



EMPLOYMENT TRIBUNALS

Claimant:
Mr D Lee

v

Respondent:
BMW (UK) Manufacturing Ltd

Heard at: Reading

On: 26 March 2021

Before: Employment Judge Hawksworth (sitting alone)

Appearances

For the Claimant: Mr M Lansman (counsel)

For the Respondent: Mr S Pender (solicitor)

JUDGMENT ON STRIKE OUT

The claimant's claims are not struck out.

REASONS

Introduction and issues for determination

1. A preliminary hearing took place on 20 September 2019 (in respect of the first claim only). Employment Judge Finlay ordered that a public preliminary hearing should be held to determine the following matters:
 - 1.1 Whether the claim should be struck out under rule 37(1)(a) on the grounds that it has no reasonable prospect of success;
 - 1.2 Whether the claim should be struck out on the basis that the tribunal has no jurisdiction to hear the claim, it having been presented out of time; and
 - 1.3 In the alternative, whether the complaint relating to matters occurring up to November 2015 should be struck out on the basis that the tribunal has no jurisdiction to hear them because they are out of time.

2. A second preliminary hearing took place on 23 June 2020 (this was in respect of both claims). Employment Judge Milner-Moore ordered that the public preliminary hearing should be to determine the following matters:
 - 2.1 whether the claimant's claims should be struck out as having no reasonable prospects of success;
 - 2.2 whether the claim should be struck out, in whole or in part, on the grounds that the tribunal has no jurisdiction to hear them on the grounds that they were filed outside the relevant statutory time limit.

3. The questions of whether a deposit order should be made and whether the claimant's application to amend should be allowed were also included in the issues to be determined at the public preliminary hearing. These issues have been dealt with in the case management summary of the hearing on 26 March 2021.
4. The issue as to the merits of the claims and the issue as to whether the claims were presented in time have both been expressed in the case management summaries as 'strike out' issues (as opposed to requiring a substantive determination of the time point). I discussed the issues for determination at this hearing with the parties' representatives at the start of the hearing, and they agreed that the issues for me are whether the claim or any part of it should be struck out:
 - 4.1 because it has no reasonable prospect of success on the underlying merits of the complaint; and/or
 - 4.2 because it has no reasonable prospect of success on the time point, that is whether the claimant can demonstrate a prima facie case on the limitation issue.
5. I heard evidence from the claimant. The respondent's witness Ms King had produced a witness statement but it was agreed that it was not necessary to hear evidence from her.
6. There was insufficient time for me to give judgment on the day and so I reserved judgment. I apologise to the parties for the delay in promulgating this judgment and reasons.

The claims and the response

7. The claimant was employed by the respondent from 10 September 2001. He presented his first claim on 19 February 2018 after Acas early conciliation from 20 December 2017 to 20 January 2018.
8. The claimant was a litigant in person when he presented his first complaint. The allegations of direct race discrimination which were included in the claimant's first ET1 form are set out in an agreed statement of issues as follows:
 - 8.1 In November/December 2013, increasing his workload by 27% with the addition of attendance at meetings and special projects;
 - 8.2 Failing to carry out risk/workload assessments;
 - 8.3 Subjecting him to the performance management procedure between February and September 2015;
 - 8.4 Failing to hold an informal meeting under the performance management procedure;
 - 8.5 Dismissing him on 9 September 2015;
 - 8.6 Reinstating him to a position five grades lower as the outcome of the performance management procedure on 9 November 2015;

- 8.7 Failing to respond to his emails to the Chief Executive and Managing Director dated 23 February 2017 & 8 March 2017;
 - 8.8 In relation to his grievance, on 22 August 2017, the exclusion by Sarah King of documents that allegedly supported his case;
 - 8.9 Colluding with the trade union in respect of the exclusion of documents;
 - 8.10 in connection with the grievance appeal on October 2017, failing to replace Julie Madley, who allegedly had a conflict of interest;
 - 8.11 In connection with the grievance/grievance appeal in 2017, obtaining a medical report or reports without C's permission.
9. The claimant also made a complaint of victimisation. He relies on his grievance of 24 April 2017 as a protected act. He says that he was subjected to detriments because of a protected act, namely:
- 9.1 delay in hearing his grievance, between 24 April & 15 June 2017;
 - 9.2 delay until 5 July 2017 in rectifying the cessation of his pay protection 2 months early in September 2016, following his complaint on 14 March 2017.
10. Following assistance from a union representative, on 31 October 2019 the claimant served a table headed 'Complaints under the Equality Act 2012 and ERA' and made an application to amend his claim. The issues as set out in the table include new issues which are not mentioned in the claim form, and expanded facts in respect of other issues. Those expanded matters are the subject of the claimant's application to amend, which is addressed separately.
11. On 28 December 2019 after Acas early conciliation from 25 November 2019 to 28 November 2019, the claimant presented his second claim. In his second claim, the claimant complains of victimisation. The protected act relied on is the first claim. The detriments are identified as:
- 11.1 on a return to work interview form dated 30th April 2019, stating the reason for the Claimant's absence as "Emotional Wellbeing";
 - 11.2 taking 24 days to respond to the Claimant's email dated 13th May 2019 attaching a medical certificate;
 - 11.3 a delay from June 2019 to September 2019 in obtaining a medical report.
12. The respondent defends the claims.

The respondent's submissions

13. The respondent said that claimant's complaints of direct age discrimination have no reasonable prospect of success because the claimant has not identified the basis on which he asserts that the treatment he complains of was because of race. His allegation that he was treated less favourably than a named comparator is conclusively disproved by the contemporaneous documents. Core disputes of fact can be decided at the public preliminary hearing, although it is accepted that the tribunal should not cherry pick parts

of a core of disputed facts.

14. The respondent says that the first complaint of victimisation cannot possibly succeed because the claimant's grievance (the protected act) does not contain any allegation of race discrimination.
15. The respondent submits that, as for the second complaint of victimisation, it is completely implausible that the detriments complained of were because of the claimant's first claim, given the time which had passed and the people involved with the actions complained of.
16. As to the time point, the respondent says that although one of the acts complained of (the grievance appeal outcome) is in time, the acts which took place in 2015 cannot be part of a continuing act ending with the grievance appeal outcome, because there is a long gap between two of the acts, one of which, a demotion, is a one-off act with continuing consequences rather than a continuing act.

The claimant's submissions

17. The claimant's counsel submits that the central facts in the statement of issues are in dispute and will turn on oral evidence and that, taken at its highest, the claim does have reasonable prospects of success.
18. The claimant accepts that he did not make an allegation of race discrimination in his grievance, and that he did not therefore do a protected act at that time, but in relation to his first complaint of victimisation, he relies on section 27(1)(b) of the Equality Act 2010, namely that the respondent believed that he may bring a complaint of discrimination.
19. In relation to the time point, the claimant says that the last act of alleged discrimination is in time, and the earlier acts are conduct extending over a period as they are part of the unjustified and discriminatory application of the respondent's poor performance procedure and the failures to uphold his grievance about that.

The law

20. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides at sub-paragraph 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..."

21. In Anyanwu v South Bank Student Union 2001 ICR 391, HL, Lord Hope said that 'discrimination issues... should, as a general rule, be decided only after hearing the evidence'. Discrimination cases are generally fact sensitive, and

strike out is inappropriate where there are central factual disputes between the parties. A strike out will only be appropriate in the 'most obvious and plainest cases'.

22. In Mecharov v Citibank UAEAT/0041/16, Mitting J summarised the approach that should be taken when considering strike out in discrimination cases. He said that:

*“(1) only in the clearest case should a discrimination claim be struck out;
(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
(3) the Claimant's case must ordinarily be taken at its highest;
(4) if the Claimant's case is “conclusively disproved by” or is “totally and inexplicably inconsistent” with undisputed contemporaneous documents, it may be struck out; and
(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.”*

23. In Javed v Blackpool Teaching Hospitals UAEAT 0135/17, a case in which the EAT held that the tribunal had been wrong to strike out the claimant's complaints of race discrimination, the EAT commented that it is obvious that:

“there will rarely be direct evidence of discrimination. Discrimination in many cases can only be inferred from the evidence; that is, all the evidence tested in cross-examination.”

24. In Javed, the EAT also considered the relevance of the claimant's failure to raise a complaint of discrimination at an early stage and concluded that there are many reasons why it might be quite late in the sequence of events before discrimination is raised, concluding that this is a point which:

“At best ... could only potentially be relevant to weight, if and when the ET considered all the evidence in the round.”

Reasons

25. Under rule 37(1)(a), the test for me is whether I consider that any of the claimant's complaints have no reasonable prospect of success, either because of the underlying merits of the complaint or because the claimant cannot demonstrate a prima facie case on the time point.
26. I have in mind that it is only in the clearest cases that a complaint of discrimination should be struck out without hearing the full evidence. It is not appropriate for me to make findings on some disputed matters where they are (or are potentially) connected with wider factual disputes.
27. In respect of the merits of the complaint of race discrimination, the claimant has identified a named comparator of a different race who at the time the claimant's performance procedure was started had more outstanding work tasks than the claimant but who was not subjected to formal performance

procedures. The claimant also says that the respondent failed to follow its performance management procedures in that it failed to hold an informal meeting with him. A failure to follow a policy or procedure could be a fact from which a tribunal could infer discrimination, such that the burden of proof could shift to the respondent to satisfy the tribunal that it has not discriminated against the claimant.

28. The claimant did not allege race discrimination at his grievance or appeal. The fact that the claimant did not allege race discrimination as part of his grievance or appeal does not mean that the claims are totally inconsistent with an allegation of race discrimination (Javed). He was unable to say at the preliminary hearing the basis on which he says the treatment he complains of was because of race but, in his evidence before me, he explained that he thought of racism as physical or verbal insults that were attributable to the colour of his skin and that racism was not a word that you would use in a professional organisation. He said he had cognitive dissonance about this, which I understood to mean a reluctance to consider the possibility of race discrimination. Again, this is not totally inconsistent with an allegation of race discrimination.
29. I have also considered the claimant's complaints of victimisation. I have thought particularly carefully about the complaint of victimisation in the claimant's first claim, as he now accepts that his grievance, which he relied on as a protected act, did not in fact contain an allegation of race discrimination. However, I have to take the claimant's case at its highest. Even though he accepts that he did not do a protected act, it remains arguable that any delay by the respondent in progressing the claimant's grievance was because, as the claimant said in his statement, the respondent 'intentionally dragged its feet as it knew that there were strict time limits to submit an employment tribunal claim' and that section 27(1)(b) of the Equality Act 2010 is made out. These are matters which the tribunal will have to consider in the light of the full evidence of the respondent's witnesses.
30. As to the complaint of victimisation in the second claim, the respondent accepts that the claimant's first claim was a protected act, but says that it is implausible that matters relating to the claimant's return to work and sickness absence were because of his first claim. It is not possible, without hearing all the evidence, to decide the reasons why the respondent took these steps. The tribunal will need to hear all the evidence to decide this complaint.
31. In relation to the time point, it is agreed that the last act of alleged direct race discrimination (the grievance appeal outcome) is in time. The question of whether the earlier acts are part of conduct extending over a period is one which should be left to the tribunal hearing all of the evidence. The same applies to the complaints of victimisation (a continuing course of conduct can include different forms of discrimination). The claimant has demonstrated a prima facie case on the time point, namely that his allegations are part of a course of conduct.

32. For these reasons, I do not consider that I can say that the claimant's complaints of direct race discrimination and victimisation have no reasonable prospect of success, either because of their underlying merits or because of the time point. The claimant's claims are not struck out.
33. In reaching this decision, I have considered whether the claimant has demonstrated a prima facie case on the time point, and I have concluded that he has. I have not made a substantive determination of the time point in respect of any of the claimant's claims; that will be a matter for consideration by the tribunal at the final hearing after hearing all the evidence.

Employment Judge Hawksworth

Date: 5 May 2021

Reasons sent to the parties on

.....11 May 2021.....

THY

.....
For the Tribunal office

Public access to employment tribunal decisions:

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.