EMPLOYMENT TRIBUNALS

Claimant: Miss O Sohail

Respondent: Premier Work Support Limited

HELD AT: Manchester **ON:** 12 July 2017

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Miss A Smith, Counsel

JUDGMENT

All complaints arising out of the actions of "Justyna" in these proceedings are dismissed because they have no reasonable prospect of success, and Premier Work Support Limited is removed as a respondent.

REASONS

Introduction

1. By her claim form presented on 15 December 2016 the claimant brought complaints of discrimination and harassment because of or related to race and religious belief against the respondent employment business, which had supplied her services to a company based at Manchester Airport called WFS Ground Handling Services Ltd ("WFS"). Her complaints were about treatment from colleagues said to be because of or related to the claimant being Pakistani and/or a Muslim. One of the colleagues responsible was identified as a Passenger Service Agent called "Justyna".

2. By its response form of 21 February 2017 the respondent resisted the complaints on their merits.

3. The complaints and issues were clarified at a preliminary hearing before Employment Judge Horne on 29 March 2017. It was unclear at that stage whether Justyna had been employed by the respondent or for WFS, but by a subsequent letter of 19 April 2017 the respondent accepted that Justyna was employed by it within the meaning of the Equality Act 2010. Employment Judge Horne set out in Schedule A to his Case Management Order the complaints brought against the respondent because of the actions of Justyna, and set out in Schedule B the complaints potentially brought against WFS arising out of the actions of four other employees.

4. Employment Judge Horne also listed the case for a further preliminary hearing to determine (amongst other things) the application made by the respondent to strike out the claims based on the actions of Justyna because they had no reasonable prospect of success. That hearing was originally listed for 18 May 2017 but was postponed to 12 July 2017.

5. To help me determine that application I had read the Tribunal file, including the claim form, the response form, Employment Judge Horne's Case Management Order, and all the correspondence on file. I also had the benefit of oral submissions from Miss Smith for the respondent and from the claimant in person.

Relevant Legal Principles

6. The power to strike out arises under what is now rule 37 of the Employment Tribunals Rules of Procedure 2013. Rule 37 so far as material provides as follows:

> **"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –**
>
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success…"**

7. As far as "no reasonable prospect of success" is concerned, a helpful summary of the proper legal approach to an application to strike-out is found in paragraph 30 of **Tayside Public Transport Co Ltd v Reilly** [2012] CSIH 46, a decision of the Inner House of the Court of Session:

> **"Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (*Balls* v *Downham Market High School and College* [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (*ED & F Mann Liquid Products Ltd* v *Patel* [2003] CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Mann Liquid Products Ltd* v *Patel*, supra; *Ezsias* v *North Glamorgan NHS Trust* [[2007] ICR 1126]). But in the normal case where there is a "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias* v *North Glamorgan NHS Trust*, supra, Maurice Kay LJ, at para 29)."**

8. There is no blanket ban against there being a strike-out, for instance in particular classes of cases such as discrimination, although in **Lockey v East North East Homes Leeds** UKEAT/0511/10/DM, a decision of 14 June 2011 before HHJ Richardson sitting alone, the EAT said at paragraph 19:

> **"…In cases of discrimination and whistleblowing there is a particular public interest in examining claims on their merits which should cause a Tribunal to consider with special care whether a claim is truly one where there are no reasonable prospects of success: see *Ezsias* at paragraph 32, applying *Anyanwu v South Bank Student's Union* [2001] IRLR 305. …..The Tribunal is in no position to conduct a mini-trial; issues which depend on disputed facts will not be capable of resolution unless it is clear that there is no real substance in factual assertions made, as it may be if they are contradicted by contemporaneous documents."**

9. In **Chandhok v Tirkey** [2015] IRLR 195, at paragraph 20 the Employment Appeal Tribunal observed that there were occasions when a claim could properly be struck-out where, for instance, on the case as pleaded, there was really no more than an assertion of a difference of treatment and a difference of protected characteristic, circumstances which according to Mummery LJ, at paragraph 56 of his Judgment in **Madarassy v Nomura International plc** [2007] ICR 867:

> **"… only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."**

10. The EAT in **Chandhok** went on to add that the general approach was nonetheless that the exercise of a discretion to strike-out should be sparing and cautious, adding:

> **"… Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."**

Discussion and Conclusions

11. Miss Smith accepted that the application should be determined on the assumption that the claimant would prove the facts in her claim form and in her allegations as recorded by Employment Judge Horne. She submitted, however, that even if those facts were proven there was no reasonable prospect of success. Employment Judge Horne had taken time to clarify with the claimant why she thought that these actions were because of or related to her race and/or religious belief, but she had been unable to provide any reason other than to say that she just believed that to be the case. She submitted that this was not sufficient to shift the burden of proof to the respondent and therefore there was no reasonable prospect of success.

12. I explained the legal framework to the claimant and gave her an opportunity to respond. I asked her how she was going to prove facts from which the Tribunal could reasonably conclude that Justyna treated her as alleged because of race or religious belief, or in a way which was related to those protected characteristics. The claimant said that the behaviour of Justyna had been directed only towards her and she was not treated the same as everyone else. Everyone knew about this. There was nothing that triggered the behaviour and no reason that she could see other than race and religious belief. There were, for example, no comments said to have been made by Justyna which showed negativity towards people of the claimants' race or religion.

13. Further, it emerged, that there were two other workers who were Pakistani and/or Muslim, Shabana (who is one of the persons against whom the other allegations are brought) and another person, and that Justyna had not treated either

of them in the same way as she had treated the claimant. The claimant said she thought this was because they had both been there longer than she had.

14. I was mindful of the authorities summarised above which caution Tribunals against striking out claims which are fact sensitive, and of those which remind Tribunals of the particular importance that complaints of unlawful discrimination should be examined on their merits. However, it seemed to me that even on the facts established by the claimant she was unable to point to anything which, applying **Madarassy**, would shift the burden of proof. Her case as pleaded (and as amplified in oral submissions) was really no more than an assertion of a difference in treatment and a difference of protected characteristic. Further, although the fact that other Pakistani workers and/or Muslim workers were treated more favourably than the claimant was not a defence to her claim if the burden of proof shifted, it underlined the difficulties she faced in establishing any link between her protected characteristics and the treatment of which she complains.

15. In those circumstances I was driven to the conclusion that even if the claimant proves all the facts on which she relies these allegations have no reasonable prospect of success and I therefore dismissed them under rule 37(a).

Effect of this Judgment

16. All the allegations of discriminatory behaviour by Justyna are dismissed. This means that the respondent is no longer potentially liable in these proceedings.

17. The allegations of discriminatory treatment against other individuals are not affected by this judgment and the case will proceed in relation to those matters.

Employment Judge Franey

12 July 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 July 2017

FOR THE TRIBUNAL OFFICE