EMPLOYMENT TRIBUNALS

Claimant: **Mr. L. Garcia**

Respondents: Landbased Ltd, trading as J.P Pharmacy

Representation
Claimant: in person
Respondent: Ms G. Boorer, counsel

London Central Remote Hearing (CVP) **On: 29 January 2021**
Before: **Employment Judge Goodman**

JUDGMENT

The claims are struck out under rule 37 as disclosing no reasonable prospect of success.

REASONS

1. This open preliminary hearing was listed by E J Paul Stewart at a case management hearing on December to decide the respondent's applications to strike out the claims, and failing that, order the claimant to pay a deposit as a condition of proceeding. It was listed to be heard in person, but converted to a remote hearing at the claimant's request given current pandemic conditions. The final hearing is listed for 5 March 2021.

2. The claim is of discrimination because of race in relation to a job application.

Materials for This Hearing

3. I have the claim form, response, and the orders of E J Stewart. I was also provided with a hearing bundle, which mainly consists of correspondence between the parties, but did usefully include screenshots of the claimant's application, CV and covering letter from the website. There was no corresponding information for the successful candidate.

4. Both sides had sent written submissions. I also heard oral submissions from both and asked some factual questions.

Factual Summary

5. The respondent placed an advertisement for 30 hour work per week as a picker and packer of pharmaceutical products. No experience was necessary. It required attention to detail and physical exertion. The advertisement said: “Language: Romanian (required)”.

6. The claimant applied online for the post on (according to the website – the claimant himself did not have the date) 27 February 2020. He attached a CV which included that he had worked as an interpreter in French and Spanish. On the application form itself he ticked a box to say he spoke Romanian.

7. He said, (after searching his emails during a break in the hearing in order to answer my question on what happened next, there being no dates of any of the events complained of in either ET1 or ET3), that he did not hear any more about the job, and was waiting to hear if he had been successful. On 27 May he contacted ACAS for early conciliation. A certificate was issued on 27 June 2020 and he presented a claim to the tribunal on 27 July 2020.

8. The claim was originally put on the basis of section 13 of the Equality Act, as direct discrimination.

9. Yesterday he added a claim under section 19, indirect discrimination. I allowed the claimant to add this claim. Having regard to the principles set out in **Selkent Bus Company v Moore**, the factual basis of the claim and an assertion that the language requirement in the advertisement is discriminatory has always been clear to the respondent. This is relabelling of a claim already pleaded in substance if not in form. I was asked to note that the claimant has brought other discrimination claims in the employment tribunal and so should have set out his stall clearly from the outset, but in my experience there are sometimes legal representatves who struggle with the difference.

10. He also seeks to add victimisation, arising out of the reference in the respondent’s submissions to other claims he has made. I have allowed this too, on the ground that until they did so he could not know that any earlier claim against someone else was considered relevant

11. The respondent defends the claim. It is argued:

    11.1 The claim form does not give essential information required for a claim to be accepted under the rules. The claimant gave a PO Box as his address. The respondent was identified at a shop address, not their business address.

    11.2 There was no detriment. The respondent states on ET3 that they had 230 applications for the job. The successful applicant was number 5, who is Italian and does not speak Romanian. They did not read the claimant’s application before offering the job to another. The claimant had ticked the Romanian box, so was in no way disadvantaged. They had in fact explained through ACAS that the requirement was a mistake and not essential, though desirable at the time as the rest of the team spoke Romanian. Consequently the claim has no prospect of

success.

11.3 The claim is vexatious. The respondent says he has made similar applications before and brought proceedings against five other employers for discriminatory advertisements. He has two degrees (in accounting and international trade) and is unlikely to want unskilled work. He can get nothing by way of award as he was not subjected to detriment. His stated aim, to improve job advertisement procedures, is not a proper use of tribunal proceedings.

Relevant Law

12. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides (emphasis added):

> (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*;

13. Rule 39 is about deposit orders:

> (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.

14. Tribunals must take great care not to strike out discrimination cases at a preliminary stage, before evidence has been heard, because they are often fact sensitive – **Anyonwu v South Bank Students Union2001 ICR 391, Ezsaias v North Glamorgan NHS Trust 2007 EWCA Civ 330**. The tribunal must take the claimant's pleaded case at its highest – that is, assume for the purposes of the application that the claimant will be able to prove the facts stated in his claim- when deciding whether that claim has no reasonable prospect of success. It may also take account of documents about which there is no question.

15. The Equality Act by section 13 prohibits direct discrimination:

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

16. Indirect discrimination is prohibited by section 19:

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a)A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c)it puts, or would put, B at that disadvantage, and
>
> (d)A cannot show it to be a proportionate means of achieving a legitimate aim.

17. The claimant gave a PO Box address. A street address is given on his CV and he confirmed in the hearing that he lives there, but as he rents a room, and he cannot rely on landlord giving him his post on time, he uses a PO Box address, which is more reliable.

18. As the respondent's address, the claimant only had the trading name from its website and so made an internet search to find an address, there being no limited company by that name at Companies House. This is a reasonable approach in a case where, as he was not an employee,an employer is not required to provide employment particulars under section 1, and where in fact ACAS have been able to contact the respondent at the conciliation stage, and when the proceedings came to the respondent's attention when served by the tribunal.

19. Quite apart from the fact that the claim was not in fact rejected for want of proper names and addresses, it seems to me that sufficient information was provided at the time. There is no defect requiring the claimant to supply more information and start again before the claim is accepted.

Prospects of Success -Discussion and Conclusion

20. To succeed in the direct discrimination claim the claimant must be able to show that he has been treated less favourably than another (an actual comparator), or less favourably than another would have been treated (a hypothetical comparator). He must also prove that the reason for less favourable treatment is the protected characteristic - here, the difference in race. Race includes nationality and national origin.

21. In my view the claimant faces insuperable difficulty in showing that he has been treated less favourably than another because of race. The respondent purported to use an ability to speak Romanian as an essential qualification. On his application the claimant ticked this box, saying he did speak Romanian. In the hearing, he said he could not recall ticking this, but he did not dispute it. (He was not asked, and he did not volunteer, whether he does have any knowledge of Romanian). During the hearing, perhaps because he now realised the difficulty for his case having ticked a box to say that he spoke Romanian, the claimant suggested that the screenshots were of doubtful validity, because there was a tab to the left giving the names of four people with Garcia (the claimant's surname) with different application dates, some of them after he had been to ACAS and had presented proceedings. As this page is headed "Search for 'Lorenzo Garcia' - Back to Result", the obvious explanation is that the respondent was searching the application website to find the claimant's application and these were the results returned for people with the name Garcia, which included his, not that there is some false manipulation or a mix-up. There is no reason to doubt the date of submission, and no reason at all to believe that it is a fake.

22. On the face of it, if the respondent was using knowledge of Romanian as a way to sort applications for consideration, the claimant was not treated less favourably than others were, or others would have been. With 230

applications for the job, it seems highly improbable that they looked at the detail of all of them, or that they read the claimant's CV and concluded that as he did not mention any knowledge of Romanian there, he did not in fact, contrary to his assertion that he did, know any. This argument by the claimant is entirely speculative. If the employer had been looking at it in this much detail, he might also have concluded that someone with a good knowledge of French and Italian might have been able to acquire some basic knowledge of Romanian, a cognate Latin language. He would not have concluded that the claimant was lying when he said he had some Romanian.

23. I take no account of the respondent's assertion that the successful candidate was an Italian who does not speak Romanian. I have no evidence of that. The respondent has been aware for several months of this claim, and has known for over a month that this hearing is coming up and could have provided a document to support this.

24. The claimant asserts that there was an injury to his feelings on reading the job application saying knowledge of Romanian was a requirement. That seems unlikely, when in fact he applied for the job nonetheless.

25. For the same reason the claimant meets difficulty in an indirect discrimination claim, which seems to be insuperable on the facts. He could show that the respondent applied a provision. He can show that the provision put persons who did not speak Romanian at a disadvantage, and that people not of Romanian national origin are a large part of this group. What he cannot show is that it put him at a disadvantage, when he said on his application that he spoke Romanian. There was no disadvantage to him by reason of the requirement.

26. It would not be necessary to go on to consider whether there was a legitimate aim - a cohesive workforce, with the respondent saying that there had been conflict before then in a largely Romanian speaking group, or whether the Romanian language qualification was a proportionate means of achieving it. Whether it was or was not is irrelevant when the claimant was not at a disadvantage by reason of the requirement. Of course it would come into play if he made it to the shortlist and had been interviewed and rejected for want of Romanian, but if he did not get the job here, that had nothing to do with the language requirement.

27. For that reason, taking the claimant's case that its highest (and it should be noted that very few facts are set out in his ET1) there is no reasonable prospect of success.

28. I deal briefly with the alternative claim of victimisation, raised yesterday. The protected acts are his previous claims to employment tribunals. On the facts of this case, there is no evidence that these previous claims came to the attention of the respondent until after the claimant had brought employment tribunal proceedings. Sometimes employers do make searches for previous claims when faced with an employment tribunal claim, particularly in job advertisement cases. It would be a very laborious thing to do for each of 230 applicants, or for each of the applicants who had ticked the Romanian speaking box, during the shortlisting process, and

so unlikely in a low skilled job that it can be discarded. There is no reasonable prospect of success in showing that the reason why he was not offered the job was because he had brought previous claims against other companies.

Deposit Order

29. Had I not made this decision, I would have ordered the claimant to pay a deposit as a condition of proceeding to the final hearing. Having regard to the respondent's assertion, (which I cannot assume to be wholly fictitious when pleaded by solicitors, even if there is at present no evidence to support it), that the successful candidate did not speak Romanian, the claimant has little reasonable prospect of success. If the respondent established this fact, a finding that he had been treated less favourably by reason of race is improbable.

30. I made a brief enquiry as to his means – it does not seem that E J Stewart or the respondent advised him of the need to provide evidence of means. He told me that he earns about £800 per month from self-employment, he is without dependents and lives alone. After paying the rent and food he has about £200 a month. I would have ordered him to pay a deposit of £50 as a condition of continuing the claim. This would not have been so high as to bar him access to justice, but he would have had to think carefully about whether to continue, because if he lost the claim on substantially the same grounds he would have had to face the real prospect of paying the respondent's legal costs.

Is the Claim vexatious?

31. I was invited to find that the claim was vexatious on the basis that the claimant had no real interest in the job and was only bringing proceedings to make a point about the recruitment process.

32. Vexatious is an old word. In modern terms it means that the claimant does not bring the claim to achieve an award or otherwise get redress for harm he has suffered, but for an improper purpose, such as to harass the respondent or otherwise make life difficult for him. If the claimant brought proceedings because the recruitment process was discriminatory, but did not discriminate against him, he was mistaken, but it is not necessarily vexatious. It would have been better for him to bring this to attention of the EHRC, who would have power to deal with it, rather than make an individual claim, when he cannot show he has suffered detriment. There may be claims that are vexatious: in the past for example there have been multiple claims by a person who did not appear to live at the address given on the claim form, who had given different dates of birth on different claim forms in claims of age discrimination, and was applying for a low-wage job over hundred miles from his home, never attended any hearing, and withdrew any claim before any final hearing. That might have been a vexatious claimant, whose claims were designed solely to harass respondents in hope of settlement but without any intention of seeking an adjudication. This claim is different. The claimant has degrees from Northumbria University in accounting and international trade, but in his 20

years in the United Kingdom he does not seem to have pursued a professional career at any high-level. From time to time he has taken voluntary work. At other times he has in effect done low level telephoning or clerking work in a professional setting. At a time of high unemployment it is not unreasonable for people with qualifications to take unskilled work in order to earn a living while looking for something more suitable; in fact employment tribunals recognise this when they consider mitigation of loss. The job was also within range of his home. I have been shown five other decisions by employment tribunals in relation to claims by this claimant of discrimination by job advertisement. The facts are different in each; I could not conclude from what I have seen of these claims that the claimant was not in fact seeking work, and only seeking to harass respondents into settling an unmeritorious claim, even though in one of them (which asked for women) the tribunal concluded there was vexatiousness. He may genuinely have forgotten that he replied to the advertisement saying he could meet the language requirement.

33. If he was genuine in seeking to stop employers issuing discriminatory advertisements, this may have been a mistaken use of tribunal proceedings (better to report to the EHRC), but is not without more vexatious. On the information available I would not strike it out on this ground.

Employment Judge - Goodman

Date: 01/02/2021

JUDGMENT SENT TO THE PARTIES ON

02/02/2021

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FOR THE TRIBUNAL OFFICE