



EMPLOYMENT TRIBUNALS

Claimant: Mr K Hepburn

Respondent: Refinitiv Limited

Heard at: Nottingham **On:** 15 January 2020

Before: Employment Judge Brewer (sitting alone)

Representation

Claimant: In person

Respondent: Mr M Curtis, Counsel

RESERVED JUDGMENT

1. The claimant's claim for age discrimination is dismissed on withdrawal.
2. The claimant's claim for direct race discrimination is dismissed as having no reasonable prospect of success.
3. The claimant's claim for direct disability discrimination is dismissed as having no reasonable prospect of success.
4. The claimant's claims for victimisation, save for the allegation set out at paragraph 18(f) below, are dismissed as having no reasonable prospect of success.

REASONS

Introduction

1. This hearing was fixed on the tribunal's own initiative, in order to consider whether to strike out the claimant's claims or in the alternative require him to pay a deposit as a condition of continuing such claims.
2. At a preliminary hearing before Judge Ahmed held on 7 October 2019 it was confirmed that the claimant was bringing claims of:
 - a. Direct race discrimination;
 - b. Direct disability discrimination
 - c. Direct age discrimination and
 - d. Victimisation.

3. The specific allegations are set out at paragraphs 2.1 to 2.14 of Judge Ahmed's Case Management Summary.
4. Judge Ahmed determined that a further preliminary hearing was needed "to determine whether the complaints of discrimination have little or no reasonable prospects of success" [para 6 of the case management summary].

Issues

5. The issues before me are set out at [3.1] of Judge Ahmed's case management Orders and are as follows:

To determine whether the complaints and allegations of race, age, disability discrimination and of victimization should be struck out as having no reasonable prospect of success pursuant to Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013, as amended.

Alternatively, to consider whether the claimant should pay a deposit as a condition of being permitted to advance any allegation or argument in relation to the complaints of race, age, disability discrimination and/or victimisation such deposit order to be made under Rule 39 of the Employment Tribunal Rules of Procedure 2013, as amended.

6. In the event, the claimant withdrew the allegation of age discrimination and I was left to consider the claims for race and disability discrimination as well as victimisation.

Law

7. The relevant parts of the Equality Act 2010 are as follows:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others...

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B...

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others...

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;*
 - (b) giving evidence or information in connection with proceedings under this Act;*
 - (c) doing any other thing for the purposes of or in connection with this Act;*
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.*
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*
- (4) This section applies only where the person subjected to a detriment is an individual.*
- (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

123 Time limits

- (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—*
- (a) the period of 3 months starting with the date of the act to which the complaint relates, or*
 - (b) such other period as the employment tribunal thinks just and equitable...*
- (3) For the purposes of this section—*
- (a) conduct extending over a period is to be treated as done at the end of the period;*
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.*
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
- (a) when P does an act inconsistent with doing it, or*
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

8. The relevant Tribunal rules are in the following terms:

Striking out

- 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...*

Deposit orders

- 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...

The hearing

9. The parties had complied with the case management orders and the claimant relied on his position statement, his ET1 and his further particulars as his evidence in chief. He was cross examined by counsel for the respondent. There was an agreed bundle of documents. At the conclusion I heard submissions from both parties, and I have also taken into account the written skeleton argument from Mr Curtis.

Findings of fact

10. It is accepted that given his diagnosis of prostate cancer, the claimant is a disabled person for the purposes of the Equality Act 2010.
11. The claimant identifies his race as ‘black British’.
12. The claimant presented his claim on 2 May 2019 following a period of Early Conciliation between 19 March and 19 April 2019. The claimant remains employed by the respondent.
13. In around November 2018 the respondent had a vacant manager role. Instead of an open recruitment exercise to fill that role, the role, or the tasks within the role were given to one Inderjeet Dhanjal. It remains unclear whether Mr Dhanjal was slotted into the manager role or whether he remained in his original role but took on the extra managerial duties. In my judgment nothing turns on that. The claimant agreed that no new staff were taken on, so there was no increase in headcount, and that one way or another, Mr Dhanjal had taken on extra work.
14. The claimant agreed that he was not the only person who could have applied for the role but did not get the opportunity to do so. He confirmed that others who were in the same position as he included white and other non-black employees, and employees who were not disabled. It was agreed that Mr Dhanjal is of Asian extraction.
15. This was the sole claim for direct race and/or disability discrimination.
16. In terms of victimization, the claimant says that there are two protected acts. First, an email the claimant sent to Mr Phil Buttacavoli on 23 November 2018. Second, the grievance raised by the claimant on 31 December 2018.
17. The respondent accepts that the grievance was a protected act but denies that the email to Mr Buttacavoli was.
18. The alleged detriments which the claimant says amount to victimisation are as follows:

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- a. 27 December 2018 – the claimant was removed from a project lead role by Mr Buttacavoli. The claimant says this was the continuation of an act by one Kellee Kaplan in November 2017;
- b. During the grievance process in early 2019, the respondent sought negative feedback on him from Kellee Kaplan and Besnik Dervishi;
- c. 24 April 2019 – the respondent made false allegations of poor performance about the claimant;
- d. 24 April 2019 – the respondent made veiled threats about the viability of the claimant’s position;
- e. 24 April 2019 – the respondent did not organize mediation;
- f. After April 2019 – the claimant was excluded from all “sophisticated work and was given minor or non-critical tasks;
- g. The grievance outcome has encouraged others to be negative towards the claimant, in particular Mr Besnik Dervishi.

19. In support of his assertions the claimant relied on a number of documents in the bundle.

20. I find that the claimant, along with all other employees of the respondent capable of filling the manger role now being undertaken by Mr Dhanjal were prevented from filling that role. I also find that those other employees include employees who do not share the race of either the claimant or Mr Dhanjal.

21. The respondent accepts that the grievance contained an allegation of discrimination and thus was a protected act for the purposes of victimization.

22. The email of 23 November 2018 which the claimant relies on as an earlier protected act is as follows:

Hi Phil

This would seem like a good opportunity to ask you who is replacing Marcin Zimmy? I don't recall seeing this senior grade/managerial role being advertised anywhere?

I trust you are familiar with UK Employment Law and Equal Opportunities policies?

I trust I am not about to witness an example of technical or engineering staff (with limited or no previous managerial experience) being promoted into a managerial role simply because they are “best buddies” with the (leaving) manager.

Or perhaps you are still working on your strategic organization of the team?

23. The claimant says that this falls within section 27(2)(c) of the 2010 Act as it amounts to “*doing any other thing for the purposes of or in connection with this Act*”. In my judgment, asking an employer if they are familiar with UK employment law and equal opportunities policies is not sufficient to amount to and therefore was not a protected act under any part of section 27(2).

24. Given the above finding, and given the grievance raised on 31 December 2018 no act prior to 31 December 2018 can amount to victimisation within the meaning of section 27.
25. In relation to the time limit in section 123 of the 2010 Act, given the date of the ET1 and the conciliation period, the earliest date an act could be in time is 28 December 2018.
26. The claimant gave no evidence as to why a tribunal should extend time in this case.

Conclusions

27. In my judgment, given that the respondent decided to have managerial duties undertaken by an individual without open competition, an act which in the general sense disadvantaged everyone who was not able to apply, in order to bring himself within section 13 of the 2010 Act the claimant would, in relation to his race claim, have to show that the respondent did this “because of race”, and given that a number of staff were equally disenfranchised, it seems to me that in a case such as this the claimant would in effect have to show that the respondent followed the process it did in order to favour Mr Dhanjal because of his race, the flip side of that being that in favouring Mr Dhanjal, everyone not of Mr Dhanjal’s race was equally disadvantaged “because of race”. In my view there is no reasonable prospect of the claimant’s claim for race direct discrimination succeeding. The same logical thought process applies to the disability claim. The claimant would have to show that Mr Dhanjal was chosen so as to, in effect, avoid choosing a disabled candidate. If the respondent wished to do this it could simply have followed its recruitment policy and appointed Mr Dhanjal, or any non-disabled candidate as the ‘best person for the role’, it did not have to ignore its own recruitment policy. Again, I find that there is no reasonable prospect of a claim for direct disability discrimination to succeed.
28. Turning to victimisation, the claimant’s claim under paragraph 18(a) above cannot succeed as at the date of the act complained of the claimant had not done a protected act.
29. In relation to the claim under paragraph 18(b), that during the grievance process in early 2019 the respondent sought negative feedback on him from Kellee Kaplan and Besnik Dervishi, the claimant relies on the grievance investigation notes. He says that in the investigation meeting with Kellee Kaplan, the investigator seeks negative feedback about him. The meeting notes start at page 66. At page 69 the claimant relies on the middle paragraph where the investigator asks: “Is KK aware of individuals who have more conflict within the team”. I note that in response Ms Kaplan gives a measured response and does not name any employees and the investigator does not ask her to do so. The claimant notes that the investigator asked Ms Kaplan specifically about a meeting she had in November 2017 and the investigator refers to other attendees being Jeff Granieri and the claimant. Ms Kaplan recalled the meeting. She was then asked whether during that meeting she made a comment about the claimant not being the right person for the project which was being discussed. The claimant says this is an example of the investigator soliciting negative feedback. It is not. The investigator asked this question because it relates

to a specific allegation the claimant made about what he alleged Ms Kaplan had said in that meeting as part of his grievance. I also note that although it is clear that the investigator is investigating a grievance, he does not tell any of the witnesses who it was had raised the grievance nor specifically what it is about. No reasonable reading of these notes could lead to the conclusion that the investigator was seeking negative feedback on the claimant from Kellee Kaplan.

30. The grievance interview with Mr Dervishi starts at page 71. The claimant relies on an exchange on pages 72/73. The claimant relies on negative comments about him by Mr Dervishi. It is entirely clear that these comments are not made because the investigator is seeking negative feedback. It is clear from the statement and from the claimant's own evidence, that he and Mr Dervishi have had a difficult relationship going back some time.
31. In my judgment the claimant has no reasonable prospect of showing that during the grievance process in early 2019, the respondent sought negative feedback on him from Kellee Kaplan and Besnik Dervishi.
32. The next allegation of victimisation is that on 24 April 2019 the respondent made false allegations of poor performance about the claimant. These he says are contained in the grievance appeal outcome letter which starts at page 90 of the bundle. Having rejected the appeal, the appeal manager goes on to say that there are two aspects of the grievance which need to be addressed. These are: the rationale behind Mr Buttacavoli removing the claimant from a project (in essence the issue at the heart of the claim of direct discrimination), and the working relationship between the claimant and Mr Buttacavoli. What the claimant says is that everything that the appeal manager recites as being said by Mr Buttacavoli about his relationship with the claimant, and the claimant's removal from the project, is false and fabricated by Mr Buttacavoli because of the protected acts. I have dealt with the time point in relation to the project issue above. As to the relationship issues Mr Buttacavoli raised during the grievance, these are all referenced to written documents. In any event, the claimant has no explanation as to why Mr Buttacavoli needed to fabricate a difficult relationship with him. The other evidence gathered as part of the grievance investigation, the grievance outcome and the appeal outcome are not challenged as discrimination or victimisation by the claimant. In my judgment there is no reasonable prospect of this allegation succeeding.
33. The next allegation of victimisation is that on 24 April 2019 the respondent made veiled threats about the viability of the claimant's position. The claimant relies on a paragraph from the grievance appeal outcome letter. At page 96 of the bundle the appeal manager set out, as part of a lengthy outcome letter, actions to be taken as a result of his findings. The first was mending the working relationship between the claimant and Mr Buttacavoli. The letter says:

If this is not addressed forthwith then there is the real risk of a detrimental impact on all the individuals concerned as well as a negative effect on the business as a whole

34. No reasonable reading of this could construe it as a veiled threat about the claimant's position. There is a) no reason not to give the words their clear

and common-sense meaning and b) in any event the claimant would need to show that the appeal manager made the veiled threat because the claimant did the protected act of raising the grievance and he gave no evidence about this at all. In my judgment this claim also has no reasonable prospect of success.

35. The next claim relates to the second of the actions to be taken as a result of the findings of the grievance appeal. This is that there should be a human resources managed mediation process to help the claimant and Mr Buttacavoli reconcile their differences. It is accepted that no such process has yet commenced. The respondent says that before mediation was arranged the litigation commenced and that altered the position. The respondent felt that the tribunal proceedings should play out first. The claimant accepts that he has never chased for mediation. I again consider that there is no reasonable prospect of the claimant showing that the HR department failed to implement a mediation process because the claimant raised the grievance.
36. The penultimate claim is that after April 2019 the claimant was excluded from all “sophisticated work and was given minor or non-critical tasks”. The difficulty for the claimant with this allegation is that he accepted that his tasks are allocated to him by his manager, a person not implicated in any way in these proceedings. The claimant says that he relies on an exchange of emails on page 121 of the bundle to show that Mr Buttacavoli has some input on the work he does. I consider that the following would need to be shown in order to succeed in this claim:
- a. That the work the claimant did after the grievance was not sophisticated but was minor and non-urgent;
 - b. That this work is different from work he would have been given had he not raised his grievance;
 - c. That the work he was given or the fact, if it be so, that he was excluded from sophisticated work amounted to a detriment
 - d. That Mr Buttacavoli excluded the claimant from the sophisticated work;
 - e. That Mr Buttacavoli did this because the claimant raised a grievance.
37. I cannot say that this claim has little or no reasonable prospect of success because I did not hear sufficient evidence about the nature of the work before and after the grievance and its allocation. This claim should therefore proceed.
38. The final allegation is that the grievance outcome has encouraged others to be negative towards the claimant, in particular Mr Besnik Deshervi. There was no evidence of anyone being negative towards the claimant other than Mr Deshervi and the evidence clearly showed a poor relationship between the two colleagues which pre-dated the grievance. Even if the claimant could show that the grievance outcome has encouraged others to be negative towards him this would not amount to victimisation as there is no evidence that those people have exhibited negativity towards the claimant because he did a protected act given that all of the documentary evidence shows that the respondent was scrupulous in a) not disclosing who raised the grievance and b) not disclosing the content of the grievance. This claim has no reasonable prospect of success.

Employment Judge Brewer

Date 11 February 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS