



EMPLOYMENT TRIBUNALS

Claimant: Mr G Yates

Respondent: The Chief Constable of Cheshire Constabulary

Heard at: Liverpool

On: 19 June 2018

Before: Employment Judge Sherratt

REPRESENTATION:

Claimant: Litigant in person

Respondent: Ms J Connolly, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The proceedings shall not be stayed.
2. The claim of direct sex discrimination shall proceed to a full hearing.
3. The claim of victimisation is struck out in the absence of a protected act.
4. The claimant's application to amend his claim to include a claim in respect of public interest disclosure detriment is dismissed.

REASONS

Introduction

1. The case came before Employment Judge T Vincent Ryan on 4 April 2018 when various Case Management Orders were made and he listed this preliminary hearing to consider the agenda to be set by the respondent in its application to be included in the amended ET3 that he provided for.

2. As to the pleaded case the claim was made on a form ET1 received in Manchester on 29 January 2018 in which the claimant alleged he was discriminated against on the grounds of sex, and as to another type of claim which the Employment Tribunal can deal with the claimant stated, "bullying and harassment". The claimant appended to his ET1 a grievance document in respect of an unsatisfactory performance regulation notice served on him in February 2017, but in the narrative he said he had a further grievance he was unable to upload, only being able to load one word document. The matter, he said, related to "two separate incidents of evidence under one umbrella".

3. The Regional Employment Judge ordered the claimant to provide full details of each act of unlawful sex discrimination, with the dates and individuals involved, to both the Tribunal and the respondent by 22 February 2018 informing the claimant that bullying and harassment do not amount to unlawful acts contrary to the Equality Act 2010 without further explanation.

4. The claimant, on 22 February 2018, submitted a further document entitled "Grounds of Complaint", including an application for a stay of proceedings.

5. The ET3 response form was dated 8 March 2018.

6. Employment Judge Ryan provided for the respondent to send the claimant a request for further and better particulars of his claims and for the claimant to provide his response to the request. The respondent thereafter was to file an amended ET3 and make its applications which are:

- (1) For the Tribunal to dismiss the claimant's application to stay the proceedings.
- (2) In respect of the claim of direct sex discrimination whether the Tribunal has jurisdiction to hear it and/or whether the claim is out of time and/or whether it would be just and equitable to extend time. The respondent contends that the claim has no or little reasonable prospect of success and that it should be struck out or a deposit order should be made.
- (3) In respect of the claim of victimisation, whether the claim has no or little reasonable prospect of success such that it should be struck out or a deposit order should be made, and whether the claim is out of time and/or whether it would be just and equitable to extend time.
- (4) In respect of the application to amend to include a claim of detriment because the claimant made a public interest disclosure, whether the application should be permitted or refused as the respondent contends it should be.

The application to stay the proceedings

7. The claimant's application to stay the proceedings was based upon the fact that the respondent is now undertaking investigations into the alleged crimes reported by the claimant which can be summarised as:

Assault – 2013

Theft – 2015

Stalking – 2015

Malicious communications – 2013-2015

Malicious communications - 2016

8. In the submission of the claimant, the investigations might support the claimant's claims that he had been subjected to a course of conduct by the respondent which would be of assistance to the Tribunal when dealing with the claim.

9. The respondent's submission was that an investigation now into the offences would not have any bearing upon the question for the Tribunal which related to what decisions were made at the time of the offences as to whether or not they were reported or investigated, who made those decisions and why they were made. What was the motivation of the decision maker(s)? Did it relate to the claimant's sex?

10. In my judgment the Tribunal will need to make findings as to why the matters were dealt with as they were from 2013 to 2016 and the reasons for the action or inaction. Such an enquiry will not be helped by the Tribunal knowing what might have happened in respect of criminal matters had there been proper investigation at the time. The outcome of the current investigation may be relevant to the question of remedy but not, in my judgment, to the question of liability. The application for a stay is therefore refused. If the claims are allowed to proceed and if the current enquiries or any proceedings arising therefrom have not concluded by the time the Tribunal has reached its decision on liability, then it may be appropriate for there to be a stay in respect of remedy should the claimant succeed.

Direct Sex Discrimination

11. The simple facts appear to be that the claimant is a police constable and from 2003 was in a relationship with a woman who was not a police constable. Her identity is not relevant for the purposes of this judgment. The relationship appears to have had its difficulties the police were involved resulting in the matters set out at paragraph 7 above.

12. It is the claimant's contention that the respondent did not record the offences that he alleged were committed against him by his then female partner, whereas had the police officer reporting crimes been female reporting offences against a male partner then the allegations would have been recorded as crimes and dealt with accordingly.

13. The claimant's comparator is said to be a hypothetical female police constable involved in domestic altercations that were regarded by the respondent as crimes, reported as such and investigated.

14. In the submission of the respondent, the claimant has failed to adequately identify the less favourable treatment relied upon, the dates thereof or the individuals involved. Insofar as the complaint is of the respondent's failure to record and

investigate as criminal offences five instances where the claimant alleges he was a victim of crime, the respondent submits that:

- (1) The Tribunal has no jurisdiction to determine them as the claimant's complaint does not relate to the respondent's treatment of the claimant as an employee;
- (2) The last act complained of is of malicious communications – 2016, which seems to relate to events in September 2016 according to the grounds of complaint. Even if, which is not admitted, this is a complaint of conduct extending over a period, a Tribunal claim ought to have been presented before 25 December 2016, subject to early conciliation extending this time. The claimant was presented on 29 January 2018 and is therefore at least a year out of time. It would not be just and equitable to extend it.

15. In the circumstances the respondent contends that the claim of direct sex discrimination does not fall within the jurisdiction of the Tribunal and/or is out of time and therefore should be dismissed.

16. The respondent then goes on to raise a number of factual issues, in particular that any defects in the respondent's system of crime recording were organisational and identified as such by Her Majesty's Inspectorate of Constabulary in 2017 and were not therefore because of the claimant's sex. Further, matters referred to by the claimant's then partner which could have been recorded as crimes against her by the claimant were not recorded, thus again establishing that any defects in crime recording were not because of the sex of the person making the report.

17. The respondent contends that the claimant's claim of direct sex discrimination has no reasonable prospect of success and should be struck out, or it has little reasonable prospect of success and the claimant should be ordered to pay a deposit in respect of it.

18. Counsel for the respondent submitted that the burden is on the claimant to satisfy the Tribunal that a discretion to extend time should be extended to him.

19. The Tribunal should consider the length of and reason for the delay and how it affects the cogency of the evidence. Consider the extent to which the claimant acted promptly. The steps he took to obtain advice. The reason for the delay and the length of it.

20. The conduct began in July 2013, some 4½ years ago, and ended in September 2016. The claimant was clear in his own mind that it was not fair not to record matters as crimes, therefore there was no reason why his claim was not brought in time. He was assisted by the Police Federation and at some stage a solicitor was acting on his behalf. It is therefore submitted that there is no satisfactory reason for the delay.

21. As to cogency of the evidence, what did the claimant say? What did the person hearing it take into account when deciding whether or not to record a crime? What was the guidance at the time?

22. Without cogent evidence of the reason for the delay the Tribunal should not extend time.

23. In the submission of Ms Connelly the Tribunal will not likely strike out a claim without an airing of the facts, so is this a claim with little reasonable prospect of success?

24. Ms Connelly referred to the judgment of Her Honour Judge Eady QC in the Employment Appeal Tribunal, UKEAT/0043/17/LA, in the case of **Tree v South East Coastal Ambulance Services NHS Foundation Trust** referring to paragraph 18, quoting from Van Rensburg:

“...The test of little prospect of success...is plainly not as rigorous as the test that the claim has no reasonable prospect of success...it follows that a Tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.”

25. Going back to **Tree** at paragraph 20:

“Where there is, thus, a risk that the making of a deposit order will result in the striking out of a claim, I can see that similar considerations will arise in the ET’s exercise of its judicial discretion as for the making of a strike out order under rule 37(1), specifically as to whether such an order should be made given the factual disputes arising on the claim. The particular risks that can arise in this regard have the subject of considerable appellate guidance in respect of discrimination claims, albeit in strike out cases but potentially of relevance in respect of deposit orders for the reasons I have already referenced; see the well-known injunctions against the making of strike orders in discrimination cases as laid down for example in case **Anyanwu v Southbank Students Union**.”

26. The claimant in response referred to the fact that the respondent was now taking action to investigate the matters not dealt with as crimes earlier when he reported them.

27. The last act the claimant relied on as an act of discrimination was done in October 2017 when management advice was given to him, thus making his claim in time.

28. He was not supported by the Police Federation, he was dealing with matters by himself.

29. Everything that had happened in terms of interviews was recorded. It would be there in black and white as would the policies. This was not a matter for memory because all matters would be recorded, either in writing, on audio or otherwise.

30. In relation to the submission that these matters were not related to the claimant as a police constable but as a member of the public reporting crime, it seems to me that by section 109 of the Equality Act 2010 the matters the claimant complains of were done by persons in the course of their employment. They were

employed by the Chief Constable as was the claimant. The question is one that should be fully argued before the Employment Tribunal which has had the benefit of hearing the evidence. There are a number of cases involving the Police Service and whether or not things occurred in the course of a police constable's employment. Whether or not the actions or inactions of the respondent amounted to direct discrimination because of the protected characteristic of sex is a matter that in my judgment should be left to a full Tribunal hearing the evidence. I do not consider it appropriate to strike out the claim without the evidence being heard and tested.

31. As to out of time, the claimant has an argument as to what he says was the last act of discrimination which may well have been in time.

32. For all these reasons it does not seem to me appropriate to do anything other than allow the allegation of direct sex discrimination to proceed to a full hearing.

Victimisation

33. The respondent, in its request for information from the claimant, noted that:

“You stated that you intended to bring a claim for victimisation arising out of your mother's appeal to the Independent Police Complaints Commission against the outcome of the investigation into her complaint about the Professional Standards Department on 21 October 2016. In respect of this claim, please:

- (i) Confirm that the protected act was the letter of appeal dated 21 October 2016; and
- (ii) Please set out in respect of each detriment relied upon:
 - (a) The date upon which it occurred;
 - (b) Full details of the detriment complained of; and
 - (c) The individuals involved.”

34. In his response to these questions the claimant wrote:

“As stated in the original paperwork the protected act is the letter provided to the Independent Police Complaints Commission by the claimant's mother dated 21 October 2016. The detriments consist of the following actions by the respondent:

- Two gross misconduct investigations for honesty and integrity (commenced January 2017 – concluded October 2017)
- One investigation for unsatisfactory performance process (commenced February 2017 – concluded May 2017)”

35. The claimant went on to note that both investigations were closed with no further action and the respondent has provided the claimant with both a written and formal apology for the actions taken against him. The claimant went on to give further details of the alleged detriments.

36. The letter by the claimant's mother to the Independent Police Complaints Commission dated 21 October 2016 was provided to me. It consists of a two page form and an attachment setting out the reasons for the appeal by the claimant's mother to the IPCC against an investigation into her complaint by the respondent.

37. In her submission Ms Connelly referred me to the case of **Dr R Beneviste v Kingston University UKEAT/0393/05/DA**, a judgment of His Honour Judge Richardson sitting alone delivered on 17 March 2016. The case related to "protected acts" for the purposes of the Sex Discrimination Act 1975 and the Race Relations Act 1976, now brought together in section 27 of the Equality Act 2010, which provides that:

- "(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."

38. In paragraph 29 of the judgment of His Honour Judge Richardson, dealing with the concept of a protected act, it states that:

"There is no need for the allegation to refer to the legislation or to allege a contravention but the gravamen of the allegation must be such that, if the allegation were proved, the alleged act would be a contravention of the legislation. If a woman says to her employer, 'I am aggrieved with you for holding back my research and career development' her statement is not protected. If a woman says to her employer, 'I am aggrieved with you for holding back my research and career development because I am a woman' or 'because you are favouring the men in the department over the women', her statement would be protected even if there was no reference to the 1975 Act or to a contravention of it. An originating application does not identify a protected act in the true legal sense merely by making reference to a criticism, grievance or complaint without suggesting that the criticism, grievance or complaint was in some sense an allegation of discrimination or otherwise a contravention of the legislation."

39. The claimant was given the opportunity to state where in the appeal by his mother to the IPCC there was any reference to any matter that might constitute a protected act for the purpose of section 27(2) of the Equality Act 2010.

40. The claimant was unable to do so.

41. In my judgment the claimant has not satisfied me that there is a protected act upon which to found an allegation of victimisation under section 27 of the Equality Act 2010, and so this part of the claim is struck out under rule 37 of the Rules of Procedure 2013 on the basis that it has no reasonable prospect of success.

Public Interest Disclosure

42. In the respondent's request for information from the claimant:

"You stated that you intended to bring a claim pursuant to section 47B Employment Rights Act 1996 that you had suffered a detriment or detriments as a result of making a protected disclosure. You stated that the protected disclosure was your mother's appeal to the Independent Police Complaints Commission on 21 October 2016. The respondent is of the view that such a claim has not currently been pleaded and is therefore clearly out of time. However, if you do intend to pursue such a claim please:

- (i) Confirm that the protected disclosure was the letter of appeal dated 21 October 2016.
- (ii) Whether you or your mother sent the letter.
- (iii) To whom did you or your mother send the letter?
- (iv) Please set out in respect of each detriment relied upon:
 - (a) The date upon which it occurred;
 - (b) Full details of the detriment complained of; and
 - (c) The individuals involved.
- (v) Provide full details of why such a claim has not been intimated before the hearing on 4 April 2018."

43. In response the claimant stated:

"As raised by the Judge at the preliminary hearing consideration has to be given in regard to legislation involving 'whistle-blowing'. In regards to point (3) the claimant will clearly state that the detriment in regard to unwarranted action taken against him by the respondent is clearly documented in the paperwork provided by the claimant for the Employment Tribunal. It is also documented in the paperwork in regards to the internal grievance investigated by Superintendent Bennett. The report by Superintendent Bennett is in possession of the respondent. The action commenced against the claimant started in October 2016 but only concluded in October 2017. The claimant will state that such a claim is in date as the employment tribunal (claim) was

lodged in January 2018, three months after the last detriment. The internal grievance commenced in August 2017 and concluded in April 2018.”

44. The claimant did not disagree in his response that the protected disclosure was the letter of appeal from his mother to the IPCC dated 21 October 2016, although he was not able to point to anything specifically amounting to a protected disclosure in the document. The claimant however told me that a copy of it was found on his desk at work and that he had worked on the letter for his mother on the respondent’s computer in the respondent’s time.

45. After further discussion as to the meaning of “protected disclosure” and what disclosures qualifying for protection might be, and after a brief adjournment, the claimant submitted that the public interest disclosures he wished to rely on consisted of the reports that he had made to the respondent that various criminal offences had been committed as set out at paragraph 7 above. The claimant said that he had mentioned these when being interviewed by officers of the respondent in his capacity as a police constable rather than as a member of the public reporting a crime to the police.

46. After lunch the claimant confirmed his submission that the public interest disclosures he relied on were the disclosures made by him to the respondent’s employees that criminal offences had been committed, when the claimant was interviewed as a police constable rather than as a member of the public, in respect of the assault in 2013, theft in 2015, stalking and harassment in 2015, malicious communications 2013-2015 and again in 2016.

47. The claimant’s alleged detriments related to the initial investigations that he said were not objective or fair which resulted in the claimant being placed under a sanction for 18 months and taken from his role as a Detective Constable and moved to a non-policing clerical role which involved his career moving backwards. Because of an administrative matter involving the claimant his career had been hampered. He had been turned down for two roles. His future employment prospects were difficult.

48. He submitted that all of this stemmed from his disclosure of the crimes.

49. Ms Connolly submitted that the claimant was a police constable therefore not unused to dealing with legislation. He had received legal advice along the way. His attempts to consider the question of protected disclosures was desultory. He had not done any research. He was not prepared for the hearing. Her skeleton argument had been provided to the claimant around the end of May so he could have done some research. It would not be appropriate for the Tribunal to give the claimant more time to provide further information which still might be unlikely to provide a properly pleaded case. The claimant had already had three opportunities in the claim form, the particulars ordered by the Regional Employment Judge and the answers to the questions put by the respondent following the hearing before Employment Judge Ryan. It would not be proportionate to allow the claimant a further opportunity and the matter should be dealt with today.

50. For the respondent it was submitted that there was still no clarity in relation to the application to amend. Whilst clearer than it was at the preliminary hearing in April, it remained unclear today. The claimant had not set out what he alleges he said by way of protected disclosures, when he said it or to whom it was said. In the

submission of Ms Connelly, the application was extensive and went beyond the allegation of sex discrimination. It was an allegation of a new claim not in the nature of an amendment.

51. If it was allowed to proceed there would need to be an investigation of what the claimant said and to whom to enable the respondent to call people to deal with the various alleged disclosures.

52. The sanction given to the claimant was, in her submission, not done on the ground that the claimant had reported crimes but out of actions of the claimant that were not connected with them. The claimant had been accused of interfering with a criminal investigation. This was not related to the alleged disclosures made by him. The sanction was imposed in May 2015.

53. Along the way the claimant had received assistance from the Police Federation. A solicitor had been involved. It would have been reasonably practicable for the claimant to have put his claims in in time. The application to amend was out of time. It was still not clearly formulated.

54. As to merits, the alleged public interest disclosure detriments were as a result of the claimant's conduct relating to deleted messages and advice being given to someone on what to say when the police investigated. The prospect of these detriments being as a result of what he may have said two years previously were minimal.

55. As to the allegation of theft, both the claimant and the third party signed a police constable's notebook to the effect that they did not wish to pursue an allegation of theft.

56. In response to a submission made by Ms Connolly the claimant accepted the last allegation of detriment would have been in 2016 when the final alleged crime of malicious communications was not recorded.

57. In my judgment, this is clearly an application for a substantial amendment to add a new cause of action. It is not a relabelling exercise in respect of facts already pleaded. The claimant had the opportunity to plead this allegation in his claim form but he did not. The matter was raised with him by the Employment Judge at the preliminary hearing and the claimant was given the opportunity to particularise the claim but he has not done so until today, notwithstanding the prompts given by the respondent in the request for particulars. The alleged protected disclosures put forward at this hearing have not been reduced to writing. They are not fully particularised

58. Looking at the possible merits of the claim the alleged detriments seem to me to relate to subsequent actions of the claimant and not done on the ground that the claimant had made one or more protected disclosures. The sanction was imposed in May 2015.

59. As to time, the claimant contends that the detriment relates to the allegedly unwarranted action taken against him following the internal grievance investigated by Superintendent Bennett in relation to action commenced against the claimant in October 2016 only concluding in October 2017. It seems to me that the alleged

detriment was suffered when the decision was made to sanction the claimant in May 2015.

60. Taking all of these factors into consideration it seems to me that there would be greater injustice to the respondent to allow this amendment to the claim than there would be to the claimant to refuse it. The application is for a substantial amendment, is late and remains unclear. The claimant still has the opportunity to pursue his main claim which is of direct discrimination

Conclusion

61. In respect of the claim that is allowed to proceed, there will be a further preliminary hearing to deal with case management so that orders can be made leading to the hearing of the claimant's claims before the Employment Tribunal.

Employment Judge Sherratt

6 July 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 July 2018

FOR THE TRIBUNAL OFFICE

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