EMPLOYMENT TRIBUNALS

Claimant: Miss SK Wasket
Respondent: British Airways Plc

PRELIMINARY HEARING

Heard at: Reading **On:** 23 January 2019

Before: Employment Judge S Jenkins (sitting alone)

Appearances
For the Claimant: Mr A Kaihiva of Counsel
For the Respondent: Mr G Hollebon (Solicitor)

JUDGMENT

1. The Claimant's application to amend her claims to include claims of wrongful dismissal, indirect discrimination on the ground of race and harassment on the ground of race are refused.

2. The Respondent's application that the Claimant's claim should be struck out is refused.

3. The Respondent's application for an order that the Claimant be required to pay a deposit as a condition of continuing with her claim is granted and the terms of that deposit order have been set out in a separate document.

REASONS

1. The hearing was a preliminary hearing to identify the issues and to consider the Respondent's application to strike out the claim or part of it and/or for the Claimant to pay a deposit on the grounds that the claim had no reasonable, or alternatively little reasonable, prospect of success. In advance of the hearing, I also noted that the Claimant had made an application to amend her claim to add a claim of wrongful dismissal which the parties had each noted in their agendas was to be considered, and I therefore considered that as well.

2. During the course of the hearing, it also became apparent that the Claimant had made a further application within particulars of claim submitted to the Tribunal by email the day before the hearing, i.e. on 22 January 2019. That

application had not found its way to the Tribunal file, but I became aware of it during the course of the hearing and therefore dealt with it as well. My decisions, with reasons, in relation to the various applications were as follows.

Application to amend to include a claim for wrongful dismissal

3. The Claimant's claim, which on its face appeared to relate only to direct discrimination (and also unfair dismissal although that claim has subsequently been struck out due to the Claimant's lack of required continuous service) was issued on 24 July 2018 following the termination of the Claimant's employment on 15 June 2018. The Claimant sent an email to the Tribunal on 24 December 2018 noting that she wished to pursue a claim of wrongful dismissal, i.e. that her dismissal was in breach of contract, as well. That application was resisted by the Respondent.

4. I considered the proposed amendment and looked at the Claimant's initial Claim Form. I then considered the direction provided by the cases of Cocking v Sandhurst (Stationers) Limited [1974] ICR 650, Selkent and British Coal Corporation v Keeble [1997] IRLR 336, and the Presidential Guidance on Case Management.

5. The guidance provided in Cocking was that the key principle when exercising the discretion to allow an amendment is to have regard to all the circumstances, and in particular any injustice or hardship which would result from the amendment or a refusal to amend. In Selkent the Employment Appeal Tribunal set out a non-exhaustive list of relevant factors which are to be taken into account in considering the balancing exercise of all the relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by the granting or refusing of the amendment. These were; the nature of the amendment, the applicability of time limits and the timing and manner of the application. The Presidential Guidance reaffirmed the Cocking and Selkent guidance.

6. With regard to the nature of the amendment, I noted that it was to add in a claim of wrongful dismissal when the Claim Form had given no indication that the Claimant was pursuing such a claim. Indeed, the Claimant had ticked the "No" box at section 6.3 of the Claim Form in relation to the question of whether she had worked or been paid for a period of notice. It seemed to me therefore that it seemed to be more an application to add a fresh claim rather than a relabelling of already pleaded facts.

7. With regard to the applicability of time limits, notwithstanding the extension of time spent in relation to early conciliation, the expiry of the usual deadline for bringing a breach of contract claim occurred on or about 14 October 2018. The first intimation of the claim was made by email on 24 December 2018.

8. I noted that the time for commencing a breach of contract claim is subject to extension only on the grounds that it was not reasonably practicable for the claim to have been brought within the three-month time limit and then that the claim was brought within a reasonable time thereafter. There was no information before me as to any reason why the Claimant had not been in a position to pursue a wrongful dismissal claim within time, and indeed she had

submitted a claim for unfair dismissal and discrimination comfortably within the required timeframe. Breach of contract was therefore being pursued some time after the expiry of the primary time limit and there was no explanation for that delay.

9. I also noted in terms of the documentation put before me, which was not disputed by the Claimant's representative, that the letter confirming dismissal dated 15 June 2018 noted that the Claimant's notice entitlement during her probationary period was one week for which she would be paid. The contract that I also saw confirmed that, during or at the end of the probation period, the notice period was one week. Whilst therefore I had no direct evidence of receipt of the payment by the Claimant, it seemed to me, taking into account all the circumstances, that it was very unlikely that such a payment had not been made and therefore that there would be very little prospect of the Claimant's claim for breach of contract being upheld. Considering all the circumstances therefore, I considered it appropriate not to grant the application.

Strike out/Deposit order

10. The Respondent submitted that the Claimant's claim had no reasonable prospect of success. The Respondent's representative noted the provision of the authorities cases which confirmed that it would be rare and unusual for strike out orders to be made in discrimination cases but contended that even if the Claimant's case is taken at its highest, bearing in mind that it relates only to an assertion that she was treated differently because of her hair colour, which the Respondent's representative indicated was not something which necessarily suggested discrimination on grounds of race, that it would be appropriate to strike out the claim.

11. The Claimant's representative asserted in reply that, whilst the reference to hair colour was the primary issue, it was clear that that was on the basis of race and that the Claimant's race, she is Afro Caribbean, was the underlying issue and that she was dismissed because of her Afro Caribbean background.

12. Having considered the representations and the case as pleaded, I was mindful of the direction provided by the House of Lords in the case of Anyanwu v South Bank Students Union [2001] ICR 391 and the Employment Appeal Tribunal in Balls v Downham Market High School and College [2011] IRLR 2017, that strike out orders should not be made in discrimination cases except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination. The EAT in Balls noted that the test is not whether the claim is likely to fail or whether it is possible that the claim will fail and it is not a test that can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts.

13. In the circumstances, and bearing in mind the high tests set by the authorities, I did not consider that it would be appropriate to order a strike out of the Claimant's claim without giving an opportunity for all the evidence to be tested and I therefore refused the Respondent's application.

14. With regard to the respondent's deposit order application, the test is not as rigorous as the "no reasonable prospect of success" test in relation to a strike out application, as noted by the EAT in Van Rensburg v Royal Borough of Kingston-Upon-Thames and others (UKEAT/0096/07), when it concluded that it followed that "*a tribunal has a greater leeway when considering whether or not to order a deposit*" than when deciding whether or not to strike out. Also, the Court of Appeal, in Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, noted that it was not wrong for a tribunal to make a provisional assessment of the credibility of a party's case when deciding whether to make a deposit order.

15. In this case, I certainly did not think that the Claimant's case had any particular prospects of success and I therefore was satisfied that the lower threshold of "little reasonable prospect" required for a deposit order was made out. It seemed to me that the Claimant's case, as presented, would have very little prospect of success, based, as it is, on an assertion of differential treatment arising from the Respondent's rules on artificial hair colour.

16. I explored with the Claimant's representative her means with regard to the amount of the deposit order, the Claimant not being in attendance herself, and he confirmed that, as he understood things, the Claimant was still not in employment. In the circumstances, I considered that it would be appropriate to order a deposit in the sum of £100 as a condition of the Claimant being ordered to continue with her claim for direct race discrimination.

Application to amend to add in claims for indirect race discrimination and harassment on ground of race

17. It was only when reading the Respondent's submissions that I became aware that there was potentially an application to amend to add in these two claims. I then heard submissions from the two representatives, with the Respondent's representative repeating his representations in relation to the application to amend to include the wrongful dismissal claim. He also noted that the Claimant herself had produced an agenda on 24 December 2018, which was resubmitted by her solicitors on 17 January 2019, which made no reference to any indication of indirect discrimination or of harassment. These matters appeared for the first time in the particulars of claim which had been submitted to the Tribunal on 22 January. He further noted that, with specific reference to an indirect discrimination claim, that the Respondent would be put to particular hardship due to the potential need to put together statistical analysis relating to the standards of hairstyles amongst its staff.

18. The Claimant's representative noted that the Claimant had been a litigant in person when putting in her original claim, that the Respondent would not be put to much disadvantage, and that the Claimant's additional claims were intertwined with her claim for direct discrimination.

19. Having considered those representations. I bore in mind the same issues with regard to amendments, applying the Cocking and Selkent cases and the Presidential Guidance, as I have noted above. I was of the view that these were new factual allegations which had not been made in the original Claim

Form. Similarly, the applications had been made some way out of time, the primary time limit having expired on or around 14 October. I was conscious however that the test for extending time in discrimination claims was not as severe as that applying with regard to wrongful dismissal and that I had the discretion to extend time on a just and equitable basis. However, I was conscious of the direction provided by the Court of Appeal in Roberts v Bexley Community Centre [2003] IRLR 434, that there is no presumption in favour of the exercise of discretion.

20. I noted that, notwithstanding that she was a litigant in person at the time, the Claimant had been able to insert factual allegations in her original Claim Form submitted in July 2018, and indeed had sought to amend her claim to add in wrongful dismissal in December 2018, but had made no reference to the addition of extra discrimination claims.

21. In the circumstances, and taking into account all the circumstances, I considered that the balance of hardship lay against the Claimant and in favour of the Respondent. The Claimant is able to continue with her claim of direct discrimination and I did not consider that pursuing any form of harassment claim as sought to be pleaded would add significantly to that. Similarly, I agreed with the Respondent's representative's submission that allowing an indirect discrimination claim based on a provision, criterion or practice of the Respondent's rules with regard to its staff hairstyles, would potentially put a significant burden on the Respondent in relation to a claim which, as asserted, did not seem to have particularly strong prospects of success. I therefore considered that it would be appropriate to refuse the application to amend such that the only claim that will fall to be considered by the Employment Tribunal, subject to the payment by the Claimant of the ordered deposit, will be that of direct race discrimination.

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Employment Judge S Jenkins

Date: ……19.02.19……..

Sent to the parties on: ...19.02.19.....