



EMPLOYMENT TRIBUNALS

Claimant: Mr S Langley

Respondents: 1) The Hut Group Limited
2) AM2PM Group Holdings Limited
3) Ginomine Limited

PRELIMINARY HEARING

Heard at: Manchester **On:** 5 February 2021

Before: Employment Judge Batten
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondents: 1. Ms R Kynman, Solicitor
2. Mr R Dempsey, Solicitor
3. No attendance

JUDGMENT having been sent to the parties on 10 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. By a claim presented on 19 November 2019, the claimant pursued a complaint which he described as harassment and bullying and also “perceptive discrimination” against the first and second respondents. The claimant contended that the first and second respondents’ management perceived him to be of mixed race. On 3 December 2019, Regional Employment Judge Parkin ordered the claimant to provide further particulars of his claim and the claimant provided brief additional details on 17 December 2019.

2. On 24 December 2019, the first respondent entered a response which contended that it did not employ the claimant and that it understood that the claimant was an agency worker of the second respondent.
3. On 31 December 2019, the second respondent entered a response which contended that it also did not employ the claimant and it named the third respondent as the claimant's employer, saying that the claimant signed a contract of employment with the third respondent on 30 November 2018 and had been placed on assignment with the first respondent.
4. At a case management preliminary hearing before Employment Judge Howard on 3 February 2020, it was decided that this hearing be convened to deal with the following matters and issues:
 - 4.1 Who 'employed' the claimant for the purposes of sections 39 and 40 of the Equality Act 2010 ("EqA");
 - 4.2 To decide any application for deposit orders/strike out of the claimant's claim; and
 - 4.3 To give further case management directions.
5. On 16 March 2020, the first respondent entered an amended response together with an application for strike out of the claim, alternatively for deposit orders.
6. At a case management preliminary hearing before Employment Judge Howard on 9 November 2020, it was decided that the third respondent should be joined into the proceedings and served with the claim. The third respondent has since failed to enter a response.

This preliminary hearing

7. The Tribunal was provided with a bundle of documents prepared by the parties consisting of 207 pages.
8. The Tribunal heard evidence from the claimant under oath and he was challenged by Mr Dempsey for the second respondent. The Tribunal heard submissions from Ms Kynman, for the first respondent, on whether the claim has reasonable prospects of success and arguments about the first respondent's liability as a principle. The Tribunal also heard extensive submissions from Mr Dempsey, for the second respondent, in support of the first respondent's application and also in relation to the issue of the claimant's employer.

Findings of fact

9. The Tribunal has made the following findings of fact relevant to the issues to be decided at this preliminary hearing.

The claimant's employer

10. On 16 August 2017, the claimant signed an application for work, at an Amazon warehouse, through a company called AM2PM Recruitment Solutions (Birmingham) Limited. The application form appears in the bundle at page 65. This company is one of a number of companies in a group under the "AM2PM" title. There is also a contract at page 72 of the bundle which shows that the claimant was an agency worker. The email address in the application, at page 65, was not written in the claimant's handwriting, and was not the claimant's email address.
11. On 4 December 2018, the AM2PM Group sent a letter to the claimant about "outsourcing the payroll". That letter appears in the bundle at page 92. It was sent by email to what was believed to be the claimant's email address, which was incorrect, and therefore the claimant did not receive the letter. In any event, the Tribunal found that the letter describes the payroll outsourcing, without any suggestion that the claimant's employment was transferring from one employer to another. The letter was about the change of payroll company only.
12. In the bundle at page 85 are terms and conditions of employment with another company, Ginomine Limited, which is the third respondent. The terms and conditions document is dated 30 November 2018 and has the claimant's name printed on the bottom with that date, suggesting that the claimant had purportedly acknowledged receipt of and agreed to employment with the third respondent. However, this was before the claimant would have been told by the second respondent by letter of any transfer of employment, if he had been so told, but the Tribunal has found that he had not received such a letter and in any event that letter, at page 92 of the bundle, did not mention a transfer of the claimant's employment, merely the outsourcing of the payroll. There was no evidence that the claimant had either received the terms and conditions or agreed to them, as he was supposedly asked to do in the letter, and anyway these were terms and conditions of employment with the third respondent. The Tribunal found that the claimant had not received the terms and conditions document.
13. There are a number of payslips in the bundle. Pages 100-162 are payslips naming either the second respondent: or AM2PM Recruitment Solutions (Birmingham) Limited, which is not the named second respondent but it is a company in the AM2PM Group. It is also the company to which the claimant applied for work on 16 August 2017.
14. At pages 163-180 of the bundle, there are payslips which mention the third respondent. They are directed to the claimant at an incorrect (home) address. These payslips say at the top "work placement through AM2PM Recruitment Services Limited", and then there is a line where "Ginomine Limited" appear but it is entirely unclear in what capacity the third respondent's name is on these payslips. The Tribunal considered that these payslips had come from the AM2PM Group.
15. At pages 181-199 are payslips which say, "Employer: Ginomine Limited". Again, they are directed to the claimant at an incorrect (home) address. The

Tribunal found that the claimant did not receive these payslips because the address on them is wrong: it states 8 Mostyn Avenue on the payslips but in fact the claimant's address, as confirmed in his first application for work is 18 Mostyn Avenue, and the Tribunal accepted the claimant's evidence that he did not receive these payslips.

Merits of the claim

16. In the claim form, section 8, the claimant said he claimed, "bullying and harassment" and "perceptive discrimination". He did not tick any of the boxes in section 8.1 of the form to indicate the grounds on which he pursued a claim of discrimination by reference to any protected characteristic under EqA, nor did he refer to a protected characteristic in his narrative. In section 8.2 of the claim form, the claimant set out vague allegations of conduct by former colleagues, consisting of calling him Patrick, which he believed was a reference to a colleague who is of mixed race, and also of monkey chants. These matters were not particularised. There were only a few dates and only first names given to identify the alleged protagonists.
17. At the preliminary hearing on 3 February 2020, very brief further and better particulars were given by the claimant as a result of an order for such.
18. At the preliminary hearing on 9 November 2020, a further discussion of the basis of the claim led to the first respondent's application to strike out the claim or for deposit orders because the first respondent contended that the claim had no reasonable prospects of success.
19. At this hearing, the Tribunal discussed the basis of the claim with the claimant, which he said was a claim of race discrimination based on his belief that colleagues perceived him to be of mixed race. The claimant says he is of White British origin.

The applicable law

20. The identity of an employer is usually to be found in contractual documentation, or documentation between the parties evidencing the arrangements between them, such as the contract of employment, statement of terms and conditions, letters between the parties and payslips. Section 1 of the Employment Rights Act 1996 ("ERA") provides that an employer shall give to an employee a statement of particulars of employment which includes the name of the employer. Section 4 ERA provides that where there is a material change in any of the particulars required to be given, the employer shall give the employee a written statement of the change(s) and the material date, within 1 month of the change.
21. The EqA protects employees from discrimination based on protected characteristics, which include race and also discrimination because of a person's perceived race – section 9 EqA.

22. Unlawful discrimination under the EqA includes less favourable treatment – section 13, and harassment – section 26, because of a protected characteristic. The burden of proof rests firstly on a claimant to show facts which are capable, absent any other explanation, of showing unlawful discrimination or supporting an inference of such on the ground contended for – section 136 EqA.
23. Rule 37 of schedule 1 of the Employment Tribunal Rules 2013 provides that a Tribunal may at any stage of the proceedings, either on its own initiative or on application of a party, strike out a claim or response on grounds which include where the Tribunal considers the claim, or response, has no reasonable prospects of success.
24. Rule 39 provides that where a Tribunal considers any specific allegation or argument has little reasonable prospects of success a Tribunal can order the party concerned to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
25. In the case of *ABN Amro Management Services Ltd and another v Hogben* UKEAT/0266/09, it was held that an apparently hopeless case should not proceed to trial in the hope that ‘something may turn up’ during cross-examination and that an Employment Tribunal was wrong not to strike out a discrimination claim when the claim was plainly implausible and there were no facts indicative of discrimination. In the case of *Anyanwu v South Bank Student Union and another* [2001] UKHL 14, it was said that the time and resources of the Employment Tribunal ought not to be taken up by having to hear evidence in cases which are bound to fail.

Conclusions on claimant’s employer

26. The Tribunal considered that the evidence showed that claimant was employed by the company called “AM2PM Recruitment Solutions (Birmingham) Limited”, which was the company to which he applied for employment in August 2017. There was no evidence to show that any transfer of the claimant’s employment had taken place to any other entity, including to the third respondent. The Tribunal considered, from the documents before it, that the third respondent was the payroll company, at best. The fact that a company name appears on certain, but not all of the payslips, does not make that company the employer in law, without more, and the rest of the documents do not point to the third respondent being the claimant’s employer.
27. In any event, the claimant had no notice of any purported change to his employer’s identity and he had not heard of the third respondent until these proceedings. The Tribunal considered it an important fact that, despite the name of the third respondent appearing on a number of the documents produced by the respondents on this issue, there was no evidence that the claimant had notice of any transfer of his employment nor that he had ever received the payslips now relied upon in that regard. The Tribunal considered that, on a balance of probabilities, the claimant did not and could not have

received notice of any change in his employer or transfer of his employment to the third respondent given the repeated errors in the email and home addresses.

28. The Tribunal found that the second respondent's letter, in the bundle at page 92, constituted notice of a change of payroll company only and not a change of employer. There is no suggestion in that letter that the identity of the claimant's employer had changed - the Tribunal found that the content of that letter was not effective to change the claimant's employer, even if he had received it, which he had not. In reaching this conclusion, the Tribunal took account of the fact that the first respondent, as principal, had a contract with the AM2PM Group, or companies within that Group to provide services and personnel but that there was no evidence before the Tribunal of any such contract or arrangement with the third respondent.
29. The Tribunal considered that, if the third respondent was employing the claimant to work in the first respondent's operations, it might be expected that the first respondent would know of the third respondent. However, the first respondent had no idea about the third respondent. These matters add weight to the Tribunal's finding that the true employer of the claimant, on a balance of probabilities, was "AM2PM Recruitment Solutions (Birmingham) Limited". That company shall now be named as a respondent in these proceedings and Ginomine Limited, the third respondent, shall be removed from the proceedings as the Tribunal can see no cause of action against Ginomine Limited. The claimant did not bring his claim against Ginomine Limited and he maintains that it was not his employer and that he did not know of it until these proceedings.
30. The second respondent can also be removed from the proceedings and in effect replaced with the company "AM2PM Recruitment Solutions (Birmingham) Limited" which will need to be served with the claim.
31. In relation to the first respondent, The Hut Group Limited, the claimant told Employment Judge Howard, at the preliminary hearing on 3 February 2020, that he pursued the first respondent under the provisions of section 41 EqA, on the basis that he was a contract worker of the first respondent. The first respondent therefore remains a party to the claim.

Conclusions on the strike-out application

32. The claimant attended this preliminary hearing in person and told the Tribunal that he is of White British origin and not of mixed race. His outward appearance supported what he said. The claimant confirmed that he pursued a claim of race discrimination based on what he said was his belief that colleagues had perceived him to be of mixed race. However, when he was asked to explain this belief further, the claimant was unable to articulate how he believed it was the perception of colleagues that he was of mixed race and, when put to him, he agreed that it was an "absurd and implausible" contention that colleagues might think so.

33. The claimant's submissions to the preliminary hearing consisted of allegations that the first respondent and Amazon had conspired to get rid of him and to get rid of others. He said that his claim had merits because colleagues had apparently been dismissed because of their treatment of him. The Tribunal considered that, if the treatment about which the claimant complains is found by a Tribunal to have taken place, that would arguably point to an intimidating, hostile or offensive working environment within the definition in section 26 EqA. However, the claimant was unable to point to any evidence of a causal link between the treatment complained of and the protected characteristic he contends for, or any perception of that protected characteristic. That causal link is essential to a claim under EqA.
34. From discussions and evidence given at the preliminary hearing, the Tribunal understood from the claimant that what he had wanted to do was to pursue a claim of unfair dismissal but he had not attained 2 years' service and so was unable to claim unfair dismissal. The claimant was short of 2 years' service by 3 weeks. In those circumstances, he presented a claim about what he considered to be harassment and bullying at work and, when the Tribunal sought further particulars of the protected characteristic relied upon, the claimant then formulated his allegation of discrimination because of race.
35. In all the circumstances, and in particular the claimant's acceptance that his contention about the perception of his race was implausible, the Tribunal considered that the claim is bound to fail and should be struck out. In reaching its decision, the Tribunal was mindful of the decision in the Amro case, that a Tribunal should not allow an apparently hopeless case to proceed to hearing – there must be reason to believe that there are matters which can be put to relevant witnesses which might cause the Tribunal hearing the claim to conclude that unlawful race discrimination took place as the claimant alleges. Likewise, the Tribunal was mindful that in Anyanwu the House of Lords gave a clear direction that the time and the resources of Employment Tribunals ought not to be taken up having to hear evidence in cases that are bound to fail.

Employment Judge Batten
Date: 30 April 2021

REASONS SENT TO THE PARTIES ON
6 May 2021

FOR THE TRIBUNAL OFFICE

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