



EMPLOYMENT TRIBUNALS

Claimant

Mr D Kuma

v

Respondent

Asda Stores Limited

Heard at: Cambridge (by CVP)

On: 16 October 2020

Before: Employment Judge Ord (sitting alone)

Appearances

For the Claimant: Mr K Antwi-Boasiako (Solicitor).

For the Respondent: Mr A MacMillan (Counsel).

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals.

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

JUDGMENT ON PRELIMINARY HEARING

1. The claimant's complaints of direct sexual orientation discrimination set out in paragraphs 11(i) and 11(ii) of the paper attached to the claimant's form ET1 in these proceedings, the complaint of victimisation in paragraph 12(i) of that document and the complaints of harassment in paragraph 13 of that document are struck out. They have been the subject of previous litigation between the same parties (Case Number 3328523/2017) (which give rise to cause of action of Estoppel) and are an abuse of process following the ruling *Henderson v Henderson*.

REASONS

1. The claimant was employed by the respondent as a warehouse operative from 8 December 2014 until 30 May 2019 when he was dismissed on the stated ground of capability.

2. On 23 October 2017 the claimant presented a complaint to the Employment Tribunal (“the original case”) which proceeded under case number 3328523/2017.
3. The claimant presented a statement of case dated 11 May 2018 in those proceedings which was drafted by Dr Ryan Hermann, described as an Attorney at Law/Advocate, Hermann Law.
4. In that statement of case the claimant complained of harassment and direct discrimination in respect of race, sex and sexual orientation.
5. In relation to the allegations of harassment, specific allegations were made relating to the conduct of co-workers during the period June to December 2016.
6. The matter came before the then Regional Employment Judge, Judge Byrne, on 18 December 2018 at a case management hearing. As part of the orders made on that date Judge Byrne made an Unless Order requiring the claimant to provide to the respondent copies of text messages, referred to in the details of the issues set out in his claim and referred to in a previous case management summary, by 16 January 2019. He was advised that if that was not complied with the claims of harassment relating to sexual orientation, direct discrimination because of sexual orientation and victimisation (all of the claims then proceeding) would be dismissed without further order.
7. That order was not complied with and on 16 February 2019 confirmation of the dismissal of the claim for failure to comply with the Unless Order was sent to the parties.
8. Subsequent to the issue of the original claim the claimant was dismissed by the respondent. The claimant had been absent from work for a total of 480 working days (from August 2016 until the date of dismissal, 30 May 2019) as a result of depression, stress, fractured thumb and flu symptoms and in particular since 8 January 2019 due to depression and anxiety.
9. According to the respondent an Occupational Health referral was made following what is described as the claimant’s unpredictable behaviour at work when he reported having hallucinations and shouting at a shift manager to get people away from him when there was nobody present. There had, the respondent says, been previous episodes at work of a similar nature where the respondent’s management team had taken the claimant to seek medical assistance.
10. The respondent says that there were capability meetings on 17 and 30 May following which the decision was taken to terminate the claimant’s employment on the grounds of ill-health.
11. The claimant, by his current claim form which was issued on 15 August 2019 following a period of early conciliation from 17 June to 17 July 2019, now seeks to bring the following complaints:
 - (i) Direct discrimination on the protected characteristic of sexual orientation;

- (ii) Victimisation following the presentation of the original claim;
 - (iii) Harassment on the basis of sexual orientation;
 - (iv) Disability discrimination; and
 - (v) Unlawful deduction from wages.
12. In relation to the complaint of harassment the claimant referred to “a continuous conduct of harassment on the ground of his sexual orientation” and recited five specific acts of harassment dated between 3 July and December 2016 all of which had formed the basis of his complaints in the original proceedings.
13. In relation to the complaint of direct discrimination on the protected characteristic of sexual orientation the claimant complained of a failure by the respondent to protect him from “continuous acts of homophobic bullying and harassment” and of the respondent “failing to prevent other employees (named) from interfering with his performance and creating a hostile, intimidating and degrading work environment for the claimant because of his sexuality as a gay man”.
14. Although the pleading referred to bullying and harassment in the work place throughout his employment to 30 May 2019 and the conduct of other employees up to that date there were no pleaded incidents after December 2016 and all of those had been referred to in the earlier proceedings.
15. The allegation of victimisation included a repetition of an alleged failure to protect the claimant from a continuous conduct of homophobic bullying and harassment and failing to prevent the same named employees from creating a hostile work environment. Again, those allegations were specified by reference to particular incidents the last of which occurred in December 2016.
16. Included in the complaint of disability discrimination was the allegation that the respondent failed to protect the claimant “from a continuous conduct of homophobic bullying and harassment” and a failure to prevent the same named employees from creating “a hostile work environment for [the claimant] from July 2016 to 30 May 2019 as stated in paragraphs 2-7 above and throughout this statement of case”.
17. That allegation appears to be a repetition of the complaint of alleged harassment on the basis of sexual orientation. It does not, as Mr Antwi-Boasiako accepted, found a complaint of disability discrimination.

The Law

18. Where an issue has already come before a court or tribunal and has been decided, or an issue could have been brought before a court or tribunal in previous proceedings but was not, a party who seeks to re-open or raise such an issue in subsequent proceedings may be barred or “Estopped” from doing so if his or her opponent successfully pleads the defence of “Res Judicata”.

19. In Devine-Bortey v Brent London Borough Council [1998] ICR 886 the Court of Appeal identified three categories of Estoppel namely:
 - (i) Cause of action Estoppel which prevents a party pursuing a cause of action dealt with in earlier proceedings involving the same parties;
 - (ii) Issue Estoppel preventing a party re-opening an issue that has been decided in earlier proceedings involving the same parties; and
 - (iii) The ruling Henderson v Henderson which states that if a party fails to raise an issue in proceedings that could and should have been raised they may be Estopped from raising that in future if to do so would amount to an abuse of legal process.
20. On behalf of the claimant Mr Antwi-Boasiako accepted that the allegations of harassment set out in paragraph 13 of the document attached to the current Tribunal application were a repetition of the claims brought in the earlier proceedings.
21. I was satisfied that in that case the principal of cause of action Estoppel applies and to re-litigate this matter would be an abuse of process.
22. It was prayed in the claimant's aid by Mr Antwi-Boasiako that the claimant had been unable to comply with the original Unless Order because of a defective mobile telephone on which the relevant text messages were contained. He said that he himself had only been instructed two days after the time limit for complying with the Unless Order had expired. I reminded him that the claimant could have either applied for an extension of time when he knew that he could not comply with the Unless Order for a reason beyond his control and/or an application could have been made under Rule 38(2) to have the order set aside on the basis that it was in the interests of justice to do so but he had taken neither step.
23. It was also accepted on behalf of the claimant that the allegations of direct discrimination on the protected characteristic of sexual orientation as recited in paragraphs 11(i) and 11(ii) of the current claim form were complaints raised on the same specific allegations of actions by fellow employees and had formed part of the original proceedings.
24. On that basis, and for the same reasons, I was satisfied that those complaints should be struck out on the basis of the ruling Henderson v Henderson and because the doctrine of cause of action Estoppel applied.
25. For the same reason the allegation of victimisation relating to the alleged failure to protect the claimant from the conduct of those fellow employees should be struck out for the same reason.
26. In addition, all of those complaints preceded any protected act relied upon by the claimant. The only protected act relied upon was the issue of the original proceedings which took place in October 2017, but the acts complained of took

place in 2016. Accordingly, there was no reasonable prospect of any victimisation claim, founded on the protected act relied upon, succeeding as the matters complained of preceded the protected act.

27. The allegation of discrimination on the protected characteristic of disability in paragraph 14(i) of the claim was not, as Mr Antwi-Boasiako accepted, a claim of disability discrimination but a claim of discrimination on the grounds of sexual orientation and a repetition of the complaint at item 12(i). That allegation will therefore be dismissed for the same reasons.

The remaining complaints

The claims

28. The following complaints remain to be determined by the Employment Tribunal:

- (i) Did the claimant suffer unlawful deductions from wages as follows?
- (1) £0.38 on 22 June 2018.
 - (2) £0.50 on 20 July 2018.
 - (3) £1.75 on 17 August 2018.
 - (4) £0.50 on 18 September 2018.
 - (5) £248.85 in October 2018.
 - (6) £414.75 on 9 November 2018.
 - (7) £288.58 on 7 December 2018.
 - (8) £492.70 on 4 January 2019.
 - (9) £687.68 on 9 February 2019.
 - (10) £129.44 on 1 March 2019.
 - (11) £1,400.66 on 29 March 2019.
 - (12) £1,471.58 on 26 April 2019.
 - (13) £1,617.12 on 24 May 2019.
- (ii) If the claimant did suffer any or all of the alleged deductions from his wages did the respondent thereby directly discriminate against the claimant on the basis of his sexual orientation?
- (iii) If the claimant suffered any or all of the alleged deductions from his wages was this an act of victimisation by the respondent, the claimant replying upon the presentation and pursuit of his original proceedings as the relevant protected act?

- (iv) Further the claimant says that the respondent “continuously” delayed correct payment to the claimant causing him to raise queries about under payments causing him mental agony and distress, the claimant says that this was a further act of victimisation.
- (v) Did the respondent directly discriminate against the claimant on the basis of his sexual orientation and/or victimise the claimant by holding a meeting to terminate his employment on 29 May 2019 and terminating his employment on 30 May 2019?
- (vi) Is the claimant disabled within the meaning of s.6 of the Equality Act 2010?
- (vii) If so, did the respondent fail to make reasonable adjustments? The claimant says that the respondent failed “to provide him with the necessary support to cope in the work place”.
- (viii) Was the decision by the respondent to hold the meeting on 29 May and to terminate the claimant’s employment on 30 May an act of direct disability discrimination?

Employment Judge Ord

Date: 28 October 2020

Sent to the parties on: 13 November 20

For the Tribunal Office