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EMPLOYMENT TRIBUNALS

Claimant: **Mr G Idenekpoma**

Respondents: **1. PMP Recruitment Ltd**
2. Amazon UK Service Ltd

Heard at: **London East Employment Tribunal**

On: **Monday 11 November 2019**

Before: **Employment Judge Ross**

Representation

Claimant: In Person
First Respondent: Ms. Lovell, Solicitor
Second Respondent: Mr. Frew, Counsel

JUDGMENT

1. **The complaint of unfair dismissal against the Second Respondent is struck out.**

2. **The complaint of direct age discrimination against the First Respondent is struck out.**

3. **The applications to strike out the remaining complaints are refused.**

REASONS

Background

1. This Claim was presented on 18 January 2019, naming the First Respondent, "PMP", as the only respondent.

2. At a Preliminary Hearing before EJ Elgot, on 13 May 2019, the Second Respondent ("Amazon") was joined as a party. The Tribunal also amended the Claim to include complaints of victimisation and unfair dismissal, which had been served by email on 7 April 2019 (see p37-38 bundle). In addition, the Tribunal made orders that the Claimant should provide further information (see paragraph 7 of the case management order). The order for further information included, at sub-paragraphs 3 and 4, a request for particulars concerning dismissal (although not clear in its

wording) and a request for further information of the claims of direct age and race discrimination and victimisation. The Tribunal also ordered a schedule of loss.

3. After that hearing, PMP applied to strike out the Claims.

4. After the Preliminary Hearing, on 9 June 2019, the Claimant provided some further information (although not marked as sent in response to the order for further information), and also a Schedule of Loss.

5. After a further letter from the Tribunal, by email on 24 October 2019 (p.63-65 of the bundle) the Claimant provided further information which purported to comply with sub-paragraphs 3 and 4 of the order for further information.

The hearing

6. The Claimant was not present at 10am. He had emailed the Respondents' solicitors, although not the Tribunal. In his email, he stated that he had had a depressive episode that morning, due to which he would be 1 hour late. He stated that he had tried to contact the Tribunal but had been unable to get through.

7. Having weighed the question of whether to proceed in his absence, or await his attendance, with the agreement of the respondents (who were represented), the start of the hearing was delayed.

8. In the meantime, the representatives for the parties directed me to documents to read in a bundle produced by Amazon ("the bundle").

9. Ms. Lovell for PMP also requested that I consider the two documents, labelled "R1". These were the form of conditional offer of employment letter provided to the Claimant by Amazon and the terms and conditions of employment of a "Flex Colleague" of PMP; it was PMP's case that the Claimant was a Flex Colleague employed by PMP at all material times and that he had not been dismissed.

10. The Claimant duly arrived about 1055. The start of the hearing was then delayed further because the Claimant arrived with documents, but without copies. I directed that these be copied and they are marked C1.

11. By the time the hearing started, it was 1115, and I had further cases before me at 12 noon and 2pm. Therefore, in fairness to the parties in this case, and in fairness to the parties in the other two cases, I had to reserve judgment on the striking out and deposit order applications.

Identifying the issues

12. The two attempts by the Claimant to provide further information about his case did not lead to clarity as to his complaints.

13. In order to further the overriding objective, and before considering the strike out applications, I sought to allow the Claimant to explain what his complaints were.

14. After questioning, I was able to list the complaints as follows; I have summarised the particulars provided under each complaint:

(1) Unfair dismissal against PMP

15. In respect of this complaint, the particulars provided by the Claimant were that he had never been told that he was dismissed nor that his assignment was terminated. He said that he had in effect been kicked out of the warehouse when he raised a health and safety issue after the incident on 31 December 2018, because his identification green badge (which signifies that he was a temporary worker) was taken off him. He said that he was not offered other work by PMP.

(2) *Direct race discrimination against Amazon by not appointing him as a permanent employee on or about 10 October 2018*.

16. The Claimant accepted that Amazon never employed him, but that he had a right to work, so it was discrimination not to employ him.

(3) Direct race discrimination against PMP and Amazon

17. These complaints were as follows:

17.1. On or about 10 October 2018, after the Claimant was not appointed as a permanent employee, Mr. Vara informed him that if he worked as a temporary worker, after 4 weeks, Amazon would appoint him. In so doing, PMP is alleged to have misled the Claimant because of his race or ethnicity.

17.2. After 4 weeks in a temporary role, Amazon failed to appoint the Claimant to a permanent role contrary to section 39(1)(c) EA 2010. This is alleged to be because of his race or ethnicity.

18. The comparator was a white British or EU national applicant who was appointed, or a hypothetical comparator.

(4) *Direct race discrimination from November until 31 December 2018 by PMP and Amazon by ignoring his complaints of back pain and refusing to make adjustments to his role to minimise such pain.*

19. The Claimant alleged that the "*harsh treatment by management*" referred to in the further information provided on 24 October 2019 (page 64 of the bundle) referred to this complaint. The Claimant argued that he had back pain from the work. He had presented medical evidence, and had expected reasonable adjustments to his role.

20. The Claimant alleged that Amazon and PMP did not take his health seriously because of his race. There was no reason, other than race, for the Claimant to be treated differently.

21. The Claimant's case before me was that adjustments would have been made for a hypothetical comparator (a white British or EU worker of Amazon at the warehouse).

(5) Direct race discrimination, on 31 December 2018, by Amazon failing to provide the Claimant with legal and safe checked equipment (specifically a ladder which fell). Amazon did not pay attention to the risk to the Claimant's health because of his race.

22. I understood the comparator was a hypothetical white British or EU national worker.

(6) On 31 December 2018, PMP and/or Amazon removed the Claimant from the warehouse premises and terminated his assignment.

23. The Claimant alleged that this was because he had raised a health and safety concern on that date, with Jonathan Hu, floor manager of Amazon. Before me, the Claimant stated that this was not an act of direct race discrimination or victimisation, which I understood to be a reference to victimisation within section 27 Equality Act 1996.

(7) Victimisation

24. At the hearing before me, from the above, the Claimant stated that the acts at (4) and (5) were also relied on as victimisation.

25. The protected act was alleged to be a complaint to ACAS in about November 2018, about feeling there was race discrimination in the process for recruitment of permanent staff for Amazon in October 2018.

26. The Claimant stated that he had spoken at the time to floor managers (of both PMP and Amazon) about this complaint to ACAS and that he was concerned about race discrimination in the recruitment process.

(8) Direct age discrimination by PMP. The Claimant was misled by Mr. Vara of PMP as set out in complaint (3)(a) above.

27. The particulars of this allegation are explained by the Claimant in his further information provided on 9 June 2019:

> "*My concern with age discrimination falls to the fact that the recruitment manager used his age being that I would expect an elderly man of his age to be sincere and honest but this was not the case I was indeed humiliated through failed promises and lured into hostile working condition*"

28. Before me, the Claimant relied as a comparator on a hypothetical white British or EU citizen worker.

Submissions

29. Mr. Frew had provided a Skeleton Argument, which I read. This supported Amazon's request that all claims against it be struck out. His oral submissions were basically:

29.1. The complaint of age discrimination was misconceived and should be struck out as having no reasonable prospect of success.

29.2. The unfair dismissal claim should be struck out; a claim under section 100 Employment Rights Act 1996 could only be brought against the employer.

29.3. Although section 39 EA could apply, the documents in the bundle at pp 67, 70, were contemporaneous documents which showed that Amazon had finished recruiting permanent staff when evidence of the Claimant's right to work was received. So complaint (2) above could not succeed.

29.4. Complaint (3) above was not part of the Claim against Amazon. Amendment was required. But if it was, it must be struck out as having no reasonable prospect of success.

29.5. The adjustments complaint (4) could not succeed, because Amazon had no knowledge of the protected act. The EC Certificate only mentioned PMP. Only today had the Claimant referred to speaking to managers of both respondents; this was not mentioned in the pleading.

30. Miss Lovell endorsed those submissions. In addition, she added:

30.1. Termination of assignment did not amount to dismissal.

30.2. Termination could not have arisen out of the incidents on 31 December 2018, because the request to terminate had been made on 24 December 2018 (see p.72 – a termination request created on 24 December 2018).

30.3. The failure to make adjustments complaint had never been mentioned before this hearing.

The law

31. A complaint must form part of a Claim before it can be responded to or advance to a merits hearing. In *Chandhok v Tirkey* [2015] ICR 527, at paragraphs 16-17, the EAT explained:

> "16.…*The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made—meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1*.
>
> *17. I readily accept that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before employment tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue*

> *formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute."*

The power to strike out

32. Rule 37(1)(a) contains a power to strike out where all or part of a claim or response has no reasonable prospect of success.

33. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In *Anyanwu v South Bank Students' Union* [2001] IRLR 305, *HL*, a race discrimination case in which preliminary questions of law—res judicata and statutory construction (RRA 1976 s 33(1))—had occupied the tribunals and courts on four occasions, Lord Steyn put forward the proposition against striking out in terms almost amounting to public policy, when he stated (at para 24):

> *"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest*."

34. A useful summary of the proper approach to a strike out application is set out in *Mechkarov* para 14:

> "*14. On the basis of those authorities, the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts. …*"

35. However, in *Anyanwu*, Lord Hope observed that the time and resources of the tribunal should not be taken up by hearing evidence in cases that are bound to fail. This point was also recently re-emphasised by the Court of Appeal in *Ahir v British Airways Plc* [2017] EWCA Civ. 1392, paragraph 16 and the passages referred to in submissions. In *Ahir*, it was held that discrimination claims could be struck out, even where there was a dispute of fact, where there was no reasonable prospect of the facts necessary to establish liability being established.

Conclusions on strike out applications

36. Applying the above law to the striking out applications, and taking into account the pleadings and submissions of the parties, I reached the following conclusions.

Complaint 1: Unfair dismissal

37. Employment Judge Elgot permitted the Claim to be amended to include complaints of unfair dismissal and victimisation. (It is to be noted that the Claimant did not, before Employment Judge Elgot nor before me, identify any allegation which was capable of being a complaint of harassment within section 26 EA).

38. On the basis of the Claimant's own case, put at its highest, the complaints of unfair dismissal against PMP have at least some prospects of success, because of at least the following:

38.1. It is common ground that the Claimant did not work in the warehouse after 31 December 2018; the reasons given for this are different between the parties. There is a dispute of fact over why the assignment was terminated.

38.2. It appeared that there is also a dispute of fact over whether he had been offered further work by PMP. The Claimant denied this.

39. Conversely, there are evidential weaknesses in the Claimant's case. The Claimant could point to no documentary or oral evidence of dismissal. The Claimant explained to me that no one had told him that he was dismissed and he did not receive a letter of termination from PMP, whether after the incident in the warehouse or otherwise. There is a dispute over whether he has been dismissed at all.

40. Moreover, on the face of the documentary evidence, there is evidence inconsistent with the Claimant's case, which indicates termination could not have arisen out of the incidents on 31 December 2018, and thus that the decision to terminate had nothing to do with health and safety complaints. On the face of the documents, the request to terminate appears to have been made on 24 December 2018 (see p.72 – a termination request apparently created on 24 December 2018, then modified on 3 January 2019). However, the termination request is made by Amazon; it is not a request of PMP. A key question is: what was the reason for dismissal by PMP (if dismissal is proved)?

41. I decided that I could not determine that this complaint against PMP had little or no reasonable prospects of success without hearing oral evidence together with all relevant documents.

42. At the hearing before me, the Claimant accepted that Amazon never employed him. It was his case that he had the right to work, but Amazon discriminated against him by not employing him: this is the basis of complaint (2) and (3). The complaint of unfair dismissal against Amazon must fail because it is common ground that Amazon never employed the Claimant. This complaint of unfair dismissal is struck out against Amazon.

Complaint 2: Direct discrimination by Amazon by not appointing him as a permanent employee on about 10 October 2018

43. In respect of Complaint 2, the Claimant's case is little more than an allegation of a difference in treatment and a difference in race. The Claimant does not allege something more which points to the treatment being because of his race or ethnicity.

44. I considered p.70, relied upon heavily by Mr. Frew. This is a contemporaneous document which suggests that Amazon had finished recruiting permanent staff when evidence of the Claimant's right to work was received. However, this document is from PMP rather than Amazon; and I found that this was not a conclusive piece of evidence in Amazon's favour. However, this document may well carry weight in the factual assessment of the Tribunal hearing the case.

45. Putting the Claimant's case at its highest, and taking into account this document, I concluded that it was not possible to state that this complaint had little or no reasonable prospect of success. The merits could only be assessed after determination of the facts after hearing oral evidence, particularly the explanation for not recruiting the Claimant as a permanent employee.

Complaints 3(1) and 3(2)

46. The Claim includes complaint 3(1), direct discrimination, against Amazon even if Amazon was not originally named as a party; this is apparent from the section 8.2 of the Claim, which states that after four weeks on the zero hours contract, the Claimant would automatically gain a permanent position. The thrust of the Claim form is that the Claimant did not get a permanent position because of his race or ethnicity.

47. Amazon's case, explained at paragraph 16 of the Skeleton Argument, is that the Claimant had a poor attendance record during his assignment, and that he received a final written warning. Subsequently, on 31 December 2018, it is alleged that he informed the Respondents that he had been hit by a falling ladder and was in substantial pain. The Respondents allege that the CCTV footage shows that he had not been hit or injured. Amazon contends that this explains why he had his badge removed and was removed from the premises.

48. In respect of these complaints, there is a core of disputed fact which must be determined by hearing oral evidence. At this stage, without hearing oral evidence, including about what the CCTV film shows, and seeing the CCTV evidence, I am unable to conclude that these complaints have no reasonable prospect of success.

49. Moreover, putting the Claimant's case at its highest, at this stage, it cannot be said that these complaints have little prospect of success. A key issue for the Tribunal in respect of the direct discrimination complaints (3(1) and 3(2)) is not just whether the

Respondents had a genuine reason for termination of the assignment, but whether the Claimant's race or ethnicity had any material influence on the decisions to terminate the assignment and remove him from the warehouse work.

Complaint 4: Direct race discrimination from November until 31 December 2018 by PMP and Amazon by ignoring his complaints of back pain and refusing to make adjustments

50. In respect of this allegation, I first considered whether it formed part of the Claim at all.

51. I considered section 8.2 and 9.2 of the Claim form. There is no mention of any failure to make adjustments, nor to any back pain suffered by the Claimant. Indeed, the only incident concerning safety is at section 9.2, which refers only to the incident on 31 December 2018 and includes:

> "*For putting my life at risk and not making sure the equipment I was using prior to the start of my shift and leading to the incident which occurred around 0930am on the 31/12/2018 which resulted in an episode of me suffering from shock, stress and anxiety* …"

52. In addition, I considered the emails of 7 April 2019 containing the amendments permitted. They do not refer to the Claimant's back pain, nor to any concern raised by him being ignored.

53. I considered the further particulars provided at the first Preliminary Hearing. There is no mention of the Claimant's alleged back pain or requests for adjustment being ignored.

54. I considered the further information provided by the Claimant in response to the orders of Employment Judge Elgot, and whether either set could be considered as an application to amend. However, neither set of further information sets out this complaint. In particular:

54.1 The further information of June 2018 does not refer to back pain nor of the Claimant's complaints being ignored. This further information appears to allege victimisation due to a protected act. It does not specify as unfavourable treatment that complaints were being ignored.

54.2 The further information of 24 October 2018 alleges direct race discrimination every week from the day the Claimant raised his concerns to ACAS through "*harsh treatment by management through the forced 40 hours temporary zero hours which restricted me from being able to have time to search for any other jobs*." Apart from the fact that this appears to be an allegation of victimisation, there is no mention of any back pain nor of complaints about it being ignored.

54.3 In any event, this further information was to provide particulars of complaints which already formed part of the Claim. The Claim is required to set out the essential case brought by the Claimant. This complaint – about complaints of back pain being ignored – was not part of the essential case.

55. The Claimant has not applied to further amend the Claim. The written further information does not indicate any application to amend.

56. The Claim cannot be enlarged by the oral submissions made by the Claimant at this hearing, so as to include this complaint. I appreciate that, likely many parties in the Tribunal, the Claimant is acting in person; but, in fairness to respondents and other parties in the Tribunal, the Claim is not something which simply gets the ball rolling, but a necessary requirement to set out the case, so that the overriding objective of justice can be delivered.

57. Accordingly, this allegation does not form part of the Claim. It does not form part of complaints to be determined at the final hearing against either Respondent.

Complaint 5: Direct race discrimination, on 31 December 2018, by Amazon

58. The Claimant's case is that Amazon failed to provide the Claimant with legal and safe checked equipment because of his race. The Claimant relies on a ladder falling.

59. This complaint consists of a bare allegation of detrimental treatment, and an allegation that it was because of his race. There is no allegation or information to explain why this treatment was because of race or ethnicity. This treatment occurred in a large warehouse; there is nothing to indicate why the same provision of equipment would not have been made to a hypothetical comparator.

60. In addition, this is a serious allegation, namely that the Claimant's health was put at risk because of his race or ethnicity. Despite the need for cogent evidence to show such a case to answer, the Claimant has not explained how such a case could be demonstrated, nor explained any evidence which could prove causation, nor provided any evidence of causation.

61. However, I weigh against this that I should put the Claimant's case at its highest at this stage and that this complaint will ultimately turn on the facts found after oral evidence. I conclude that I cannot find that this complaint has no reasonable prospect of success.

62. In my judgment, however, this complaint has little reasonable prospect of success

Complaint 6: On 31 December 2018, PMP and/or Amazon removed the Claimant from the warehouse premises and terminated his assignment.

63. The Claimant was permitted to add a new claim of victimisation by email dated 7 April 2019. This alleged that the Claimant was dismissed or removed from the warehouse or had the assignment terminated because he asked why his life was put in danger by the ladder or safety equipment.

64. At the first Preliminary Hearing, this was categorised as an act of direct race discrimination or race discrimination by victimisation after Employment Judge Elgot heard from the Claimant: see paragraph 6 Case Management Summary (p.40) and the list of issues. The Claimant did not respond to the Case Management Summary by

complaining that it was inaccurate but stated at the Preliminary Hearing before me that this was not a claim of race discrimination, either by direct discrimination or victimisation.

65. In essence, the Claimant has alleged that he was subjected to a detriment on the ground that he raised health and safety matters. In the first Preliminary Hearing, it was alleged that this treatment was because he had done a protected act. It appeared that, at this second Preliminary Hearing, the Claimant wanted to alter the type of victimisation relied upon.

66. The Claimant had the opportunity to set out his case in the Claim, and the opportunity to apply to amend the Claim (which was taken) and to provide further particulars at the first Preliminary Hearing. In addition, orders were made requiring him to provide further particulars. At no point did he take the opportunity to refer to any type of victimisation outside of section 27 Equality Act 2010. It would be contrary to the overriding objective, and not fair to the Respondents, to record that some type of victimisation, other than a complaint under section 27 Equality Act 2010, is already included in the Claim. To introduce such a complaint, a written application to amend his Claim further would be required, setting out the nature of the amendment, with full details of it.

67. However, given the way that this complaint was formulated at the first Preliminary Hearing, and given my conclusions in respect of Complaints 1 and 3 above, I have decided that its prospects of success as a complaint under section 27 EA can only be determined after all the evidence is heard. The fundamental issue between the parties is the reason (or reasons) why the assignment and/or the employment was terminated.

68. However, if the Claimant wishes to withdraw this complaint of victimisation under section 27 EA 2010 he should inform the Respondents and the Tribunal.

Complaint 7: Victimisation

69. The acts at Complaints (4) - (5) are relied on as victimisation.

70. For the reasons set out in respect of Complaint (4) above, this complaint of victimisation is not part of the Claim.

71. At the first Preliminary Hearing, the protected act was identified as phone calls made to ACAS by the Claimant to ask about his rights in respect of age and direct race discrimination.

72. In respect of the acts in Complaint (5) alleged to amount to acts of victimisation, the Claimant stated before me that the alleged protected act was a complaint to ACAS in about November 2018, about feeling there was race discrimination in the process for recruitment of permanent staff for Amazon in October 2018.

73. At the hearing before me, the Claimant added further particulars, as explained above. The Claimant stated that he had spoken at the time to floor managers (of both PMP and Amazon) about this complaint to ACAS; this is disputed. I concluded that this was an issue of fact which required determination after hearing the oral evidence.

74. For the same reasons as stated in respect of Complaint (5) above, however, I concluded that the complaint that unsafe equipment was provided because of a protected act had little reasonable prospect of success. This is a very serious allegation, but the Claimant did not explain how it was connected to a protected act, nor refer to evidence which connected the alleged provision with the protected act relied upon.

Complaint 8: Age discrimination against PMP

75. Taking into account the particulars provided on 9 June 2019, and putting the Claimant's case at its highest, this complaint of age discrimination has no reasonable prospect of success. My reasons are as follows.

76. There is no allegation by the Claimant of less favourable treatment because of age. The allegation is that the recruitment manager of PMP was not honest and sincere and lured the Claimant into a hostile working environment; but this does not relate to the Claimant's age.

77. The Claimant does not allege that the luring of him into an allegedly hostile working environment was because of <u>his</u> age. The complaint is that Mr. Vara acted as he did because of his (Mr. Vara's) own age. At most, it could be said that the allegation is that Mr. Vara took advantage of being older. Moreover, the complaint is that Mr. Vara was not "*sincere and honest*"; but this does not relate to the Claimant's age.

78. In addition, the Claimant applied for the post as a permanent employee of Amazon, so it is contradictory for the Claimant to allege that he was lured into the post. This contradiction also points to this complaint having no reasonable prospect of success.

79. Apart from the further information set out at paragraphs 27 to 28 above, and the points made orally at the hearing recorded above, the Claimant provided no other particulars of the complaint of direct age discrimination despite email letters of the Tribunal requiring this (sent on 23.10.19).

80. This complaint against PMP is struck out.

81. Further, as I have explained above, no age discrimination complaint was brought against Amazon. For the avoidance of doubt, had such a complaint been advanced, I am satisfied that it would have had no reasonable prospect of success for the same reasons given in striking out this complaint against PMP.

Employment Judge Ross
Date: 17 December 2019