



EMPLOYMENT TRIBUNALS

Claimant: Miss Samantha Doherty

Respondent: Asda Stores Ltd (sued as Asda Superstore)

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (in private by telephone) **On:** 04 December 2020

Before: Employment Judge R S Drake (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr A MacMillan (of Counsel)

JUDGEMENT

1. The Claimant's claim of unfair dismissal is struck out in accordance with Rule 37(1) paragraph (a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), on the grounds that the claim has no reasonable prospect of success.
2. The proper citation of the Respondent's name is as recorded as above, and is therefore thus amended.

Reasons

3. I went through with the Claimant every single paragraph of the Respondent's response to her claim, and noted in particular with reference to paragraph 30, that the Claimant accepted that in a Disciplinary Hearing on 15 May 2020 she had admitted she had uttered certain words (on an unspecified date – and it does not matter when) to an apparently Asian customer of the Respondent, which included “ ... We see it all the time with people like you” ... (my emphasis) and that this could be and indeed was regarded by that customer

as reference to her race. The Claimant says today but has not said in her claim form (ET1) that the context of this was reference to making large scale purchases which could have meant that such purchases were non-essential in the context of national lock down during the current Covid19 pandemic. I noted that the Claimant could not establish that she made this context clear at the time of the incident nor during the disciplinary process.

4. This engages and brings into consideration the terms of paragraph (a) of Rule 37(1). I find that whatever the Claimant regarded in her own private mind as being the context of the words she uttered, when viewed by a customer of Asian background, they would be regarded as having a racial basis. I find that this would be in breach of the Respondent's policies, and this on the basis of her own admissions to me, whatever she says was the context as she saw it to be. What mattered to the Respondent was the words actually used and the way they would be and were understood by the customer in question who raised a complaint about them.
5. Further, I noted that the Claimant otherwise accepted each and every one of the key paragraphs of the Respondent's response. Therefore, I am satisfied that the Claimant knew that the reason for her dismissal was that she had used the words complained of by the customer, who raised legitimate complaint about their use and regarded them as being referable to her race. I therefore concluded that the Claimant is and was at all material times aware that at any Preliminary Hearing she would face an application for strike out.
6. I further concluded that the Claimant was aware that she had been dismissed for use of these words to a person of Asian background.
7. I further noted that the Claimant was not arguing that there was any procedural flaw in the procedure adopted by the Respondents leading to her dismissal and that she was aware of the Respondent's Policy with regard to their so called "Global Statement of Ethics" and their Disciplinary Procedure In respect of any departure by employees from requirements under that Global Statement. I find that this engages Paragraph (a) of Rule 37(1).
8. For the sake of completeness, I set out below the basis upon which I had to consider the position so far as set out in Rule 37: -
 - (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 ... has no reasonable prospect of success (my emphasis)"
9. I note that the Claimant sought to argue that it could not be said that her claim had no reasonable prospect of success, but that it should be regarded as having a limited prospect and that she was capable of paying a deposit as a condition of being allowed to proceed with her hearing. I concluded that on her own admissions to me, the Claimant accepted that whatever she thought

was the context in which the words were uttered, they could be regarded as being of racial causation so far as the customer was concerned.

10. I concluded that on the Claimant accepting use of such words by her, it was open to the Respondent to regard such use as being gross misconduct under their Policies and that dismissal was therefore a reasonable outcome. Because the Claimant could not argue before me any basis for saying that this was not a reasonable outcome, that she had no reasonable prospect of success in her claim as such.
11. I took account of the Court of Appeal's finding in **Swain v Hillman [2001] 1 All ER 91** in which it was held that a Court (or Tribunal in this case) must consider whether a party " ... has a realistic as opposed to fanciful prospect of success ..." in the context of assertions as in this case that the Claimant's case has no, as opposed to little, prospect of success. In this case there is clearly on my examination no conflict of evidence on the key points such as would necessitate ventilation at a full hearing. I considered the balance of prejudice facing the Claimant if I struck out her case leaving her with no further way of arguing her views as to the context of her admitted words, or to the Respondent if the case were not struck out causing them to have to devote considerable time and energy to meeting a claim which on what I have seen and heard today and based on the Claimant's admissions has no prospect of success. On this analysis I conclude that the balance of prejudice favours the Respondent leading me to conclude it is right I should strike out the claim.
12. For all the reasons set out above, I conclude paragraph (a) of rule 37(1) is engaged and empowers me to strike out the claim in accordance with rule 37. Therefore, I have no alternative but to dismiss the claim.

Employment Judge R S Drake

Signed 04 December 2020