EMPLOYMENT TRIBUNALS

Claimant: **Mr D Mukhuna**

Respondent: **Sodexo Limited**

Heard at: **Nottingham** **On:** **Monday 13 August 2018**

Before: **Employment Judge P Britton (sitting alone)**

Representation
Claimant: **In Person**
Respondent: **Mr E Beever, Barrister at Law**

JUDGMENT

1. The claim for unfair dismissal is dismissed for lack of qualifying service.

2. As to the claim for race discrimination it is not dismissed as it has more than little reasonable prospect of success and for the same reason a deposit order is not made.

3. Directions as set out hereinafter revise those originally issued.

Introduction

1. This Judge having read the pleadings in this case of his own initiative ordered that today's planned telephone case management discussion be converted to an attended Preliminary Hearing. The reasons he did that are as follows:-

1.1 Because he agreed with the Respondent in their application that the claim for unfair dismissal on the face of it could not proceed for want of jurisdiction as the Claimant lacks the necessary 2 years qualifying service and none of the exemptions apply. That is a reference to Section 108 of the Employment Rights Act 1996.

1.2 Second the Judge on the pleadings formed the provisional view that the remaining claim of race discrimination appeared to have no reasonable prospect of success and that in the alternative it had only little reasonable prospect of success, and so he ordered this Preliminary Hearing to determine whether the claim should be struck out pursuant to Rule 37(1)(a) of the 2013 Tribunal Rules of Procedure or in the alternative that the Claimant be ordered to pay a deposit of up to £1,000 as a condition precedent of continuing pursuant to Rule 39.

2. As it is I have had the opportunity to read the core bundle which I had ordered the Respondent to provide. In essence I have concluded the following:-

2.1 I at present I would see a clear cut contradiction in the original interview with the Claimant about what I would describe as the Blessings incident. Prima facie the document that the Respondent relies upon does not contain as it maintains an unequivocal admission that the Claimant used words to the effect of "stinking Nigerian" in the altercation that occurred between him and a Nigerian agency worker namely Blessings on 12 February 2018. The Claimant is from Malawi whereas

Blessings is Nigerian.

2.2 That there does not on the face of it, and I say no more than that, appear to have thus been sufficient consideration in the disciplinary process to the Claimant's position and in that sense evidence that on the face of it shows intimidatory behaviour toward him and particularly by Blessing's uncles in public view at the counter of the restaurant facility where the Claimant was employed by the respondent at the David Ross Centre in Nottingham.

2.3 The third point is as to whether or not the manager, Kaylee, who heard the appeal should have done as the Claimant had made plain that on the day of the incident when he had difficulty contacting 2 other line managers he was able to contact that manager explaining contemporaneously as to what had occurred and asking for her help. He referred in the interviews to texts between the two of them. Where are they? Not in the disciplinary pack that I have seen.

2.4 The final point is that the Claimant raised that he was treated disproportionately in contrast to serious negligence if that be the case by a white female worker who was not only not suspended but no disciplinary action was taken against her. He was told by the employer that what had occurred in that respect was confidential, but of course once race discrimination is raised it seems to me to be incumbent upon the employer even if it has to redact the name concerned to usually disclose the documentation to show that there is no inference to be drawn.

2.5 The final point that the Claimant raises is about there having been a complaint of racism by an Asian female worker a few months before the issues relating to him and which he believes was not dealt with. That again could raise the inference, and no more than that at this stage, that the employer doesn't sufficiently seriously address these kind of complaints when made by its BME workers.

3. So what it means is that I have concluded having read that trial bundle and being aware that to strike out is an exceptional course of action, that I cannot now conclude that the claim has no reasonable prospects of success or indeed only little such prospect.

4. As to the current schedule of loss I note that the Claimant had about ten weeks without employment but then obtained a comparable role in East Midlands Airport albeit at a loss, but he will have to provide his payslips, of about £55 a week. He then remained in that employment until about week ago when he left because he couldn't accommodate the revised shift patterns because of his personal circumstances. Prima facie that employment constitutes a break in continuity therefore the loss of earnings would cut off at the time he obtained that employment. That would thence leave a claim for injury to feelings and I have drawn the Claimant's attention to the Presidential Guidance on Vento published in 2017 and that he can access the same via the internet. He will therefore provide a revised schedule of loss.

5. I then indicated that it is my judicial opinion that this case is suitable for Judicial Mediation. The Claimant has indicated he would be prepared to undergo the process and Mr Beever will seek instructions.

6. Finally I make the following revised directions.

Directions

1. The Claimant will revise his schedule of loss to incorporate his submissions on Vento by Tuesday **28 August 2018**.

2. By the **same deadline** the Respondent will indicate whether it is willing to enter into Judicial Mediation.

3. If it is willing, then there will be listed as a matter of priority a short telephone case

management to confirm Judicial Mediation, give directions for it and set a date.

4. In the interim the current directions are revised as follows.

5. Discovery will be as follows:-

5.1 By Friday **21 September 2018** the Respondent will send the Claimant its proposed trial index, chronologically set out and double spaced.

5.2 By **12 October 2018** the Claimant will reply sending back that trial index having added at the appropriate space by brief description any additional document he wants in the trial bundle. If he has got the same, then he will send a copy to the Respondent's solicitor. If he doesn't have the document, but believes it to be in the possession or control of the Respondent and that it is relevant to the proceedings, he will make that plain.

6. By not later than **16 November 2018**, a single bundle of documents is to be agreed. The Respondent shall have the conduct for the preparation of the bundle for the hearing. The bundle is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
- correspondence between the Tribunal and the parties, notices of hearing, location maps for the Tribunal and other documents which do not form part of either parties' case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should <u>not</u> be sent to the tribunal in advance of the hearing.

7. By not later than **14 December 2018**, the parties shall mutually exchange the witness statements of all witnesses on whom they intend to rely on. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The Tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. Witness statements should not routinely include a précis of any document which the Tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the Tribunal to draw from the document as a whole.

8. For the purposes of the main hearing currently scheduled before a full Tribunal panel at Nottingham for **3 days commencing Monday 17 June 2019**. The first morning will be a reading in period to which the parties attendance will not be required. Via the Respondent for the use of the Tribunal there will prior thereto have been deposited with the Tribunal, in triplicate:-

8.1 The trial bundle.

8.2 The witness statements from both sides in a combined witness statement bundle.

8.3 The parties attendance will be required so that they are in attendance for a 2:00 pm prompt start on the afternoon when evidence will start to be given.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management': https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Employment Judge P Britton

Date: 22 August 2018

JUDGMENT SENT TO THE PARTIES ON

24 August 2018

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.