

# **EMPLOYMENT TRIBUNALS**

#### BETWEEN

Claimant MR K HAMID DANKALI

Respondent LONDON UNITED BUSWAYS LIMITED

## **OPEN PRELIMINARY HEARING JUDGMENT**

HELD AT: London Central (CVP video audio call)

ON: 9 November 2020

**BEFORE: Employment Judge Russell (sitting alone)** 

REPRESENTATION: Claimant: No appearance Respondent: Ms Blythe , Solicitor

### Judgment

- The Respondent's application for a strike out order under Rule 37 of the ET's ( Constitution & Rules of Procedure) Regs 2013 Sch 1 on the grounds that the Claimant's claim of race discrimination under section 9 and/or section 13 of the Equality Act and under Reg 7 TUPE Regs 2006 and Part 10 ERA 1996 for automatic unfair dismissal have no reasonable prospects of success and are dismissed.
- 2. The Respondent's application for a strike out and or deposit order under Rule 37 or Rule 39 of the ET's (Constitution & Rules of Procedure) Regs 2013 Sch 1 in respect of his wrongful dismissal/ breach of contract claim, on the basis such claim(s) have no or little reasonable prospects of success, is refused.
- 3. The Claimant's claims of unfair and wrongful dismissal/ breach of contract shall continue to the listed full hearing on 27,28 and 29 July 2021 now listed for 3 days ( down from the initially listed 5 days ).
- 4. On reconsideration on the tribunal's own initiative the above judgment is confirmed .

#### Reasons

#### Claimant's non-appearance and Reconsideration

5. Although the Claimant made no appearance today I heard representations from the Respondent and in the course of doing so I read carefully the ET1 particulars and much of the internal discussion between the Claimant and the Respondent during his

long period of illness. In part to ensure the Claimant's position was properly considered despite his representative making no appearance.

- 6. Before proceeding in the Claimant's absence, I took the following steps. A) I checked the Claimant was aware of the listed hearing and noted he had been aware of it and the issues to be considered and had communicated with the ET as to the hearing. B) The clerk emailed both parties to ensure that they had the correct CVP hearing route and or to check if the Claimant's representative had any substantive reason for non-attendance noting that whilst this was not to be Mr Neckles he wished to be the continuing contact point and was simply passing over to PTCS member (Daniel Ibekwe) for today's hearing. C) I did not start the hearing until 10.30 am. D) In the ET clerk's second email the representative was invited to join late if he could and wished to do so.
- 7. And after the hearing I asked the Respondent's representative to email the Claimant without referring to the orders I have made (which were advised to the Respondent on the day) to indicate that I had proceeded in the Claimant's absence and that my orders and reasons would be sent to the parties asap including further case management orders.
- 8. I was subsequently informed by my clerk that the wrong CVP link had been sent out to both the Claimant and Respondent's representative but having then reconsidered my own decision under Rule 70 ETs (Constitution & Rules of Procedure) Regs 2013 Sch 1 I founds that as both parties initially received the incorrect CVP hearing invite there was no reason to vary my decision which was confirmed .The Respondent's representative managed to attend the hearing having clarified the correct link , the Claimant did receive the correct link in time to join the hearing at some point and yet at no stage in the two hours or so of the hearing did the Claimant's representative do so nor did he contact the Tribunal to clarify the position. Nor was the Claimant going to attend to give evidence in any event and my findings were primarily made based on the pleadings .
- 9. The prejudice to the Respondent by delaying the hearing outweighed the prejudice to the Claimant in proceeding where it I was fairly able to do so and the Claimant's representative could and should have attended the hearing even if the initial fault was with the tribunal administration.

#### Long Term Absence Policy and Breach of contract /wrongful dismissal claim

10. The long-term absence policy relied upon by the Claimant to justify his claim of unfair treatment was one used by his former employer (the Transferor). There was no evidence that this policy was being used by the Transferor at the time of the relevant transfer to the Respondent on or about 30 January 2003. Whether it has contractual effect or not as part of a collective agreement (transferring over under Reg 5 TUPE along with the Claimant's employment at that time) or otherwise is unclear. It may be that it is simply part of a series of discretionary employment policies used by the Transferor. But I cannot make and do not make a finding about this given the lack of documentation available and in the absence of evidence.

11. The Claimant's wrongful dismissal claim / breach of contract claim is limited to claiming an extra 4 weeks paid notice. He was employed from 18 February 2003 to 24 January 2020 so this is 16 full years and so claims 16 weeks' notice under the Transferor's long term sickness policy (inherited by the Respondent) as opposed to the 12 weeks he actually received being his minimum statutory entitlement under section 86 ERA 1996. So, this claim must be determined by the full tribunal. I observe the amount at stake is a relatively small sum of 4 weeks' pay is at stake here and the Respondent is not materially prejudiced by having to deal with this issue as well as the unfair dismissal claim .

## Race and TUPE Claims

12. The Respondent dismissed the Claimant after a long period of absence . On the purported grounds of capability. There are no details whatsoever given in the ET1 to show that the dismissal was or could be due to the Claimant's Eritrean descent . Nor are there are any that are or might be linked to the relevant transfer made some 13 years ago . His TUPE claim. And whilst I neither make nor seek to make any other finding as to the reason for dismissal I can and do conclude that a strike out order is appropriate in respect of the Claimant's race and TUPE related dismissal claims for reasons expanded below under strike out order - legal and further findings.

# Disability

- 13. The Respondent states that when they dismissed the Claimant it was clear that , inter alia, he was not suffering from a disability (which he claims as a physical disability relating to chronic back pain) and although he was not getting any better he was only using OTC medication to alleviate the symptoms and that there were no reasonable adjustments that could have been made to assist the Claimant ( and none he suggested). Given his job as a bus driver with the obvious strains that might put on one's back they had come to the end of a fair process at that point (24 January 2020) at which time the Claimant had been off with sickness for some 176 calendar days.
- 14. The issue of the Claimant's disability remains disputed . The Respondent denies he had long term sickness related to a disability . In part because he was expected to be able to return to work even though he did not and in part because his medical reasons for absence varied. However, it is clear that the Respondent's OH department classed his sickness as " long term absence " with " an underlying condition" and as medical evidence has yet to be provided by the Claimant the issue of disability would therefore be dealt with at a future time.
- 15. It is also unclear, to the extent there was a disability, what adjustments might have been considered and whether they were. However there are no apparent claims made as to a detriment claimed by the Claimant relating to his disability other than a failure to make reasonable adjustments and in relation to his dismissal. This is reflected in the issues identified by me in case management orders made subsequent to my judgment.

## Strike Out Order Legal and Further Findings

- 16. In considering an application under Rule 37 and Rule 39 the Tribunal is not restricted to purely legal issues but is entitled to have regard to the likelihood of a Claimant being able to establish the facts essential to his case and reaching a provisional view as to the credibility of the assertions put forward. The Tribunal must have a proper basis for doubting that essential facts could be established before making an order: Van Rensburg v Royal Borough of Kingston-upon- Thames UKEAT/0095/07.
- 17. The power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised rarely: <u>Tayside Public Transport Co Ltd</u>[2012] IRLR 755. Examples of where strike out might be merited however are where it is "instantly demonstrable that the central facts in the claim are untrue", where the facts sought to be established by the claimant were "totally and inexplicably inconsistent with the undisputed contemporaneous documentation" (<u>Ezsias v North Glamorgan NHS Trust</u> [2007] IRLR 603).
- 18. When determining a strike out application, Tribunals should have regard to the essential case to which a Respondent is required to respond, which is contained in the ET1, taken at its highest. Tribunals, crucially, should not determine strike out applications on the basis of other material, such as a witness statement or some other document, as 'such an approach too easily forgets why there is a formal claim' [Chandhok and another v Tirkey (Equality and Human Rights Commission intervening) [2015] ICR 527, 14-18].
- 19. Unlike in cases where there is a crucial core of disputed facts, Tribunals may have greater confidence in exercising their strike out powers when the central facts in a claim are not in dispute. Similarly, Tribunals may have confidence striking out a discrimination claim where:

'on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ in <u>Madarassy v Nomura International plc</u> [2007] ICR 867, para 56): "only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination" [Chandhok and another, 20].

- 20. In respect of the race complaint it is not enough for the Claimant to simply show, still less just state, that he has been treated differently. There must be a quality in the treatment complained of that enables the complainant reasonably to complain about it [Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL]. An unjustified sense of grievance cannot amount to detriment or less favourable treatment [Shamoon, approving Barclays Bank plc v Kapur (No. 2) [1995] IRLR 87].
- 21. A complaint of direct discrimination will only succeed where the Tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. Where the reason for the alleged less favourable treatment is not immediately

apparent, the Tribunal must focus on the reason why the employer acted as it did in so treating the claimant [*R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors* [2010] IRLR 136, SC].

- 22. There is limited dispute as to the facts and yet no substantive information as to the existence of a race claim . There are no pleaded facts of any kind relating to any race claim . It is simply an allegation made , that the failure to make unparticularised reasonable adjustments or pay him the higher notice period , sought under what the Claimant states was the applicable sickness policy , was or may in some way connected to his Eritrean descent. But there is no other detail or assertions as to on what basis this claim is made and the race claim, clearly has no reasonable prospect of success. And if the suggestion is that but for his ethnicity he would not have been dismissed then , on the pleadings, such a claim clearly has no reasonable prospect of success.
- 23. In addition there is no pleaded case at all that does or could show the dismissal , over a decade on from the transfer over of the Claimant's employment is related to such " relevant transfer " and , as claimed by the Claimant , a refusal to accept the terms of a transferring collective agreement . The TUPE claim is said to arise from a relevant transfer some 13 years previously but the only dispute that exists as to the referred to long term sickness policy , part of a collective agreement. It remains unclear at this stage whether or not the Claimant has been served with the correct period of notice and whether the Respondent followed the procedure contained within the sickness policy and this may be relevant to his unfair dismissal claim. But on the pleadings, a TUPE claim clearly has no reasonable prospect of success.
- 24. The Claimant is stating that he should have got a longer period of notice because of contractual commitments inherited through a TUPE transfer and that the dismissal was an unfair one , particularly given his disability which seems to be stated as being chronic back pain . These are the therefore the principal issues that will progress to a full hearing over a reduced 3 day hearing .

**EMPLOYMENT JUDGE - Russell** 

16 November 2020 Order sent to the parties on

16/11/2020

for Office of the Tribunals