EMPLOYMENT TRIBUNALS

Claimant: **Alistair Patterson**

Respondent: **Department for International Trade**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **27 August 2020**

Before: **Employment Judge Russell**

Representation
Claimant: **In person**
Respondent: **Mr B Gray (Counsel)**

JUDGMENT

The judgment of the Tribunal is that:

The claims brought under Section 63F of the Employment Rights Act 1996 are struck out pursuant to rule 37 of the Employment Tribunal Rules of Procedure 2013 as they have no reasonable prospects of success.

REASONS

1 By a claim form presented on 3 October 2019, the Claimant brought complaints arising from his unsuccessful application for the post of International Trade Trainee with the Respondent. The Respondent resists all claims.

2 At a Preliminary Hearing on 14 February 2020, the particular claims and issues were identified and are recorded in the Summary of that hearing. In addition to a claim of failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010, there was also a claim identified under section 63F of the Employment Rights Act 1996 which raised issues as to whether (a) the Claimant was a qualifying employee within the definition of section 63(d)(6); and (b) whether the Respondent's rejection of his application was in breach of section 63F.

3 The Claimant was given some time to consider after the hearing whether he wished to pursue his section 63F claim as he was never employed by the Respondent. After the hearing, he confirmed in writing that he maintained the claim and the Respondent applied for an open Preliminary Hearing to consider striking out the claim as

having no reasonable prospects of success. It is only the Employment Rights Act 1996 claim which is subject to the strike out application. It is common ground that the disability discrimination claim will proceed to a hearing as the Equality Act 2010 applies to applicants for employment as well as employees.

4 There is no dispute that the Claimant applied for a position with the Respondent organisation, his application was not successful and that he was not at any point employed by the Respondent.

5 Section 63F of the Employment Rights Act 1996 sets out the employer's duties in relation to an application made by an employee for study or training. Section 63D of the Employment Rights Act 1996 provides that the statutory right to make a request in relation to study or training within part 6A of that Act accrues only to a qualifying employee. A qualifying employee for the purposes of the statutory right to make a request and the employer's duties in relation to such a request is a person with 26 weeks of continuous service with the employer.

6 Mr Gray submits that even if the Claimant had been employed at any time (for example if his application had succeeded) there is no conceivable factual basis upon which he could satisfy the 26 week continuous employment requirement. Even taking the Claimant's case at its highest, as a matter of law the claim must fail and should be struck out as having no reasonable prospect of success.

7 In response, the Claimant accepts that he was not an employee of the Respondent. He relies upon Section 39(2)(b) of the Equality Act 2010 referring to employment benefits which he says includes staff development. The Claimant submits that a fair and transparent process requires that all prospective employees and candidates for a job should have the right to study and be trained on the processes which they will need to use. This, he submits, is necessary in order to level the playing field between applicants from outside the organisation and those who are already within the organisation. Upon further questioning, the Claimant clarified that it was not his case that such a learning intervention, as he termed it, would apply simply to disabled candidates as part of a reasonable adjustments argument, rather that it is an intervention that should be applied to all candidates to ensure a fairness to all.

8 I carefully considered the Claimant's ingenious submissions and, even if he is right about the general desirability of such a learning intervention, I cannot accept that it gives rise as a matter of law to a claim under section 63F of the Employment Rights Act 1996. The Equality Act 2010 is an entirely separate piece of legislation giving rights to employees and applicants for employment who are discriminated against in one of the prohibited ways for a reason which is linked to one of the protected characteristics (the precise causal link depending on the type of discrimination involved). This would include applicants for employment who are deprived of learning and training opportunities so long as the causal link with a protected characteristic is established. The Equality Act 2010 does not apply to all employees to ensure a level playing field generally. The Employment Rights Act 1996 does apply to all employees and guarantees a number of rights irrespective of any protected characteristics. The ability of an employee to exercise a right is limited to the extent set out in the Act and independently from the Equality Act, for example in requiring a period of qualifying service. The Employment Rights Act 1996 expressly requires that in order to benefit from the section 63F right, a claimant must be a qualifying employee with 26 weeks continuous service.

9 To strike out a claim without a final hearing is a draconian sanction, it has a very high threshold and the Tribunal must be satisfied that there are no reasonable prospects of success. It is not a question of whether the claim is likely to fail, or may well fail - it requires that there are *no* reasonable prospects. In deciding if the threshold is surpassed, I took the Claimant's case at its highest and assumed that everything he says would ultimately be proven as a fact.

10 On the Claimant's own case, he was an applicant for employment. On the Claimant's own case, he was never in fact employed. On the Claimant's own case, he did not have 26 weeks continuous service. It follows that as a matter of law this is a claim that has no reasonable prospects of success and accordingly I strike it out.

11 I would like to express my gratitude to the Claimant and Mr Gray for the patience they demonstrated when the Preliminary Hearing had to be delayed by a week due to technical problems with the cloud-video platform and for their courtesy throughout the hearing.

12 The final hearing for the remaining Equality Act 2010 claim will be listed for two days on the first available dates after 22 February 2021. Case management orders were made by consent.

Employment Judge Russell
Date: 17 September 2020