not a temporary work agency within the meaning of the Agency Workers Regulations 2010 and the claimant was not an agency worker. The second respondent was a client of the second respondent, for telephony services.

12. In respect of a claim for holiday pay, such a claim may be brought by a worker. A worker is defined, in regulation 2 of the WTR and section 230 of the ERA, as an individual who works under a contract of employment or any other contract whether express or implied and (if it express) whether oral or in writing, whereby the individual undertakes personally to do or perform any work for another party to the contract whose status is not by virtue of the contract that of a client or customer or any profession or business undertaking carried on by the individual.

13. The claimant entered into no contract with the second respondent, expressly or impliedly, to do work for them personally. She did the telephony work on the DWP contract pursuant to her contract of employment with the first respondent. She worked for the second respondent as the client of the first respondent. The claim for holiday pay as against the second respondent cannot succeed.

14. A discrimination claim may be brought against a broader category of respondent than the employer of the claimant. They are contained in Chapter 1 of Part 5 of the EqA. The claimant relies upon the second respondent as her employer, for the same reasons set out above in respect of the unfair dismissal claim, or on the basis there was some joint liability.

15. The definition of an employee is broader under section 83 of the EqA than section 230 of the ERA, in that it includes a contract do work personally. It is similar to the definition of a worker under the ERA. The claimant says in the second claim form that she joined DWP as an outsourced employee of Capita and in the first that she was moved to the DWP contract under Capita. In neither does she say she was an employee of the second respondent. For the same reason that she was not a worker, that there was no contract between her and the second respondent, she cannot establish she was an employee under the EqA.

16. The claim against the second respondent is in reality a claim for harassment about the customers who made phone calls about benefits, not the employees of the second respondent. These are members of the public. They are not people for whom the second respondent has legal responsibility under the EqA. The complaint is about harassment by third parties. The right to bring a claim for third party harassment against an employer or other responsible party within Part 5 of the EqA has now been removed, following the repeal of provisions for that type of complaint under section 40 of the EqA, and there is no residual claim, see ***Unite the Union v Nailard [2019] ICR 28.*** This claim cannot therefore succeed against the second respondent.

17. With respect to joint responsibility, there are provisions which extend the liability to others under Part 8 of the EqA, but these were not argued and I cannot see they assist the claimant. The employees of the first respondent cannot attach liability to their client under the premise that the first respondent acted as the agent of the second respondent, see ***Ministry of Defence v Kemeh [2014] ICR 625***.

18. In these circumstances the discrimination claims cannot succeed against the second respondent. I have already refused the applications to allow an amendment against the second respondent for the reasons set out in the Case Management Order which accompanies this judgment.

19. The claimant raised the public authority duty under section 149 of the EqA. That duty is not enforceable by an action in the employment tribunal.

20. The claimant relied upon the case of ***James-Bowen v Commissioner of the Metropolitan Police [2018] ICR 1353***. The case is authority for the proposition that a comparable duty of trust and confidence applies to office-holders as between employer and employee, but the duty did not extent to reputational damage of officers who were affected by the way the Commissioner had conducted litigation. It has no relevance to the claims brought against the second respondent.

The claims against the first respondent

21. In ***Chandok v Tirkey [2015] IRLR 195*** Langstaff J said, "*A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237) the claim as set out in the ET1".*

22. The contents of the claim form with respect to the complaints of age discrimination, religious or belief discrimination, disability discrimination and sex discrimination are so lacking in detail and clarity that the first respondent cannot sensibly respond to them. They are a mere list of protected characteristics in box 8.1 which have no apparent relevance to the matters contained in box 8.2. The application to amend includes facts about each of these claims, but they are not in the claim form. They are new. I have refused requests for amendments in respect of these claims. As presented in the claim form, these claims have no reasonable prospect of success.

Employment Judge D N Jones

Date: 23 February 2022