EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100184/2020 (V) Preliminary Hearing by Cloud Video Platform (CVP) on 13 January 2021

Employment Judge: M A Macleod

Mr Jatin Haria	Claimant In Person
The Scottish Ministers	Respondent Represented by Mr R Turnbull Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the respondent's application for strike-out of the claimant's claim is refused.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 15 January 2020 in which he complained that he had been discriminated against by the respondent on the grounds of his race.

2. The respondent submitted an ET3 response resisting the claimant's claim.

3. On 17 September 2020, the respondent made an application for strike out of the claimant's claim on the grounds that it had no reasonable prospect of success, under Rule 37 of the Employment Tribunals Rules of Procedure 2013.

4. A Preliminary Hearing was listed to take place on 14 January 2021 by CVP in order to determine that application, which the claimant opposed. The claimant appeared on his own behalf, and the respondent was represented by Mr Turnbull.

5. The hearing was conducted successfully by CVP, with each participant able to see and hear all others, and being able to communicate freely when asked to do so. I was satisfied that the hearing was conducted in a fair and accessible manner, and that all that both parties wished to say was said and noted.

6. This Judgment sets out the application itself, the submissions made by the parties and the Tribunal's decision and reasons therefor.

The Application

7. The application was submitted by Mr Turnbull, who had recently been instructed as the respondent's representative, taking over from another solicitor who had acted for the respondent from the commencement of the proceedings.

8. Mr Turnbull said that he had been reviewing the pleadings and correspondence, and noted that there had already been a Preliminary Hearing in which the Employment Judge had found that *"the pool specified appears, on the fact (sic) of it, to be potentially valid. It consists of a group which the PCP affects (or would affect) either positively or negatively. Given this, the claim should now proceed to a substantive hearing where the claim can be determined."*

9. He went on to say that they were "struggling to understand" the basis for that view in the face of the relevant case law: he could not see how any evidence would lead to the claimant succeeding in his claim. It is a simple point of law that the basis and statistical evidence relied upon by the claimant means that the claimant cannot proceed further in his claim.

10. He submitted that if he were wrong about this, and there is a basis or further evidence which the claimant can present to the Tribunal, the respondent

must be provided with fair notice of that prior to the final hearing in the case. However, the respondent had already sought clarification of the claim, and the claimant having provided that to the best of his ability, the respondent remained of the view that the claim has no reasonable prospect of success.

11. As an alternative, Mr Turnbull proposed that a Preliminary Hearing should be listed to determine this part of the claim before considering the additional questions at issue, and in particular objective justification. The question to be determined should be, he suggested *"Does the PCP relied upon put or would put persons of the Claimant's racial group relied upon at a particular disadvantage when compared to other persons?"*

12. The respondent considered this to be a relatively simple point in law, and if the claimant were to lose that point, it would dispose of the entire claim. In the event that the case were to proceed to a full hearing, considerably more evidence would be required, and approaching the case in this way would be consistent with the overriding objective, of even more importance during the challenging times of the pandemic.

13. Mr Turnbull went on to set out the legal basis upon which he sought strike out of the claim.

14. He reminded the Tribunal that the onus is on the claimant to prove group disadvantage, and that it is apparent that the claimant intends to do this by statistical evidence. In establishing whether a PCP places persons of a protected characteristic at a particular disadvantage, the starting point, he said, was to consider the impact on people within the pool for comparison. Any comparative disadvantage suffered by those of the claimant's protected characteristic as a result of the PCP must be measured against actual or hypothetical persons whose circumstances are not materially different (s23(1) of the Equality Act 2010).

15. Mr Turnbull went on to say that the pool for comparison will depend on the nature of the PCP being tested, which, in this case, a criterion for recruitment. It is well established, he argued, that the pool will be those people who would be eligible for the job but for the criterion in question

(**University of Manchester v Jones [1993] ICR 474**). That means that the pool should include those with the required experience and qualifications for the post advertised. The claimant's pool does not.

16. He submitted that people who have no interest in the advantage or disadvantage created by the PCP in question should not be included in the pool, and the pool must be one which suitably tests, and is potentially capable of illustrating, the particular discrimination complained of.

17. Mr Turnbull argued, therefore, relying upon a number of authorities, that including "all people of working age (16/65) in Scotland" or, in the alternative, "all people of working age (16/65) in the UK" is inappropriate for this particular case, and is not the correct pool, as it contains people who should not be included. Then to provide statistics relating to the wrong pool, as the claimant has done, means that the claimant will never be able to demonstrate the advantage or disadvantage from the PCP.

18. He concluded by submitting that no sufficient basis or relevant material had been put forward despite requests for clarification being sought, to enable the Tribunal to find the particular disadvantage sought. The claim must fail, on the basis that there are no reasonable prospects of success.

19. The claimant responded on 30 September 2020, strongly objecting to the application. He said that there had already been a case management hearing on 24 April 2020, and a Preliminary Hearing on these issues on 6 July 2020, following which a Judgment was issued on 10 July 2020. He pointed out that the Employment Judge had refused the application of the respondent and had set out the issues for a final hearing. He argued that instead of applying for strike out they should have asked for reconsideration of that Judgment within 14 days.

20. The claimant submitted that a Rule 37 application could not be made time and time again on the same facts. It serves the interests of all to abide by the Judgment issued.

Submissions

21. Mr Turnbull spoke to his application. Essentially, he supported his written application and submission by saying that the statistical evidence provided by the claimant means that he cannot proceed further because he cannot show that the PCP puts people of his racial group at a particular disadvantage, and no disadvantage can be inferred. Both the racial group and the disadvantage must be identified. He submitted that it was well established that the pool for comparison would be those would be eligible for the post but for the application of the PCP. The pool should therefore include those who have the appropriate qualifications for the advertised post. The claimant's pool for comparison does not include that. Not to look at the qualifications of the comparison group would be irrational and might have startling results. People who have no interest in the advantage or disadvantage should not be included in the pool.

22. He referred to the Equality and Human Rights Commission (EHRC) Services Code paragraph 5.18.

23. With regard to the claimant's objections, he observed that there is no reason why a further application for strike-out should not follow the one originally determined, where no consideration of these issues took place at the previous PH. The Tribunal's decision at that stage was that the pool appeared to be sufficient. The previous representative for the respondent only received the claimant's further particulars the night before and did not have enough time properly to consider them. The Tribunal, he submitted, has not considered the relevant authorities.

24. It would be in accordance with the overriding objective of the Employment Tribunal Rules of Procedure were the Tribunal to come to its own decision, in order to allow the matter to be brought to a conclusion without further expense, and deal swiftly with the matter.

25. He invited the Tribunal to strike out the claim under Rule 37.

26. The claimant responded in support of his objections to the application. He said that there is no dispute that the respondent did apply the PCP, and that

only civil servants can apply. The vast majority of people who might wish to apply are barred from doing so.

27. He pointed out that he made his submission on 6 July, and that this should not be discussed further. The respondent confirmed that the "tweaking" of the pool did not change the respondent's response. They argued at the PH in July that the pool had not been properly specified, and that the PCP had an identical impact upon all those not civil servants regardless of race.

28. Employment Judge Sangster accepted that his pool was a potentially valid pool for comparison, and decided that the case should go to a full hearing. The claimant argued that the respondent should have challenged that decision rather than presenting a new strike out application.

29. He argued that the application should be rejected for three reasons.

30. Firstly, he submitted that the matter had already been argued and determined by Employment Judge Sangster; secondly, he submitted that the reliance upon qualifications is wrong, because the Scottish Government relies upon experience rather than upon qualifications, and say that all jobs at band 2 or 3 require 3 Highers and the rest relies upon competencies; and thirdly, the respondent should not rely upon cases about people uninterested in the PCP, since in some cases there were people who were interested but did not meet the criteria. With regard to the third point, the claimant accepted that there may be people of working age who are not interested in applying for the post, but that that would be true of those who are not disadvantaged by the PCP as well.

31. He argued that the pool as submitted is valid.

32. In paragraph 4.18 of the EHRC Code, the claimant said, it provides that there may be more than 1 pool, and if so, the Tribunal would decide which of the pools to consider. Selecting the pool for comparison is a matter for the Tribunal. It would be unfair to strike out his claim, he said, merely on the respondent's objection.

33. The PCP leaves an advantaged and a disadvantaged group. He said that if the Tribunal were to decide that a different pool for comparison were appropriate he would then ask for the hearing to be adjourned so he could go and investigate the matter.

34. He asked that the Tribunal refuse the strike out application.

Discussion and Decision

35. It is useful, prior to addressing the points made by both parties, to note what was said by Employment Judge Sangster in her decision following the PH on 6 July 2020.

36. The respondent opposed the claimant's attempt to submit further and better particulars, through their then solicitor Mr Carey. Having heard representations from both sides, it was recorded at paragraph 10 that there was no requirement for the claimant to amend his claim to incorporate the further particulars provided, and that, at sub-paragraph (b):

"The pool specified appears, on the face of it, to be potentially valid: it consists of a group which the PCP affects (or would affect) either positively or negatively. Given this, the claim should now proceed to a substantive hearing where the claim can be determined."

37. Finally, Employment Judge Sangster directed that the preliminary issue of time bar would be reserved to be determined at that substantive hearing.

38. It is for this Tribunal to determine the application now placed before me by the respondent, but that background is of importance in understanding the context.

39. It appears that the respondent, having instructed new representatives, have sought to reopen the issue of the appropriate pool for comparison, having reviewed the matter with a fresh pair of eyes.

40. As the claimant generally appeared to accept, it is not inappropriate in general terms for the respondent to seek strike out on more than one occasion, though the claimant's position was that he believed that the

respondent should have challenged the earlier decision, rather than raising a new application.

41. It seems to me entirely proper for the respondent, at any stage of the proceedings, to raise an application for strike out, and to do so more than once, in the event that the circumstances of the parties have changed. The claim which the claimant seeks to advance is a complex one, particularly taking into account the fact that he is unqualified in the law and lacks the benefit of legal representation. Having survived a previous attack on the validity of the pool for comparison, the claimant clearly considers it unfair to have to meet a further attack on what seems to be similar grounds.

42. I should say that the explanation provided by Mr Turnbull before me, which was that the previous solicitor (an experienced employment lawyer known to the Tribunal) had only just received the further particulars the night before the PH, and had been unable to formulate a full response to it, is an insufficient explanation for the matter to be raised again. If insufficient time were available to the solicitor, it was open to him to apply to have the hearing adjourned, but I do not understand that application to have been made by him.

43. While I am sympathetic to the claimant's concern, however, there is a difference, in that the claimant has now presented to the respondent further statistical data which seeks to provide support for his assertion that the comparative pools can be seen to have been differently advantaged and disadvantaged.

44. The application is carefully worded, and is made on the basis that "no sufficient basis or relevant material" presented by the claimant, despite clarification having been sought, to enable the Tribunal to find the particular disadvantage alleged.

45. The Tribunal is conscious of the need to treat an application for strike out at this stage in the proceedings of a discrimination claim with caution. The power is a draconian one, described as 'not to be readily exercised' by Lord

Justice Sedley in **Blockbuster Entertainment Ltd v James [2006] IRLR 630, CA; [2006] EWCA Civ 684, 25 May 2006** at para 5.

46. The authorities are clear that where there may be a dispute of fact, the Tribunal should only strike out a claimant's claim in exceptional circumstances. Clearly, if the claim were held to have no reasonable prospect of success, that would amount to justification for a finding that it should be struck out.

47. However, in this case, it is the respondent's position, as I read it, that the claim is bound to fail because the statistical data presented by the claimant is insufficient to prove his point about the pool for comparison, as well as that the definition of the pool for comparison is inadequate and much too broad to succeed.

48. Having considered the submissions made by both parties, I have concluded that the application for strike out should not be granted. While I understand the respondent's wish to have this matter resolved at as early a stage as possible, it seems to me impossible for me to conclude that the statistical evidence is such that the claimant's argument is bound to fail. The pool for comparison is very broadly drawn, it is true, but I concur with Employment Judge Sangster's conclusion that it is potentially valid, as it consists of a group which the PCP will advantage or disadvantage; and find that there is an area of evidential dispute between the parties, namely the assessment of the statistical data provided by the claimant, which can only be properly determined at a hearing of evidence in this case.

49. The respondent has cited the need to act in accordance with the overriding objective, which of course requires Tribunals to hear cases justly, and in doing so, to seek to save expense and time and to deal with the complexity of a case proportionately. In my judgment, the claimant's interests require to be served as well as those of the respondent, and the interests of justice, including the requirement to ensure, so far as possible, that the parties are on an equal footing, persuade me that it would be unjust to prevent the claimant presenting a complex claim at a hearing on the merits in this case.

It seems clear that the hearing will not require to take long, perhaps a day or at most two, and in all of the circumstances the dispute is still a live one, partly based on the evidence being presented by the claimant, and it would not be just, in my judgment, to withdraw from the claimant his right to have the evidence ventilated at a hearing and his claim determined by a Tribunal in these circumstances.

50. I am therefore unable to find that the claim has no reasonable prospects of success under Rule 37, and in these circumstances, the respondent's application for strike out is refused.

Employment Judge: Murdo Macleod
Date of Judgment: 02 February 2021
Entered in register: 08 February 2021
and copied to parties