



EMPLOYMENT TRIBUNALS

Claimant: Mr D March

Respondent: East and North Hertfordshire NHS Trust

RECORD of an Open PRELIMINARY HEARING

Heard at: Bury St Edmunds (open)

On: 11 August 2020

Before: Employment Judge Tynan (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr T Sheppard, Counsel

JUDGMENT ON PRELIMINARY ISSUES

- (1) The following parts of the Claimant's claim are struck out on the basis that they have no reasonable prospect of success:
- 1.1 the claim for damages for fraud as set out at paragraph 1 of the Claimant's Title of Complaints document (pages 50 – 58 of the Respondent's Preliminary Hearing bundle);
 - 1.2 the claim for damages for misrepresentation / false representation / fraud as set out at paragraph 2 of the Claimant's Title of Complaints document;
 - 1.3 the complaint of harassment as set out at paragraph 3 of the Claimant's Title of Complaints document;
 - 1.4 the claim to damages for breach of contract as set out at paragraph 4 of the Claimant's Title of Complaints document; and

- 1.5 the claim to compensation for breach of Health and Safety at Work Standards and COSHH as set out at paragraph 6 of the Claimant's Title of Complaints document.

Deposit Order

- (2) The Employment Judge considers the Claimant's allegations or arguments that he was discriminated against on the grounds of sex have little reasonable prospects of success. The Claimant is Ordered to pay a deposit of £50 **not later than 21 days** from the date of this Order being sent as a condition of being permitted to advance those allegations or arguments.
- (3) The Judge has had regard to any information available as to the Claimant's ability to comply with the Order in determining the amount of the deposit.

REASONS

- (4) The Claimant was employed by the Respondent as an Assistant Housekeeper at its Lister Hospital. He commenced employment with the Respondent on 25 June 2018, though worked at the hospital for a number of years before that. He resigned his employment on 24 September 2019.
- (5) The Claimant represented himself at the hearing before me on 11 August as he has done throughout these proceedings. The Respondent was represented by Counsel, Mr Sheppard.
- (6) The Claimant lodged a box file of documents for the hearing comprising 22 sections. The sections were indexed but the documents themselves were not paginated, each section being contained within a plastic wallet. The Respondent had prepared a Preliminary Hearing Bundle comprising 27 documents running to some 277 pages. There was some degree of duplication between the two sets of documents.
- (7) Given that a number of the events in question occurred during a period when the Claimant was on long term sickness absence, at the outset of the hearing I enquired as to the Claimant's health. He told me that he has no current physical or mental health issues.
- (8) Mr Sheppard had filed outline written submissions on behalf of the Respondent, to which he spoke. I heard submissions from the Claimant and also made enquiries as to his current financial situation in case I was minded to make a Deposit Order.
- (9) I reserved my Judgment particularly in order that the Claimant would have a written record of my decision and the reasons for it.

(10) Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides,

“(1) At any stage of the proceedings, either on its own initiative or on the application of a party, the 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...”

(11) Rule 39 of the Employment Tribunals Rules of Procedure 2013 provides,

“(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.”

(12) I remind myself that the power to strike out should only be exercised in rare circumstances (Tayside Public Transport Company Limited (t/a Travel Dundee) v Reilly [2012] IRLR 755; that cases should not, as a general principle, be struck out where the central facts are in dispute (Tayside and North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330); and, as a general principle, that discrimination cases should not be struck out except in very clear circumstances (Anyanwu v South Banks Student Union [2001] UK HL14).

(13) As regards the making of Deposit Orders, I further remind myself that a Tribunal may have regard to the likelihood of a party being able to establish the facts essential to his case and to reach a provisional view as to the credibility of the assertions being put forward, albeit the Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.

(14) In Anyanwu Lord Steyn said:

“From my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive, and their proper determination is always vital to our pluralistic society. In this field perhaps more than any other the bias and favour of a claim being examined on the merits or demerits with its particular effects is a matter of high public interest.”

(15) In a similar vein, Lord Hope said:

“I would have been reluctant to strike out these claims on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of Law that have to be determined are often highly fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The Tribunal can then

base its decision on its findings of fact rather than on assumptions as to what the Claimant may be able to establish if given an opportunity to lead evidence.”

- (16) Ahir v British Airways Plc [2017] EWCA Civ 1392, is a case in which the Court of Appeal upheld an Employment Tribunal’s decision to strike out claims of less favourable treatment as a fixed term employee. At paragraph 16 of the Judgment in Ahir, Lord Justice Underhill specifically noted that the hurdle of a strike out is higher than the hurdle of the making of a Deposit Order, which depends on the claim having little reasonable prospect of success as opposed to no reasonable prospect of success. Nevertheless, a Deposit Order may still serve a significant deterrent to a party in continuing with their claim. I approach the matter having careful and proper regard to the public interest considerations that apply in discrimination claims.
- (17) This case came before Employment Judge Laidler on 5 February 2020 for a Case Management Preliminary Hearing. She noted that the Claimant had completed section 8 form ET1 to indicate that he was claiming sex discrimination, but also noted that in the particulars attached to form ET1 he raised various allegations of fraudulent conduct, misrepresentation, breach of Health and Safety and other matters which did not appear to be within the jurisdiction of the Employment Tribunals.
- (18) The Record of Case Management Discussion at pages 68 – 76 of the Respondent’s Preliminary Hearing Bundle confirms that Employment Judge Laidler used the Claimant’s Schedule of Loss and his Title of Complaints document as the basis for the discussion on 5 February 2020 in order to identify the issues in the case. The issues were documented by reference to the same headings used in the Title of Complaints document and it was with reference to those headings and Employment Judge Laidler’s list of issues at paragraphs 6 – 34 of the Case Management Summary that I approached the hearing and with reference to which I set out my conclusions below.

Fraud

- (19) I do not intend to repeat Employment Judge Laidler’s comments at paragraphs 6 – 10 of the Case Management Summary, save to note that she explained to the Claimant that the Tribunal does not have jurisdiction to deal with fraud on its own and that the only basis on which it would be able to do so is if the alleged fraud was in some way connected and associated with a claim brought under the Equality Act 2010. Employment Judge Laidler specifically asked the Claimant whether the alleged fraud was because the Claimant was a man and she recorded his very clear response that he was not alleging this. The Claimant confirmed this again to me.
- (20) The Employment Tribunals were created by statute and the scope of their powers have been defined by Parliament. They do not have an inherent jurisdiction. They may only consider those claims and matters that Parliament has conferred upon them as falling within their statutory jurisdiction. The Claimant’s allegations of fraud do not form part of any complaint by the Claimant

that he was discriminated against on the grounds of his sex or that his statutory employment rights were otherwise infringed. I am satisfied that this Tribunal does not have any jurisdiction to determine the Claimant's fraud complaint and, in those circumstances, it shall be struck out on the basis that it has no reasonable prospect of success.

Misrepresentation / false representation / fraud

- (21) Mr Sheppard makes the point that the allegation at paragraph 12 of the Record of Case Management Discussion did not form part of the Claimant's pleaded claim. In any event, Employment Judge Laidler recorded on 5 February 2020 that the Claimant was clear that his various allegations and complaints that there had been misrepresentation, false representation and fraud was not less favourable treatment because he was a man. He confirmed this again to me, though did clarify that his allegation that he was denied a role working as an assistant housekeeper on another ward at the Lister Hospital was because he was a man (paragraph (14) of the Record of Case Management Discussion). To deal with this under the claim of sex discrimination complained of it is recorded at paragraph 31 of the Record of Case Management Discussion.
- (22) For the same reasons as above, this Tribunal does not have any jurisdiction to determine any free-standing claim for damages for misrepresentation, false representation or fraud brought by the Claimant against the Respondent which does not form part of any complaint by the Claimant that he was discriminated against on the grounds of his sex or that his statutory employment rights were otherwise infringed. Accordingly, the claim shall be struck out on the basis that it has no reasonable prospect of success.

Harassment

- (23) The Claimant complains of three matters as constituting harassment. The details are at paragraphs 15 – 17 of the Record of Case Management Discussion. In each case, the Claimant describes them as examples of general harassment. I explored them further with the Claimant on 10 August. He explained that he was pursuing these matters as a contravention of the Respondent's Dignity and Respect at Work Policy (page 105 – 122 of the Respondent's Preliminary Hearing Bundle). The Claimant made specific reference to Section 3.1 of the Policy which provides,

“Harassment is any unwanted physical, verbal or non-verbal conduct which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. A single incident can amount to harassment.”

- (24) Unlawful harassment for the purposes of the Equality Act 2010 is defined at s.26 of the Act. In order for harassment to be actionable under the Act the unwanted conduct complained of must be of a sexual nature or related to a relevant protected characteristic. The Claimant confirmed to me that Employment Judge Laidler had correctly recorded that the matters complained of constituted general harassment and that the alleged perpetrators had not engaged in unwanted

conduct of a sexual nature, or which related to a relevant protected characteristic of his or anyone else. Given that confirmation, any harassment complaint pursuant to s.26 of the Equality Act 2010 cannot succeed. In these circumstances I shall strike it out on the basis that it has no reasonable prospects of success.

Breach of Contract

- (25) The Claimant alleges that the Respondent acted in breach of Section 13.1 of his Contract of Employment. Section 13.1 provides,

“Notification of absence due to sickness must be made as soon as possible to your line manager or other nominated officer.”

Section 13.1 cannot support any complaint by the Claimant that the Respondent breached contract since it describes the Claimant’s responsibility to notify the Respondent of his absence due to sickness. It does not contain any contractual obligation on the part of the Respondent.

- (26) In discussion with Employment Judge Laidler on 5 February 2020, the Claimant additionally identified that the Respondent had failed to comply with four of its documented policies, namely its Long-Term Sickness Absence Management Policy, Dignity and Respect at Work Policy, Disciplinary Policy and Managing Stress at Work Policy. At paragraphs 22 – 27 of the Record of Case Management Discussion, Employment Judge Laidler endeavoured to identify the respects in which the various policies had not been complied with, though following some discussion noted and recorded that the Claimant was unable to identify any specific breach of the Disciplinary Policy. The Judge evidently had difficulty identifying with the Claimant what his financial loss would be if there had been a breach of contract. I note that in his Schedule of Loss, the Claimant has claimed one year’s salary, namely £17,460, for each policy that he alleges was breached, i.e. a total of £87,300 by way of damages for breach of contract. This sum does not correspond to any quantifiable loss of his.
- (27) The Claimant could not explain to me why the policies formed part of his Contract of Employment, or otherwise why he was entitled as a matter of contract to have their provisions adhered to by the Respondent. As far as the Claimant was concerned the existence of the policies and the fact he was expected to conduct himself in accordance with the policies meant he had a cause of action against the Respondent if it failed to adhere to them. In the course of his submissions he referred me to paragraphs 9.1 and 10.1 of his Contract of Employment at page 100 of the Respondent’s Preliminary Hearing Bundle; they refer amongst other things to the Respondent’s policies and procedures in relation to Sick Leave and to its Disciplinary Policy. However, the Dignity and Respect at Work Policy and Managing Stress at Work Policy are not referred to. Even then, the Sick Leave Policy and Disciplinary Policy are not stated to form part of the Claimant’s contractual terms and conditions of employment. There are copies of the four policies at pages 105 – 177 of the Respondent’s Preliminary Hearing Bundle. I went through the policies with the Claimant but could not identify any provisions in any of them to the effect that their provisions have been incorporated into staff

terms and conditions of employment. The Claimant did not put forward any other submissions as to why they gave rise to contractual rights on his part. Nor could he explain why he believes that he is entitled to damages of £87,300 in respect of any failure on the part of the Respondent to adhere to the policies. His Claim Form, Title of Complaints document and Schedule of Loss do not clarify why five years' salary corresponds to any loss that he says he has sustained in consequence of a failure on the part of the Respondent to comply with his Contract of Employment or the four policies. On the contrary, the Claimant explicitly confirmed that he had received all salary and sick pay due to him. He expressed frustration at various administrative delays and what he perceived as the way he had been treated by the Respondent, but he acknowledged that he had ultimately been paid the sums due to him and could not identify any specific financial losses.

- (28) Given that the Claimant has not put forward even basic facts as to why the four policies might have been incorporated into his terms and conditions of employment or why the Respondent's actions might amount to a breach of Clause 13.1 of his Contract of Employment, and in circumstances where he effectively confirmed that he has not suffered any financial loss in consequence of the Respondent's alleged failure to comply with its documented policies and procedures, the breach of contract claim plainly has no reasonable prospect of success and I shall strike it out.

Health and Safety and breach of COSHH

- (29) Employment Judge Laidler explained to the Claimant that the Tribunal has no free-standing jurisdiction to deal with complaints of this nature. The Claimant did not suggest that he had been dismissed for one of the reasons set out in s.100 of the Employment Rights Act 1996. His complaint is that he was told by Andy Sims, of the Respondent, to remove his disposable gloves and place his uncovered hands into a sink containing industrial cleaner. Even accepting the allegation at face value, the matter does not fall within the ambit of any of sub-sections (a) – (c) of sub-section 100(1) of the Employment Rights Act 1996. I am satisfied that the Employment Tribunal has no jurisdiction to consider the Claimant's complaint and accordingly shall strike it out on the basis that it has no reasonable prospect of success.

Sex Discrimination

- (30) The complaints of sex discrimination, summarised at paragraphs (28) to (33) of the Record of Case Management Summary, are fact sensitive and as such I am not satisfied that they can be said to have no prospect of success. However, I am persuaded that it would be appropriate to make an Order that the Claimant should pay a deposit as a condition of pursuing his complaints against the Respondent. The complaints are poorly articulated and there is little or no explanation by the Claimant in each case as to why he believes that his alleged treatment was related to his sex. There is little more than a bare assertion by him of less favourable treatment. The Claimant has not identified any comparator and in the case of the allegation at paragraph (30) of the Record of Case Management the complaint seems to relate to how two colleagues were

treated by the Respondent rather than any treatment of the Claimant. I consider that the various complaints have little reasonable prospect of success and, accordingly, that the threshold test is met for potentially making a Deposit Order. I take into account that the making of such an Order may act as a significant deterrent in pursuing the complaints given the increased risk that the Claimant may be ordered to pay the Respondent's legal costs if he pursues his complaints but does not succeed at the Full Merits Hearing. Nonetheless, I consider it would be just and equitable to make such an Order.

- (31) As I have noted, it is a matter of public interest that Tribunals should generally examine the merits of discrimination claims. I bear in mind that the Claimant's claim is yet to be considered on its merits and the potential for any Deposit Order I make to restrict his rights of access to a fair trial. Notwithstanding my provisional assessment of the Claimant's prospects of success, he may succeed at trial. Any Deposit Order I make should not operate to restrict disproportionately his fair trial rights or access to justice.
- (32) As to the amount of the deposit to be paid, the Claimant described his financial situation as challenging. He is in receipt of Universal Credit. During the Coronavirus pandemic the amount he receives has increased briefly to £398 per month. He pays £200 per month for his accommodation, does not run a car and has no children to support. He told me, and I accept, that he has approximately £35 per week to get by on. His finances are evidently stretched and there is limited money left over at the end of each month. If the Claimant intends to run the risk that he may be ordered to pay the Respondent's costs if he is unsuccessful in his discrimination complaint, I should not fix the deposit at a level that would act as a further deterrent or obstacle to pursuing the complaints. Whilst satisfied that a Deposit Order would pursue a legitimate aim in this case, I consider that a proportionate order would be for the Claimant to pay a Deposit not exceeding £50 as a condition of pursuing any allegations or arguments that he was discriminated against on the grounds of sex by the Respondent.

25 August 2020

Employment Judge Tynan

Sent to the parties on:

10.09.2020

.....

For the Tribunal:

T Yeo.....



**PRELIMINARY HEARING
NOTE ACCOMPANYING DEPOSIT ORDER**

Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a “deposit order”) requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.
2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.
5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.
8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.
9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.
12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 916 5015. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

✂-----

DEPOSIT ORDER

**To: HMCTS
 Finance Support Centre
 The Law Library
 Law Courts
 Small Street
 Bristol
 Avon
 BS1 1DA**

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order