OPINION

in the cause

CAROLINE WATERLOO

v

NATIONAL LIBRARY of SCOTLAND

2018

Your reference:
CHRP/PAM/WA24657.0001
THORNTONS LAW LLP
DUNDEE

OPINION

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A. INTRODUCTION

1. I refer to letter of instruction dated 24 October 2018 and accompanying extensive brief of papers. In particular I have been provided with the following documents:

   1.1. Extensive looseleaf papers;
   1.2. Bundle of Documents – Parts 1 – Part 15 inclusive extending to 1596 pages;
   1.3. Witness statements of the Claimant and Claimant Witnesses (received on 1 November 2018); and
   1.4. Respondent Witness Statements (received on 1 November 2018)

2. For the purpose of this Opinion, Caroline Waterloo will be hereafter referred to as the Claimant and the National Library of Scotland as the Respondent. The numbers in square brackets [] are a reference to the documents referred to in paragraph 1.2 above.

3. I have been asked for my overall assessment of the merits of the Claimant's case. In addition I have been asked to consider the following:

   3.1 Prospects of success with the claims for unlawful age discrimination contrary to section 13, 26 and 27 of the Equality Act 2010 (hereinafter referred to as the 2010 Act.)

   3.2 Practical challenges that the claimant is likely to face in light of the Respondent's position.

   3.3 Prospects of success with the unfair dismissal claim;

   3.4 Post termination conduct and impact on compensation or even costs;

3.5 any other relevant points.

B. SUMMARY

4. Based on present information, in my opinion, prospects of success with the Direct discrimination claim are no higher than 50%.

5. Based on present information, in my opinion, the Claimant does not enjoy prospects of success with the harassment claim.

6. Based on present information, I assess prospects of success with the victimisation claim of the order of 55%.

7. Based on present information, I assess prospects of success with the unfair dismissal claim of the order of 55%.

8. On being successful, the ET is likely to make a deduction for Polkey, if an unfair dismissal claim, and for contributory conduct.

C. FACTS

9. The facts of the case are, on one view, relatively straightforward. It is the application of the facts to the legal claims that is difficult in this case. In summary the keys facts are the following:

    9.1 The Claimant commenced employment with the Respondent in 2014 as Digitisation Programme Co ordinator. With effect from 1 February 2016 her title was changed to Digitisation Programme Manager [0158]. The change appears to be one more of name than substance.

    9.2 The Claimant's employment was terminated with effect from 14 June 2018 by reason of some other substantial reason.

    9.3 As far back as 2010 it was being recognized that libraries were facing a challenge in the digital age and that they would be likely to face a shortage of skilled staff in the future unless steps were taken which included growing their own digitially skilled staff.

    9.4 In 2015, Darryl Mead, Deputy National Library wrote in a report that "The curatorial and digital work programmes needed to focus on the digital transformation…"

    9.5 In February 2016, curatorial staff were reporting that there was a sense of "overall confusion at our end of who does what…"[0170] and in November 2016 a report was sent by Ines Byrne [IB] to her line manager Robin Smith [RS] entitled, "Lessons learned." The report referenced the above perceived confusion [0359 – 0361]. The same is, in my opinion, relevant for it is the work environment into which Stuart Lewis [SL] arrived as new Head of Digital in September 2016. I have it noted that SL

commenced employment with the Respondent on 19 September 2016.

9.6 By December 2016 it is clear that SL is starting to think about the Respondent's digitization programme. That in itself is not surprising given that he had been employed as the Respondent's new head of digital. In this regard please see [0384, 0392, 0393, 0407, 0410]. SL produced a document entitled, "Digital Department – Initial Review." In the same at paragraph 3.4.3 he made observations which related directly to the role of the Claimant and IB. On 20 December 2016 SL introduced a new 2 tier governance structure [0410]. What can be taken from the above is that structural and operational changes were afoot and perhaps inevitable.

9.7 It can also be said that in December 2016, IB was perhaps aligning herself directly with SL. In this regard I refer to email dated 9 December 2016 where she refers to confusion in roles between her and the Claimant [0396]. At that time clear tensions were beginning to emerge between the Claimant and IB. In this regard please see [0404].

9.8 In my opinion there is some email correspondence involving SL which would allow one to form the view that perhaps he felt the Claimant was, if not resistant to change, not a driver of change. In this regard I refer to the email exchange of 8 December 2016 [0392 – 0393], [0490] in which the Claimant is perhaps being portrayed as an obstacle, the Claimant's own email dated 1 March 2017 [0532] and the email dated 2 June 2017 [0755].

9.9 In March 2017, RS drafted a Business Case for a new post "Digital Third Programme Manager". That post ultimately became known as "Digital Transistion Manager" [hereinafter referred to as the new post]

9.10 We know as a matter of fact that SL and RS were discussing not only the new post in March 2017 but who would occupy the post. In this regard I refer to email dated 16 March 2017 [0569]. In my opinion the email is not clumsily written as suggested during Grievance 2. In my opinion, the email makes clear that SL and RS wanted job duties currently undertaken by the Claimant to be undertaken by IB. That of necessity involves, at least in part, a transfer of functions and duties.

9.11 The Respondent's position is that IB could be transferred into the new post by virtue of redundancy and redeployment. I am not impressed by the Respondent's position in this regard. In doing so, I must make clear that the ET will not involve itself in the business decisions of the Respondent. The courts have made clear that it will not interfere with the business decisions of employers. The Claimant therefore can have no

issue with the Respondent taking the decision to restructure the Digital Department. Employers are entitled to take such business decisions.

9.12 The documentation in the case however makes clear that SL was in correspondence with IB re the new position on 2 and 17 May 2017. In this regard see [0631 and 0653]. Irrespective of what the Respondent say, two roles were effected by the change and not just 1. The Claimant however first became aware of the change not at the formative stage but when she was informed IB was to be appointed to the new post. On any view, in my opinion, the change involved a change to the Claimant's terms and conditions of employment. Indeed that is, in my opinion, what the email of 16 March 2017 was seeking. IB, I would suggest also understood that to be the case. See [0801] and [1164]. The programme plans going forward would be IB's responsibility and not the Claimant's. It is also my opinion, that the new post was that. It was a new post which envisaged that the holder would, among other duties, deputise for the Head of Digital. Instead of accepting that they had jumped the gun, the Respondent's sought to justify their position and they did so on the basis of redundancy and redeployment. RS prepared a paper re the new post on 1 June 2017 [0696]. SL carried out a Job evaluation exercise on 7 June 2017. A formal redundancy consultation with IB was carried out 27 June 2017 [0801] and IB gave her consent to redeployment on 5 July 2017 [0827 – 0839]. In short, some of the steps that ought to have been carried out before 17 May 2017 were carried out afterwards but never at any time involving or engaging with the Claimant. As at 10 July 2017, no revised job description or business case had been presented to or discussed at either LLT or Steering Group. In this regard, see [0879].

9.13 As a result, the Claimant lodged a grievance [Grievance 1] and an investigation interview took place on 8 June 2017. [0765] A hearing took place on 28 June 2017. The Claimant's grievance was partly upheld. The Claimant appealed the grievance outcome. Her appeal letter [0885] raises, in my opinion, valid points.

9.14 The Claimant reported sick on 3 July 2017 citing work related stress.

9.15 The Appeal Hearing took place on 26 July 2017 [0917]. The Appeal outcome is dated 1 August 2017 [0966]

9.16 On 4 August 2017 the Claimant again reported sick citing work related stress.

9.17 At no time in the above period had the Claimant referred to her age being the reason for her treatment. The first time age was mentioned was

in, I believe, on or around 25 August 2017 [01017].

9.18 The Claimant submitted Grievance 2 on 4 October 2017 [1068]. There is no mention of age albeit a reference to bullying and harassment. Interestingly the dismissal letter refers to discrimination.

9.19 An ET1 was lodged on 18 October 2017 and makes reference to age discrimination.

9.20 On 22 December 2017 the Respondent intimated Grievance 2 investigation outcome. The conclusion was that there was no evidence of bullying or harassment such as to allow the matter to proceed to a hearing. The Claimant did not appeal the decision of the investigator.

9.21 On 8 January 2018 the Claimant reported fit for work. The Respondent placed the Claimant on special leave. The Claimant remained on special leave until the termination of her employment on 14 June 2018.

D. UNFAIR DISMISSAL

10. I am advised that a claim for unfair dismissal has now been included in the claim. I have not seen papers to that effect. Notwithstanding the same I propose to deal with the unfair dismissal claim first.

11. The start point in a consideration of unfair dismissal is **section 94 of the 1996 Act. Section 94** confers the right, namely that employees have a right not to be unfairly dismissed. The right involves 2 elements, dismissal and fairness. It is not is dispute that the Claimant was dismissed by the Respondent. That being so, the consideration turns to fairness or not and to **section 98 of the 1996 Act.**

12. In my opinion, in the period up to probably 8 January 2018, the Claimant had a good case for constructive unfair dismissal. I accept the Claimant did not terminate her employment and I accept that she does not claim constructive unfair dismissal. The same may however be relevant to how the ET approach the unfair dismissal claim.

13. **Section 95 of the 1996 Act** provides:

> "For the purposes of this Part an employee is dismissed by his employer if…or
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

14. **Section 95 (1)(c)** is what is known as constructive dismissal.

15. What conduct of an employer entitles an employee to terminate his or her contract and claim that he or she has been dismissed by the employer? The answer is, conduct amounting to a breach of the contract of employment – see

Western Excavating (ECC) ltd v Sharp 1978 Q.B 761 at 762. In that case the Court of Appeal made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of reasonable conduct by the employer. In my opinion the Claimant was correct when she wrote that the Respondent had breached her contract of employment; that they had unilaterally changed her terms of employment and that they had breached, in addition, the implied term of mutual trust and confidence.

16. Harvey on Industrial Relations and Employment Law at paragraph D1 [403] states:

> "In order for the employee to be able to claim constructive dismissal four conditions must be met:
>
> (1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
> (2) That breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of incidents which justify his leaving.
> (3) He must leave in response to the breach and not for some other unconnected reason
> (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."

17. I mention the above for, in my opinion, the Claimant by reporting fit to return to work on 8 January 2018 effectively affirmed the Respondent's breach of her contract of employment, point (4) of Harvey above.

18. As I understand it, the Claimant's position is that she was fit to return to work but was not prepared to be line managed by IB or even by SL. In this regard see [1249]. In determining whether the dismissal of the Claimant was fair or not the ET will have regard to section 98 of the 1996 Act. Section 98 provides:

> **98**
> **General.**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (b) relates to the conduct of the employee,
> (c) is that the employee was redundant, or

19. As I understand it, sections 98(2)(a),(b) and (c) have no application in this case. Instead the Respondent relies on section 98(1)(b) and some other substantial reason.

The reason

20. There is no doubt that in the period August 2017 to January 2018 communication between the Respondent and Claimant became very strained and by December 2017 the correspondence suggests a clear breakdown in trust. In this regard please see [1197 and 1249 referred to above].

21. In the case of **Perkin v St George's Healthcare NHS Trust 2005 EWCA Civ 1174** the Court of Appeal was of the view that although personality could not of itself amount to a misconduct reason for dismissal it could manifest itself in such a way as to amount to a fair reason for dismissal. The Court of Appeal considered that where a personality clash had led to a breakdown in the functioning of the employers's operation that could amount to some other substantial reason. In my opinion, this is the line being advanced by the Respondent. A recent case in the same vein is the case of **Simmonds v Salisbury NHS Foundation Trust 2018 EWCA Civ 1864**. In that case the Court of Appeal upheld as fair the decision to dismiss an employee on the basis that due to a breakdown in relationship and there being no possibility of redeploying either employee, the employer felt it had no option but to dismiss.

22. The Respondent's position is that while the Claimant reported fit to return to work she was not prepared to accept the decisions of her employer in terms of line management. The question then becomes was the Claimant herself then in material breach of contract by so refusing and if so, was the Respondent entitled to accept the breach and did the Respondent act fairly in doing so. These are ultimately questions of fact. It will be for the Respondent to establish the reason for the dismissal.

23. In cases of "some other substantial reason", reasonableness of the decision is often tied up with the reason itself. Please note the reason has to be "some other **substantia**l reason."

Reasonableness

24. As to reasonableness of the decision, there is no doubt that the Respondent's prior conduct in unilaterally changing the Claimant's terms and conditions of employment can be pointed to by the Claimant but equally the ET will be entitled to have regard to the Claimant's affirmation of the breach. The weight to be attached is a matter for the ET. Of course to put oneself out of a job is not an easy step to take and the ET will also take that into account.

25. The Respondent has prepared a detailed letter setting out their actions but what is clear, I would suggest, is that in January 2018 the Respondent had no plan at all in place as to how to manage the Claimant. It is almost as if they expected that she would not want to return. When the Claimant made clear

that she was well enough to return to work efforts quickly turned to termination of employment and dismissal. We see that in [1282 and 1285]. I would suggest that was unreasonable. It is noteable that the Respondent took over 2 months to revert to the Claimant following the meeting of 5 April 2018. Much mention is made in the dismissal letter of mediation. However, it is also noteable that in 2017/2018 parties were engaged with ET proceedings and that in connection with said proceedings the Claimant was stating to the ET Judge that she was agreeable to judicial mediation and the Respondent's were either refusing or delaying to agree to the same. In this regard see note of preliminary hearing dated 15 January 2018 [1478] and of 4 April 2108 [1509]. Further, whilst the Respondent makes much reference to mediation they do not offer the services of an independent external person. In my opinion these are all matters relevant to reasonableness and fairness of the decision to dismiss.

26. My overall view is that the decision to dismiss when it happened was unfair. As against that one cannot get away from the fact that at the material time the Claimant was writing, "Stuart has created an unfair, unhealthy and unsafe environment for me…."

27. This is a difficult case. I suggest it would have been much easier for the Claimant had she terminated her own employment. To explain the difficulty, the Court of Appeal, as an example, in the case of **Hatton v Sutherland and others 2002 ICR 613** made clear that reasonable employers do also require to take into account the interests of other employees and the need to treat them fairly in, for example, the distribution of duties.

28. On balance however, in my opinion, the Respondent's were too quick to dismiss the Claimant, acted unfairly in failing to permit the Claimant to return to work and in failing to robustly manage the Claimant's return to work. There was no attempt at robust management. The job of a manager is to manage employees, including difficult employees. Please note, I am not suggesting the Claimant was a difficult employee. I am simply attempting to make a point about a manager's role. The Respondent, in placing the Claimant on special leave and keeping her on special leave for 5 months, effectively signalled that it could not manage the Claimant yet it had made no effort to do so.

29. In my opinion, by dismissing the Claimant when it did the Respondent effectively thwarted the Claimant's right to proceed to a ET whilst still employed. In my opinion, that cannot be deemed to be fair except in exceptional circumstances.

30. The Claimant should give detailed consideration to all the Respondent could have done to facilitate a return to work in order to undermine the Respondent's position that it acted fairly.

31. I assess the Claimant's prospects of success with the unfair dismissal claim as of the order of 55%.

E. DISCRIMINATION CLAIMS

32. The Claimant makes 3 claims under the 2010 Act.

Direct Discrimination

33. Firstly, she contends that the Respondent treated her less favourably because of her age contrary to **section 13 of the 2010 Act**. Section 13 is the statutory provision that defines direct discrimination.

34. The relevant statutory provision is Section 13 which provides:

> 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.

35. In a direct discrimination claim there are effectively 2 elements. First, the less favourable treatment and secondly, the reason for the less favourable treatment. The first element involves an element of comparison – the Claimant must have been treated differently and less favourably to a comparator, be the comparator actual or hypothetical. The Claimant compares herself with IB. In my opinion the Claimant will be able to prove that she was treated differently and less favourably to IB. The Claimant was not consulted with when the new post was at a formative stage. One would have thought the Claimant's position was as much affected by the creation of the new post as IB.

36. Establishing less favourable treatment is not however sufficient. For a claim for direct discrimination to be made out the conduct complained of must be on prohibited grounds and in this case on the ground of age.

37. The issue for the Claimant is the reason for the less favourable treatment or to express it another way, what is or are the ground or grounds for the treatment complained of. Whilst the facts averred cover the period up to June 2018, the period of time which requires to be examined for the section 13 discrimination claim is essentially the period up to 17 May 2017.

38. The law on direct discrimination is set out in the reasoning of Lord Nicholls of Birkenhead in **Nagarajan v London Regional Transport 2000 1 AC 501** and as expanded by Peter Gibson LJ in **Igen v Wong 2005 ICR 931**. In the case of **Nagarajan v London Regional Transport 2000 1 AC 501,** Lord Nicholls stated:

> Section 2 should be read in the context of section 1. Section 1(1)(a) is concerned with direct discrimination, to use the accepted terminology. To be within section 1(1)(a) the less favourable treatment must be on racial grounds. **Thus, in**

every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? **Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.**

The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination under section 1(1)(a), as distinct from indirect discrimination under section 1(1)(b), the reason why the alleged discriminator acted on racial grounds is irrelevant. Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign. For instance, he may have believed that the applicant would not fit in, or that other employees might make the applicant's life a misery. If racial grounds were the reason for the less favourable treatment, direct discrimination under section 1(1)(a) is established.

[para 2 and 3 on page 5] and

The same point was made in James v. Eastleigh Borough Council 1990 2AC 751. The reduction in swimming pool admission charges was geared to a criterion which was itself gender-based. Men and women attained pensionable age at different ages. Lord Bridge of Harwich, at p. 765, described Lord Goff's test in the Birmingham case as objective and not subjective. In stating this he was excluding as irrelevant the (subjective) reason why the council discriminated directly between men and women. He is not to be taken as saying that the discriminator's state of mind is irrelevant when answering the crucial, anterior question: why did the complainant receive less favourable treatment?

I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the

> inference is legitimately drawn, falls squarely within the language of section 1(1)(a). The employer treated the complainant less favourably on racial grounds. Such conduct also falls within the purpose of the legislation. Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination. Balcombe L.J. adverted to an instance of this in West Midlands Passenger Transport Executive v. Singh [1988] I.R.L.R. 186, 188. He said that a high rate of failure to achieve promotion by members of a particular racial group may indicate that 'the real reason for refusal is a conscious or unconscious racial attitude which involves stereotyped assumptions' about members of the group.
>
> [paragraph 2 and 3 on page 6]

39. The protected characteristic need not be the sole reason for the conduct but it must be the activating cause, a substantial and effective cause, a substantial reason, an important factor. [See **Nagarajan v London Regional Transport 2000 1 AC 501,** page 7 para 2 which provides:]

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out. Read in context, that was the industrial tribunal's finding in the present case. The tribunal found that the interviewers were 'consciously or subconsciously influenced by the fact that the applicant had previously brought tribunal proceedings against the respondent."

40. Applying the same to the present case, why did the Claimant receive less favourable treatment. Why did SL want to hear IB's programme plans and not CW? That is the crucial question. Was it on grounds of age? Or was it for some other reason. As I see it, all that the Claimant can point to in support of her position are the policy documents which pre date SL and the documents referred to in paragraph 9.12 above. She can also point to the fact that she and IB are in different age groups and she can point to no prior adverse performance findings. The same may be sufficient for the burden of proof to be reversed. It is however a matter of fact for the ET. The Respondent's say the ground or reason is that SL felt that the present structure was simply not working with a view to achieving business aims and that a difficult structure was required. That does not however, in my submission, explain why SL wanted to hear IB's plans and not the Claimant's. That means there has to be something more than just the structure. As indicated, whether the ground was age or not is a matter of fact. The ET is the master of the facts and as a matter of law and practice, it is difficult to interfere with its decision on appeal.

41. **Section 136 of the 2010** Act deals with the reversal of the burden of proof in discrimination matters. What that means is that the burden of proving the discrimination claims starts with the Claimant but once the Claimant has established sufficient facts, which in the absence of other explanation point to a breach having occurred, the burden shifts onto the Respondent to show that it did not breach the provisions of the 2010 Act.

42. Direct discrimination cases are however difficult. In my opinion, prospects of success with such a claim enjoy no higher than 50% prospects of success.

Harassment

43. The second claim is harassment contrary to section 26 of the 2010 Act. Section 26 provides:

> **Harassment**
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct **related to a relevant protected characteristic**, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (2) A also harasses B if—
>
> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (3) A also harasses B if—
>
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
>
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are—
>
> age;
>
> disability;
>
> gender reassignment;
>
> race;

religion or belief;

sex;

sexual orientation.

44. As can be seen from the above, the unwanted conduct must relate to a protected characteristic. I must confess that I am unclear what the unwanted conduct is the Claimant complains of. As I understand it the claimant was understandably unhappy following the meeting of 17 May 2017 and thereafter sought to explain her position including by use of the Grievance procedures. Moreover there has never been any suggestion in any of the emails between the Claimant and IB that the reason for any of the emails, be it before or after 17 May 2017, was age.

45. I regret, based on present information, I cannot conclude that prospects of success exist with a harassment claim based on age.

Victimisation

46. The third claim is victimisation contrary to section 27 of the 2010 Act. Section 27 provides:

> 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.

47. Victimisation is technically no longer a form of discrimination but rather "other prohibited conduct" with the result that there is no longer a need to compare the treatment of an alleged victim with that of a person who has suffered done the protected act.

48. In this case the protected act is the bringing of proceedings under the Act, that is the lodging of the ET1. The Claimant also lodged 2 grievances. Neither grievances however raised directly the protected characteristic of age. To that extent, in my opinion, the grievances do not fall within section 27(2)(c) above. There was however a lot of correspondence between the Claimant and the Respondent in the period August 2017 and January 2018, some of which refers to Equality and would, in my opinion, fall within section 27(2)(d). In my opinion, the Claimant can satisfy the "protected act" part of section 27.

49. The treatment the Claimant complains of is being unable to return to work, being put on special leave after the 8 January 2018 and ultimately being dismissed from her employment. What the Claimant has to establish is that the lodging of the application with the ETO and the correspondence referred to above was the reason for her not being able to return to work. In short, the Claimant must establish that the protected act was the reason for the treatment and the detriment must be because of the protected act.

50. In my opinion the Claimant enjoys prospects of success with such a position. The Respondent has a grievance procedure. The Claimant was she able to return to work after Grievance 1. Why was she not so able after Grievance 2? On one view, it seems the Claimant continuing to adhere to her position as set out in the ET1 has prevented her from being able to return to work. As far as the Respondent is concerned the Claimant has exhausted the internal procedures. The Respondent was not at all interested in the suggestion that the Claimant be line managed by another until at least the conclusion of the ET proceedings. The Claimant's position is presumably that she cannot accept the conclusions of the Grievance procedures hence why she seeks the decision of the ET Judge. The Respondent is a large organisation. It should have been able to be open to creative solutions even on an interim basis. The Respondent must have experience in managing [difficult] employee situations. The Claimant made clear that she had no objection to working alongside IB but did not want to be managed by her [1264]. In my opinion, that wasn't necessarily a position the Claimant was entitled to take but at the same time the Respondent should have been able to manage the Claimant's return with clear boundaries and with reference to disciplinary procedures if necessary. The Respondent failed to manage the Claimant and in doing so subjected her to a detriment.

51. This head of claim is of course linked with the Respondent's dismissal of the Claimant and thereby with the Claimant's claim of unfair dismissal. All of what is said in relation to unfair dismissal applies equally to this head of claim.

F. POST TERMINATION CONDUCT

52. Be it on an unfair dismissal basis or discrimination ground, the ET would require to have regard to post termination conduct.

53. In relation to unfair dismissal, the post termination conduct of the Claimant would open up a Polkey argument and would in all probability lead to a reduction in any award of compensation.

54. In my opinion, the correspondence between the Claimant and Respondent in the period August 2017 to January 2018 would also open up the possibility of a reduction for contributory conduct. The extent, if any, of the reduction, would depend on the tribunal's assessment of the witnesses. Please note the ET are obliged to consider contributory fault even if a submission to that effect is not made.

G. CONCLUSION

52. This is a very unfortunate and now difficult case. In my opinion consideration should be given to endeavoring to secure an out of tribunal settlement. The Claimant's employment, employment which she enjoyed, has now been lost to her.

53. The Claimant would have had good prospects of success with a constructive unfair dismissal case but the time for that has long since passed and would have required the Claimant to terminate her own employment. I agree with much of what the Claimant writes about the manner in which the Respondent went about seeking to impose change on the Claimant. That does not however mean that the Claimant will be successful with the claims she now makes. Direct discrimination cases are difficult to prove. In my opinion the Claimant does not enjoy prospects of success with the harassment claim. In discrimination terms, her best prospects exist with the victimisation claim.

54. I have been asked about the practical challenges the Claimant faces. The Respondent has agreed to lead in this case. That is usual in unfair dismissal cases but not in discrimination cases. The case is proceeding with witness statements. That means that the case will start with the cross examination by the Claimant of the Respondent witnesses. The Respondent's evidence in chief is taken as read. The downside of that is that the ET are not hearing the story from the beginning from the Claimant's perspective. The Claimant will have to bring her story out through the questions she puts to the Respondent's witnesses. On the other hand, the benefit is that the Claimant will be able to think about and prepare her cross examination questions in advance.

There was a very large volume of papers to consider in a short space of time. Agents should accordingly not hesitate to contact me if they wish to discuss this Opinion in any way.

Anne Bennie
Advocate,
1 November 2018