EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms V Kankonda	v	Automatic Data Processing Ltd.

OPEN PRELIMINARY HEARING

Heard at: London South **On:** 8 July 2019

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: in person
For the Respondent: Mr S Sanders of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The claim based on direct race discrimination on the ground of race is struck out as having no reasonable prospect of success.

2. The claim based on indirect discrimination on the ground of race is struck out as having no reasonable prospect of success.

3. The claim of harassment is Sunday working claim is struck out as having no reasonable prospect of success.

REASONS

Preliminary

1. This Preliminary Hearing was listed to determine the following:
    a. The respondent's application for strike out of the claims pursuant to Rule 37 ET Rules or in the alternative a deposit order pursuant to Rule 39 ET Rules;
    b. In the event that any claims survive the above, case management directions.

2. The claimant was provided with an interpreter.

Background

3. The claimant was employed by the respondent as a French Financial Services Specialist and her employment commenced on 15 January 2018. The decision to offer the claimant employment was based on an interview conducted by three people, including Ms de Boer. The claimant's employment was expressly stated to be subject to a three-month probationary period.

4. The claimant's performance was monitored and assessed during this probationary period and at the end of the period Ms de Boer decided that the claimant had not attained the requisite standard and that she would be unlikely to attain that standard if the period were extended.

5. Ms de Boer decided to terminate her employment, and conveyed that decision to the claimant at a probation review meeting on 13 April 2018 which was attended on behalf of the respondent by Ms de Boer and Ms Elizabeth Dimitriou, an HR Business Advisor at the respondent. The claimant was also provided with a letter of termination dated 13 April 2018.

6. Ms Kankonda asked Ms Dimitriou for written reasons for her dismissal by email on 20 April 2018 and these were provided by Ms Dimitriou via email on 23 April 2018.

7. Ms Kankonda exercised her right of appeal of the decision to dismiss her by contacting Ms Louise Barton, HR Business Partner at the respondent. An appeal meeting occurred on 9 May 2018 and was attended on behalf of the respondent by Mr Paul Brand, FP&A Manager at the respondent and Ms Barton.

8. Mr Brand took the decision to uphold the decision to dismiss the claimant and communicated that decision to the claimant in a letter dated 14 May 2018. The claimant does not have two years' service to bring an unfair dismissal claim.

9. The ET1 contains a lengthy narrative history of the claimant's employment with considerable detail of what took place in January, February and March 2018.

10. At a previous Preliminary Hearing, when the claimant did not have the assistance of an interpreter, she confirmed that she had assistance with documents in the case and would be able to provide further and better particulars of her claim prior to the present hearing.

11. Consequently, EJ Harrington ordered the claimant to provide such further and better particulars by 24 June 2019, as had been repeatedly requested by the respondent in correspondence, to which there had been no response. The respondent had received no such particulars as at 24 June 2019, and therefore wrote to the claimant stating that they would apply for her claims to be struck out, or alternatively for a deposit order, if this remained the position at the time of the hearing.

12. The claimant emailed the Tribunal and the respondent on 26 June 2019 providing some further information. The respondent submits that the further information provided does not comply with the clear terms of EJ Harrington's order,

and discloses no reasonable prospect of success. The respondent now applies for the claims to be struck out, or alternatively for a deposit order. The respondent wrote to the claimant on 2 July 2019 giving the claimant notice that it would be making this application.

13. The contents of the further information are again in narrative form although now categorised under headings o direct and indirect discrimination.

14. The Tribunal heard submissions for both parties in support of their respective positions.

Strike out

15. The strike out of claims is governs by Rule 37 of The Employment Tribunals Rules of Procedure 2013 which provides:

> "(1) 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—
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> (a) that it is scandalous or vexatious or has no reasonable prospect of success;
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> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
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> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
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> (d) that it has not been actively pursued;
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> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

16. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v, St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

> Rule 37 of the Employment Tribunal Rules 2013 provides materially: -
>
> "(i) At any stage in 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) Where it is scandalous or vexatious or has no reasonable prospect of success…"
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> 55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):
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> "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of

> success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"

56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

17. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid.

18. In **Hasan v Tesco Stores Ltd** UKEAT/0098/16, Lady Wise said that at an early stage in proceedings where the claimant was a litigant in person, the question of whether there was no reasonable prospect of success could not determined simply on the current state of the pleadings, but rather the Tribunal should consider whether the claim *"could have a reasonable prospect of success if properly pled"* (at [15]). At paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

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19. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

20. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

(i) Ordinarily, the claimant's case should be taken at its highest.

(ii) Strike out is available in the clearest cases – where it is plain and obvious.

(iii) Strike out is available if the claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

21. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001]

IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

22. In **Ahir v. British Airways plc** [2017] EWCA Civ 1392 CA, Lord Justice Underhill reviewed the authorities in discrimination and similar cases and and said at [16] that when considering whether the ground is made out, it is not helpful:

> "to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities."

He held at paragraph 18, that:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."

Deposit Order

21. Deposit orders are covered by Rule 39 of the ET Rules, which provides:

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

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

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

22. A deposit order can be made if the specific allegation or argument has little reasonable prospect of success. It was noted in **Van Rensburg v. Royal Borough of Kingston-Upon-Thames** UKEAT/0095/07/MAA at paragraph 27 that:

> "Moreover, the test of little prospect of success in r 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in r 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

23. In **Hemdan v. Ishmail** [2017] IRLR 228, Simler J, pointed out that the purpose of a deposit order 'is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails' (para 10), she stated that the purpose 'is emphatically not to make it difficult to access justice or to effect a strike out through the back door' (para 11).

24. As a deposit order is linked to the merits of specific allegations or arguments, rather than to the merits of the claim or response as a whole, it is possible for a number of such orders to be made against a claimant or respondent in the same case.

DISCUSSION and DECISION

Indirect discrimination

25. The Tribunal was unable to identify any of the actions complained of in relation to indirect discrimination as coming close to amounting to a provision, criterion or practice ("PCP") adopted by the respondent but rather simply consist of individual actions.

26. Since no PCP is identified, it follows that the claimant's claim also does not set out how that PCP put (or would have put) person's sharing her protected characteristic at a particular disadvantage, or how its application put her at a disadvantage.

27. Indirect discrimination is therefore inapplicable to this case and the claimant has no reasonable prospect of success as to this claim.

Harassment

28. Although the claimant's ET1 contains the phrase moral harassment, in response to the Order of EJ Harrington requiring the claimant to set out the type of discrimination relied upon, the claimant has only advanced acts under the heading of

direct and indirect discrimination. The Tribunal holds that the claimant has made no claim for harassment and if she has, it has no reasonable prospect of succeeding.

Direct discrimination

29. This claim is the only one which might have had potential. Considering the narratives in the ET1 and further particulars, none of the actions complained of by the claimant appear to have any connection to a protected characteristic, nor has the claimant provided any details of how such actions are so related.

30. A possible exception is the allegation that Ms de Boer forbade the claimant from speaking a language other than English. This allegation is stated to have occurred in January 2018 which would be out of time if not a continuing act. In circumstances in which a multi-ethnic team were generally permitted to speak in other languages, it has not been articulated how this claim is related to the claimant's race. In common with each of the other allegations made by the claimant, this allegation relates only to the conduct of Ms de Boer.

31. As to the conduct of Ms de Boer, the Tribunal noted that:
a. Ms de Boer was one of three decision-makers who decided to offer the claimant a job initially;
b. Ms de Boer manages an ethnically diverse team;
c. The comparators relied on by the claimant at various points (Anna Shah and Achilles Madouth) are themselves from a minority ethnic background; and
d. The claimant raised no complaint of discrimination against Ms de Boer at any stage during her employment.

32. The claimant sets out in narrative form what she says happened to her. She does not explain any basis for the claim based on race discrimination except that this is the protected characteristic she possesses. Simply because she has a certain protected characteristic is insufficient in law to sustain a claim of discrimination against the respondent on the basis of that characteristic. The Tribunal considered how the claimant might establish a *prima facie* case generally and in relation to the specific allegations. The Tribunal considered the claimant's case on its own merits and took it at its highest. Her comparators were said to be her co-workers. The fact that she named comparators of the same ethnicity as herself does not mean that her claim cannot succeed as she might have constructed a hypothetical comparator but the failure to address how she would establish her claims was an insurmountable problem.

33. The Tribunal then took on board the authoritative exhortation about not striking out discrimination cases and sought not to be too pedantic about the pleadings when weighing up the appropriate course of action as the claimant was a party litigant. The Tribunal considered the claims in the round and also individually. The Tribunal concluded that the claims based on direct discrimination had no reasonable prospects of succeeding.

34. The Tribunal proceeded to consider whether to exercise its discretion not to strike out the claim despite its lack of prospects.

35. The Tribunal did not consider the **Hasan** case to be relevant as the claimant has already been ordered to provided Further and Better Particulars and has purported to comply with that order. The claimant has not complied with the Order made by EJ Harrington which is clear and specific as to its requirements. As no request was made to try to provide particulars that did comply, this is an important factor which points towards an exercise of the discretion in favour of strike out.

36. In the present case, another important key factor which guided the exercise of the Tribunal's discretion is that "[t]he time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail" (**Anyanwu** at [39] per Lord Hope of Craighead). As the Tribunal is satisfied that the claim has no reasonable prospect of success, it would be a waste of the time and resources of the Tribunal and of the respondents if the case were allowed to proceed, and the claimant would also gain no benefit. In addition, whilst the Tribunal is aware that there has not been disclosure or an opportunity for cross-examination, if there is "ostensibly innocent sequence of events leading to the act complained of," then:

> there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it. **Ahir** at [19]

As the case of **Ahir** shows, that burden to avoid strike out will not be satisfied if the claimant merely makes an *"assertion"* as to the factual position without identifying any potential evidence or basis, and this is even more so if that assertion is "speculative" and/or "highly implausible" (**Ahir** at [21]).

37. The Tribunal did not consider that it should make a deposit order.

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Employment Judge Truscott QC
Date 15 July 2019