EMPLOYMENT TRIBUNALS

Claimant: Mr A Masood

Respondent: (1) Iceland Foods Limited (2) Mr G Morris; (3) Ms L Spiers; (4) Ms Z Kurt (5) Mr W Clarke; ; (6) Mr B Bareham; (7) Mr G Arthurton; (8) Mr D Cazop; (9) Mr D Edwards (10) Ms D Yavas Yavas; (11) Ms N Harkin; (12) Ms N Chambers; (13) Ms J Morris

Before: Employment Judge A James (sitting alone) by CVP

Date: 7 September 2020

Appearances

For the claimant: In person

For the respondent: Mr J Gidney, counsel

JUDGMENT ON APPLICATIONS FOR STRIKE OUT

(1) For the reasons set out below, the Employment Judge considers that the claimant's allegations or arguments that:

> (a) Ms L Spiers harassed the claimant or treated the claimant less favourably because of race by trivialising his grievance complaint; not taking it seriously; rejecting it on 23 October 2019; and by failing to take action against Ms Kurt by moving her before 9 November to another store; and that he was subjected to race-related harassment by being required to work with Ms Kurt after 23 October 2019;
>
> (b) Mr D Edwards treated the claimant less favourably because of race and/or subjected him to race related harassment by giving instructions to Dawid Cazop and Ben Bareham on or around 29 November 2019 to carry out more bullying and harassment against him;

have no reasonable prospect of success. **Those claims are struck out and are dismissed.**

WRITTEN REASONS

A. Introduction – the applications made and the structure of these reasons

1. Prior to and at the hearing, there were two broad submissions made by Mr Gidney on behalf of the respondent, as to why certain classes of claim should be struck out. Those classes of claim are (1) all of the harassment claims and (2) all of the claims against the individual respondents (on the basis that such clams should proceed against the first respondent alone). There were then specific applications for strike out and/or deposit orders in relation to specific claims against various individuals.
2. Bearing in mind those applications, these reasons are structured as follows. First, the general legal principles to be applied in relation to strike out and deposit order applications are set out. Second, the general application in relation to all of the harassment claims is considered. Third, the general point in relation to the claims against named individuals is considered. Finally, the judgment deals in turn with each of the specific applications made in relation to claims against specific individuals.

B. The law

(1) Strike out

3. The relevant paragraphs of Rule 37 of the **Employment Tribunal Rules of Procedure 2013** state:

(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—

(a)that it is scandalous or vexatious or has no reasonable prospect of success;

(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;

(c)for non-compliance with any of these Rules or with an order of the Tribunal;

(d)that it has not been actively pursued;

(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. ….

4. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances - see *Anyanwu v South Bank Students' Union [2001] IRLR 305, HL*, in which Lord Steyn 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.''

5. And at para 39, whilst Lord Hope noted 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', he also stated (see para 37):

   " … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

6. Neither of these statements are to be seen as amounting to a fetter on the tribunals' discretion (see *Jaffrey v Department of the Environment, Transport and the Regions [2002] IRLR 688 at para 41, EAT*). However, it is clear that the power to strike out in discrimination cases should be exercised with greater caution than in other, less fact-sensitive, types of case. The time taken to consider such applications should be measured in hours rather than days and 'should rarely, if ever, involve oral evidence' – see para 49 of *QDOS Consulting Ltd v Swanson UKEAT/0495/11* (12 April 2012, unreported), Judge Serota QC.

7. Similar views were expressed in *Chandhok v Tirkey [2015] IRLR 195, EAT*, where Langstaff J upheld the decision of an employment judge refusing to strike out at a preliminary stage an amended race discrimination claim alleging discrimination on the grounds of the claimant's caste. Although 'caste' did not specifically fall within the definition of 'race' in EqA 2010 s 9, he held that it was possible that some of the factual characteristics of caste might fall within the scope of 'ethnic origins' in s 9(1). A tribunal could only reach a decision about this after hearing and determining the full facts. Langstaff J reiterated (at paras 19–20) that 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'.

   (2) Deposit orders

8. Rule 39 to Schedule 1 of the *Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013* ("the ET Rules") states:

   (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. ….

(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.

9. When determining whether to make a deposit order, a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward *(Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07, *[2007] All ER (D) 187 (Nov)*. Although, as Elias J pointed out in that case (which was decided under the 2004 Rules), the less rigorous test in what is now r 39(1) of the 2013 Rules allows a tribunal greater leeway to take such a course than would be permissible under the test of no reasonable prospect of success in r 37(1) of the 2013 Rules, the tribunal 'must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response' (para 27).

Discussion and conclusions

(1) The Harassment Claims

10. Mr Gidney submits on behalf of the respondent (referred to from here onwards as 'the respondent's position') that the harassment claims have no reasonable prospects of success, because there is nothing on the face of the alleged treatment of the claimant, as clarified at the 21 April 2020 preliminary hearing, to suggest that the treatment is in any way related to race. This submission is in contrast to the respondent's position on the direct discrimination claims. The respondent's position on those claims generally (and subject to the submissions made in relation to specific acts set out below), is that it will be necessary for the tribunal to look at the whole of the evidence, before deciding whether the reason for the treatment is because of race. Hence there is no blanket application for a strike out of all of the direct discrimination claims as a whole.

11. I conclude that it is not appropriate to strike out the harassment claims as a whole, for the following reasons. Section 13 Equality Act 2010 uses the words 'because of [race]'; section 26 uses the words 'related to [race]'. In my view, the latter implies that in some circumstances, a looser (or 'associative') relationship can exist between

the alleged treatment in order for a tribunal to be able to conclude that the treatment amounts to harassment. For example, where a heterosexual person is offended by homophobic comments by work colleagues. In those circumstances, the treatment is not related to the sexual orientation of the person complaining of the harassment; but it is related to sexual orientation more generally due to the homophobic nature of the language used. Such treatment would therefore be likely to be caught by the harassment provisions of the Equality Act, even if it were not caught by the direct discrimination provisions.

12. However, in some claims, the facts are such that if a claimant were able to succeed in a direct discrimination claim, they would also be likely to succeed in a harassment claim and vice versa. It appears to me that Mr Masood's claims are, on the whole, in that category. What the tribunal is really concerned with in relation to both sets of claims, which are reliant on the same set of basic facts, is the reason why the various individual respondents acted (or failed to act), as they did. If the fact findings of the tribunal hearing this claim as to the reasons for the treatment alleged, lead to the conclusion that the treatment was <u>because of</u> race, they will in most of these claims also lead to the conclusion that they are <u>related to race</u>; and vice versa.

13. Further conclusions would then of course have to be made as to whether the other issues in relation to harassment claims (such as prohibited purpose or effect and whether the treatment was unwanted), are also made out on the facts. However, it appears to me at this stage of the proceedings, dealing with the claims as pleaded but without having had the benefit of hearing any oral evidence, that on the central question as to whether the treatment was because of or related to race, the conclusions in relation to most of the allegations be the same. For that reason, Mr Gidney's submission that all of the harassments claim should be struck out is rejected.

14. It is also noted that the scheme of the Equality Act is such that the harassment allegations should be considered first (as suggested in the footnote to paragraph 10 of Underhill LJ's judgment in *<u>Unite the Union v Naillard [2018] EWCA Civ 1203</u>*). The reason for this is that the anti-overlap provisions in Section 212(1) Equality Act 2010 provides that 'detriment does not… include conduct which amounts to harassment'. Therefore, if it is concluded that the alleged treatment amounts to harassment, those claims cannot also succeed as direct discrimination claims (although the tribunal might still determine that question in the alternative in case its conclusions on the harassment claims are challenged). The order of the list of issues annexed to the case management orders reflects this position.

15. For the avoidance of doubt, the conclusions above are based on my current understanding of the way the claims are put, without having heard any evidence. The employment tribunal panel at the liability hearing, having heard all of the evidence, may well come to a different conclusion on liability in the harassment claims compared to the direct discrimination claims. Nothing said above is intended to and nor does it bind that tribunal.

<u>(2) The claims against named individual respondents</u>

16. As for the claims against named individual respondents, the respondent's position is that the claimant's purpose in pursuing such claims is to cause stress and disruption to those individuals. I accept that allegations of discrimination are serious and may cause named individuals stress. However, no specific evidence was put forward in support of that position and it was denied by the claimant. He asserted that claims

have been made against named individuals because they bullied, threatened and victimised him and the company did not take any action against them. Instead, he was dismissed.

17. The scheme of the Equality Act 2010 is such that wherever an employer is liable for discrimination, the employee who did the actual act complained of will be individually liable as well, if they have been named as an individual respondent in the proceedings – Section 110(1). A claimant is legally entitled as a general rule to pursue claims against named individuals, as well as against the employer.

18. In the absence of any evidence of an improper purpose being pursued by the claimant in maintaining the claims against named individuals, there is no basis on which those claims could be struck out as a whole so that the claims would only proceed against the first respondent. I therefore decline to do so.

19. Having dealt with the general points, I now turn to the applications made in relation to the specific allegations against certain individuals.

(3) Claims relating to specific individuals

Ms Kurt - R4

20. There are various aspects to this set of allegations. The claimant alleges that Ms Kurt (1) shouted very loudly at him in front of colleagues; (2) told him he did not know anything about his job; (3) told him that she would tell him how to work; (4) questioned how he got the job in the first place; (5) told him he did not know how to do his job; and (6) questioned with another supervisor Mr Atif Rahman why the claimant left the store.

21. These are diffuse allegations and without being referred to any of the specific documentation, or hearing oral evidence, it is not possible to determine the reason why Ms Kurt acted as she did. Whilst there appears to be little or no corroborative evidence, this is still not in my view a case where it could be reasonably concluded that the allegations have either no or little reasonable prospect of success.

Mr Morris - R2

22. Mr Morris heard the claimant's grievance and made a decision on it. From what was said at the hearing, it appears that there is a factual dispute as to whether or not, prior to the grievance decision being made, the claimant had alleged that Ms Kurt's actions were motivated by his race. The respondent says not but the claimant says he did, in an email. None of the documents relating to the grievance were before me. Again therefore, this is not in my view a case where it where it could be reasonably concluded that the allegations have no or little reasonable prospect of success.

Ms Spiers – R3

23. Ms Spiers was the note taker at the grievance hearing. She is a HR representative. The claimant accepts that she was not the decision-maker but he argues that she did participate in the hearing in that, for example, she commented on the grievance process. Since Ms Spiers works in the HR department, it is hardly surprising that she commented on the grievance process during the grievance hearing. There is no suggestion by the claimant that her advice was discriminatory. **I conclude that this allegation has no reasonable prospect of success and should be struck out.**

Mr Clarke – R5

24. The respondent argues that the claims against Mr Clarke should be struck out because he was simply a witness at the meeting which took place with Ms Kurt on 9 November 2019. The claimant alleges however that Mr Clarke raised performance issues about him and also that he shouted at the claimant during that meeting. Those are matters for evidence in due course. Therefore, this is not a case where it could be reasonably concluded at this stage that the allegations have no or little reasonable prospect of success.

Mr Arthurton – R7

25. Mr Arthurton heard the claimant's grievance appeal. The claimant alleges that following the appeal hearing, Mr Arthurton gave instructions to Ben Bareham and Dawid Cazop to carry out more bullying and harassment against him. The claimant admitted during this hearing that he did not have any evidence that happened, he is simply assuming that it did. It appears to me that there is at least the possibility that a tribunal, having heard and considered all of the evidence, could conclude that such an instruction was given. **However, given the admitted absence of any corroborative evidence that is what happened, I conclude that there is little prospect of the claimant succeeding in this claim and a deposit order is made in relation to it.**

Mr Edwards – R9

26. Mr Edwards was the note taker at the grievance appeal hearing. That is accepted by the claimant. He alleges however that Mr Edwards may also (or instead of) Mr Arthurton, have given the instructions to Mr Bareham and Mr Cazop to bully and harass him. This is nothing more than a bare assertion with no evidence whatsoever to back it up, against an individual whose only involvement was as a note-taker at the grievance appeal hearing. **I conclude that this allegation has no reasonable prospect of success and it is struck out.**

Mr Bareham – R6

27. There are a number of aspects to the allegations against Mr Bareham. First, that on 30 November 2019 (1) Mr Bareham rudely told the claimant to come into his office, whilst Ms Kurt's close friend Mustafa Yilmaz who was also present did not say anything but just sat there smiling); (2) Mr Bareham shouted at the claimant that his shift was 3 to 12; (3) Mr Bareham told the claimant that a full pallet was due to be delivered and he would have to clear that, fill any gaps in the shelves, and work on the back stock, despite the claimant telling him it would not be possible to carry out that amount of work in the time available and it being an unreasonable and impossible task.

28. Further, it is alleged that on 7 December 2019 (1) Mr Bareham came onto the shop floor, rudely told the claimant that his shift started at 3 pm and questioned why he was in the store; (2) Mr Bareham pushed the claimant's hands and acted in an angry way towards the claimant. (3) called a security guard and asked them to remove the claimant from the store. (4) told the claimant to get out of the store and on the claimant refusing to do so, continue to act in an aggressive way towards the claimant.

29. All of these allegations are fact sensitive, and it is not appropriate to strike them out without a hearing of the facts. Nor am I able to conclude at this stage that the claims have little reasonable prospects of success.

Mr Cazop – R8

30. He allegedly told the claimant to 'fuck off' in Polish on 1 December 2019. There is a further incident alleged that on 7 December 2019, the claimant saw Dawid Cazop on the shop floor and told him he wanted to speak with him. The claimant took another video clip, and Mr Cazop threatened to call the police. The claimant told Mr Cazop that if he had a problem with the claimant, Mr Cazop should suspend him. Mr Cazop was allegedly smiling and laughing during this incident.

31. Again, both of these allegations are fact sensitive, and it is not in my view appropriate to strike them out without a hearing of the facts. Similarly, I am not able to conclude that the claims have little reasonable prospects of success.

Dilek Yavas Yavas – R10

32. It is agreed that Ms Yavas asked the claimant to work at the Streatham store. The respondent argues that this was not a detriment since it was contractually entitled to request the claimant to move stores and the Streatham store was nearer to his home. The claimant responded by stating that the detriment was being told to go to the Streatham store without any consultation or warning, as required.

33. Again, the allegation is fact sensitive, and it is not in my view appropriate to strike it out without a hearing of the facts. Similarly, I am not able to conclude that the claim has little reasonable prospects of success.

34. As to the victimisation claim, it is the respondent's case that Ms Yavas did not know about the previous claim forms. That may well be the case but it cannot be established without hearing oral evidence. The strike out and deposit order applications are again rejected for the same reason as set out above.

Nicola Harkin – R11

35. Ms Harkin was the investigating officer for the respondent in relation to the disciplinary allegations against the claimant. She works in the HR department and was instructed to carry out the investigation. The claimant refused to engage with her or the disciplinary investigation. There appears to be no real basis to the claimant's allegation against Ms Harkin, save from a bare assertion of discrimination, and a difference in race. It is hard to avoid the conclusion that the claimant asserts an improper purpose or motive in relation to anyone who makes an adverse decision against him.

36. My decision whether to strike out this allegation is finely balanced, However, given the fact-sensitive nature of discrimination claims, I have concluded, on balance, that it is not appropriate to strike out this allegation since I am not satisfied that it has no reasonable prospects of success. **However, I do consider that in the circumstances it has little reasonable prospects of success and I order a deposit order in relation to it.**

Nicole Chambers – R12

37. Ms Chambers was the disciplinary hearing officer. The claimant refused to engage with Ms Chambers or with the disciplinary process. He suggested at the hearing that since he had submitted employment tribunal application claims, he was protected, and implied that the disciplinary process against him should not have taken place. He said that it was not right that he sit down with either Ms Harkin or Ms Chambers in such circumstances. I accept that may be the claimant's belief (without making any specific finding on that point, which is for the full panel in due course). If so

however, that belief is wrong. The submission of an employment tribunal claim by a claimant does not mean that an employer cannot, in any circumstances, take disciplinary action against that claimant.

38. I arrive at the same conclusion in relation to this allegation as I do in relation to the above allegation against Ms Harkin. Whilst I do not consider it appropriate to strike it out, **I do make a deposit order in relation to it because it has little reasonable prospect of success.**

Joanna Morris – R13

39. Ms Morris was the appeal decision manager. The claimant did not attend the appeal, although he did send some information to Ms Morris prior to her making her decision. Ms Morris did not interview the witnesses again. It is a common practice in appeal hearings for the appeal manager to review the decision rather than make a fresh decision without undertaking a complete re-hearing of the disciplinary allegations; that is the case here.

40. I take due notice of the legal principle that in discrimination claims, if the decision maker does not have a discriminatory motive, their decision is not an act of discrimination, even if others who provided evidence to the disciplinary or appeal process did have a discriminatory motive themselves. See **CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439**.

41. My conclusions in relation to this allegation are the same as for Ms Harkin and Ms Chambers above, and by the same reasoning, **I conclude that this allegation has little reasonable prospects of success and I make a deposit order in relation to it.**

42. In arriving at the above conclusions, I did consider Mr Gidney's submission that I should treat the factual assertions made by the clamant in defence of these applications with some scepticism and should concentrate on the claim as pleaded. Whilst I understand that submission, it appears to me that if the claimant is asserting a different factual position to that put forward by the respondent, that does tend to suggest that a tribunal panel would need to hear oral evidence, before it could make findings as to what actually happened and when.

Conclusion

43. The claims set in the judgment above are struck out as they have no reasonable prospect of success.

44. A separate Deposit Order will be made in relation to the allegations listed above as having little reasonable prospect of success.

45. The case has been listed for a final hearing and a separate case management summary sets out the dates of that hearing, followed by orders in relation to the further conduct of this case.

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Employment Judge A James

7 October 2020

Sent to the parties on:

8 October 2020

For the Tribunal: