



EMPLOYMENT TRIBUNALS

Claimant: Mr. V. Asokan Sanju

Respondent: Carclo Technical Plastics Limited

Heard at: London South, Croydon

On: 7 July 2017

Before: Employment Judge Sage

Representation

Claimant: Mr K. Sudarsanan Lay Representative

Respondent: Mr T. Brennan EEF Adviser

JUDGMENT having been sent to the parties on **13 July 2017** and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is the Respondent's application for to strike out the Claimant's claims or in the alternative that a deposit order should be made. They submit that the Claimant's claims for direct race and age discrimination either have no reasonable prospect of success or in the alternative they have little reasonable prospect and a deposit order should be made. The Respondent's application was made in writing and will not be replicated in full in this decision however they gave details of the facts of the case at paragraphs 11-44.
2. It was the Respondent's submission that there was no evidence to suggest that the Claimant had been discriminated against because of his age or race as the dismissal manager was the person who recruited him two weeks earlier. There was no evidence to suggest that if a non-white or older person had committed the same act of vandalism, they would not have been treated in the same way. It was also relevant that the Claimant owned up to the graffiti when confronted with it and was apologetic. The Respondent submitted that the claims of direct discrimination are ill founded and misconceived.
3. The Respondent further submitted that the protected act relied on in the claim for victimisation did not occur until after the termination of employment therefore it can have had no impact on the dismissal or any allegation of being subjected to a

detriment. The complaint is solely about how his appeal was handled and it was submitted that the claim was misconceived.

Cases relied upon by the Respondent

Bennett v London Borough of Southwark [2002] IRLR 407

Attorney General v Barker [2000] EWHC 453

Anyanwu v South Bank Students' Union and South Bank University [2001] IRLR 305

The Claimant's submissions in reply

4. The Claimant's representative produced a written submission and a statement but the Claimant was not present at the hearing. It was submitted on behalf of the Claimant that the Respondent's applications had no merit stating that there was new evidence that supported the claims. The Claimant's case was that the Respondent had misrepresented the evidence in order to get an order from the Tribunal. It was submitted that the Claimant's claims for direct discrimination and victimisation had more than a reasonable prospect of success.
5. It was submitted that discrimination can take place consciously or subconsciously but a Tribunal should explore all the events both before and after the alleged incident and make a decision on all the evidence. The less favourable treatment relied upon was the failure to offer the Claimant the right to be accompanied to the dismissal meeting and to advise him that the allegation against him could amount to gross misconduct and result in dismissal. The Respondent failed to follow a fair procedure and the fact that the Claimant was a teenager played a significant role.
6. It was submitted that the Claimant was not saying that his race or age were the only reason for dismissal, but they played a significant part; they also played a significant role in the failure to follow procedures. It was also submitted that the Respondent's failure to acceded to his requests during the appeal procedure (for copies of statements and for Mr Ward to provide evidence) was significantly influenced by the Claimant's grievance alleging race discrimination. The Claimant also submitted that his complaint of "bribery and corruption" was not properly dealt with by the Respondent.
7. The fresh evidence that had since come to light was handed up by the Claimant marked 105A-D which was alleged to be evidence that an employee named Mr. Charlton (who was described as white and 'middle aged') wrote graffiti on a wall but no disciplinary action was taken against him. The documents showed a health and safety poster with a red nose coloured on the face of the model and someone had written the word "why?" on a paper notice prohibiting mobile phones in the Clean Room. The new evidence showed that the graffiti was not written directly on to a wall but was on notices affixed to a wall.
8. It was admitted that the Claimant had written graffiti but the Claimant disputed that he had admitted to the Respondent that he wrote graffiti directly on the wall or directly on to a newly installed wall. He accepted that there was evidence that he had admitted to writing graffiti on to plastic (page 108). It was accepted by the Claimant that on the 16 November 2016 he felt bored and wrote with a marker pen on the plastic sheet on the wall his tag "Yong-Ryder Croydon" (sic) (paragraph 6 of the rider to the ET1 at page 14 of the hearing bundle). Mr Nash took a picture of it and made a statement to Mr Fay the following day.
9. It was alleged that the way the meeting was conducted by Mr Fay was flawed because he gave no indication it was a disciplinary hearing or that the matter was considered to be an act of gross misconduct, where dismissal was a possible outcome. It was alleged that no evidence was presented until after the meeting

was adjourned. It was submitted at the preliminary hearing that the Claimant was a 19 year old Indian boy who was not adequately educated (paragraph 25 of the Claimant's submissions), he was **"able to understand and speak English in an appropriate level for the doing the job of a factory employee"**. It was stated that there was a **"culture of corruption was going on within the Respondent in the matter of recruiting employees, particularly from Malayalee community"** (paragraph 27 of the submissions). The Claimant submitted that the Respondent's managers are White British (referring to Mr Fay, Mr Ward and Mr Nash). When the Respondent called the Claimant to the disciplinary hearing they knew he was young and **"not able to speak or write English fluently or effectively or as good as a White British employee"** (paragraph 33 of the submission and paragraph 24 of the Claimant's statement). The Respondent's defence at page 29 of the bundle at paragraph 10 stated that the Claimant scored 86% in an aptitude test where literacy and numeracy were tested and he was awarded the 'maximum score' for communication skills during the interview (see pages 74-80 of the bundle).

10. It was submitted that the Claimant's witness statement should be accepted and read by the Tribunal and that Mr Fay the dismissal manager and Mr Ward (the appeals manager) were influenced or motivated against the Claimant. The Claimant's representative also referred the Tribunal to several documents in the bundle namely those at pages 108-146A, 165-7 and 51-53.

The Law

Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013
Schedule 1

Rule 37(1)(a) 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 ...on any of the following grounds that it is scandalous or vexatious or has no reasonable prospect of success"

Rule 39(1) "Where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim ...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"

Rule 39(2) "The tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to such information when deciding the amount of the deposit".

The decision of the Tribunal is as follows:

11. First of all, in relation to the Respondent's application for a strike out, having considered the case law referred to in their submissions, I conclude that it is impossible to conclude that this case has no reasonable prospect of success. I have taken heed of the warnings in the case law that cases of discrimination should only be struck out at the preliminary stage in the most obvious of cases and there is a public policy argument that cases of discrimination should be heard. I therefore conclude that the respondent's application to have the claimant's claim is struck out is rejected.
12. However, having considered the written submissions and oral submissions of both the Claimant and Respondent and having read the witness statement that has been submitted by the Claimant, I believe that this is a case where a deposit order should be made. In reaching this conclusion I have also considered all the documentation referred to by both parties.

13. This is in essence a simple case; the claimant was in employment for a total of 14 days (five of those days were not working days as he was not scheduled to work from the 17-20 November). He admitted that he wrote on a surface in the Respondent's premises on the 16 November, it was not disputed that the graffiti in question was in the production area. The dispute is whether the graffiti was written on a newly prepared wall or if it was on plastic. The graffiti in question was a tag written with a (permanent) marker pen. The Respondent considered the Claimant's conduct to be an act of vandalism.
14. It was agreed that the Respondent telephoned the Claimant on the 17 November and this was referred to in paragraph 10 and paragraph 11 of his statement and although there was a dispute as to what was said during this telephone call, the Tribunal conclude that the Respondent's evidence in the bundle together with their written submission at paragraph 20 and the notes of the disciplinary hearing at pages 108 to 109 were consistent, that the Claimant was told of the charges he had to face and knew it related to the graffiti he had written on the wall/plastic. The notes of the disciplinary hearing conducted by Mr Fay also reflected that the allegations did not appear to be a surprise to the Claimant when they went through what was discussed during the telephone conversation and the Claimant's stated in the disciplinary hearing that it was his fault (and this was consistent with the Claimant's statement before the Tribunal at paragraph 8). The Claimant appeared to know that the allegations against him was of writing graffiti on a wall. It was difficult to understand what further investigations were required considering the facts of the case and in the light of the Claimant's admission.
15. The Claimant raised a number failings in the disciplinary process and these are referred to in his witness statement at paragraph 13 to paragraph 23; however, this is not a claim of unfair dismissal, it is a claim for race and age discrimination and the issue for the Tribunal will be whether any failings in the process are less favourable treatment because of age and race as compared to a real or hypothetical comparator. The Claimant also complained the photograph of the graffiti had been enlarged in the bundle (see page 106), this appeared to be irrelevant to the issues in the case. His criticisms appeared to be that an unfair procedure was followed; however there was no consistent evidence to show that this amounted to less favourable treatment because of race or age.
16. Although the Claimant's representative was asked many times for the details of the reason why he claimed that this was less favourable treatment because of race, he replied that race and age were not the sole reason and it was not alleged that the dismissal manager was racist or ageist. The claimant's case was that part of the reason for dismissal was due to the claimant's race and age and this was noted in the claimant's witness statement at paragraph 51. The Claimant also stated at paragraph 52 that **"I am also saying that fact I am not white British played a significant role in the failure to offer me opportunity to be accompanied by a work colleague and to advise me that the allegation against me was considered to be a gross misconduct and if it was proved the outcome could be my dismissal when I was invited to the meeting by Mr Fay on 21 November 2016"**. The same allegations were advanced in relation to his claim for age discrimination.
17. In essence therefore, the claimant is equating procedural flaws in the process to less favourable treatment relying on the unconscious or conscious motivation of the decision maker. The claimant will therefore say that as a result of these flaws, he was treated less favourably because of race and age.
18. Although the claimant's representative was unable to produce any cogent evidence before this tribunal to show a difference in race and age, a difference in

treatment and that the reason for the less favourable treatment was because of race and age; this should be considered by a full tribunal. On the evidence and the submissions made on behalf of the Claimant, there is little evidence to suggest that the burden of proof will shift to the Respondent. However, I accept that cases of discrimination are fact sensitive and should be heard by a Tribunal. However, should the burden shift to the Respondent, they will state that the Claimant was dismissed during a very short period of employment (and during his probationary period) for an act of vandalism; this appears to show that they will be able to provide a non-discriminatory reason for dismissal.

19. The Tribunal then moved to the consideration of the appeal and the Claimant's appeal letter dated 24 November at pages 113 to 117 of the bundle. The Claimant's case is that the Respondent failed to provide him with the notes of the investigation and of the disciplinary hearing and it is alleged at paragraph 35 of the Claimant's written submissions that Mr Ward was influenced or motivated against him because he had made accusations of discrimination against Mr Fay. It was noted that the Claimant refused to attend the appeal hearing unless certain pre-conditions were met. One of those preconditions were that Mr Fey was to be asked for replies to information (see paragraphs 16-7) and the Claimant asked to be accompanied by his father Mr Kuttapan (see paragraph 18 of the appeal letter). At the end of the appeal letter and for the first time, the Claimant made serious allegations against the company and its officers of bribery and corruption. The Tribunal were told these allegations were discovered by Mr Kuttapan. In this letter the Claimant admitted he had no direct evidence to support allegations of bribery and corruption. These allegations were repeated in a letter dated 26 December 2016 at page 143-6 of the bundle sent where the Claimant's father is identified as Mr Kuttapan.
20. It was accepted by the Claimant's representative that the allegations of bribery and corruption were unrelated to the Claimant's claims of discrimination before this Tribunal, the Claimant only made the allegations after he had been dismissed. It was difficult to understand the relevance of these serious and unsubstantiated allegations to the Claimant's claims for discrimination.
21. The Claimant's complaint at its highest is set out in his statement at paragraph 55 where he states his grievance of race discrimination "played a significant role" in the dismissal of his appeal and the fact he was a teenager and not White British "played a significant role" in his dismissal and in the failure to follow a fair procedure.
22. Although the Claimant's representative was unable to provide an indication of why the burden of proof would move to the Respondent in respect of the claim for victimisation. I have again considered that discrimination cases are highly fact sensitive and it is only on hearing all the evidence that a Tribunal will be able to form a view to whether the burden of proof will shift.
23. However, for the reasons stated above, I conclude that the Claimant's claims of race and age discrimination and victimisation have little reasonable prospect of success and this is a case where a deposit order will be made.
24. It was concluded that a deposit of £500 will be made in respect of each allegation or argument he pursues, a separate award will be made in respect of his claim for race discrimination, age discrimination, and victimisation. I took into account the Claimant's statement where he stated that he presently was unemployed and living at home, this is the reason why the full award of £1000 was not made in respect of each allegation.

Employment Judge Sage

Date: 24 July 2017