Case No: 2603667/2019
2603122/2020
2600051/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr AR Mohammed

Respondent: Tesco Stores Limited

Heard at: **Nottingham** **On:** **4 May 2021**

Before: **Employment Judge Butler (sitting alone)**

Representation
Claimant: Mr M Anastasiades, Solicitor
Respondent: Ms A Niaz-Dickinson, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is the claims are not struck out and no deposit order is made. The Respondent is ordered to pay costs of £900 inclusive of VAT to the Claimant.

REASONS

The Claims

1. This open preliminary hearing was listed by EJ Broughton at a preliminary hearing by telephone on 16 March 2021. EJ Broughton concisely set out the claims and issues and I do not rehearse them further here.

The Applications before me

2. The applications before me were made by the Respondent under rules 37 and/or 39 of the Tribunals Rules of Procedure. They were made on the basis that the claims had either no reasonable prospects of success and should be struck out (rule 37) or that they had little reasonable prospect of success and should be made subject to a deposit order (rule 39).

3. The claims subject to the application are:

Claim no. 2603667/2019: direct race discrimination:

(i) Mr Mark Utting allegedly saying, "I do not give priority holiday to parents who have kids";

(ii) Mr Oliver Wrighton telling the Claimant, "You get paid to deliver shopping, not to bring back the shopping", "If you were on a criminal charge, would a judge give you a second chance" and "You like to argue";

(iii) Mr Wrighton allegedly saying to the Claimant, "Why did you put your name down for overtime when you knew your Grandfather was ill?"

Harassment:

(iv) Mr Utting's sister acting as note taker.

Claim no. 2603122/2020: victimisation:

(v) The Claimant being accused of assaulting his wife and being visited by the police late at night as a consequence;

(vi) His absence from work with work related stress and being placed on sick pay;

(vii) The Respondent terminating sick pay on around 23 August 2020.

Claim no. 2600051/2021:

(viii) The Claimant's dismissal on 15 October 2020.

Submissions

3. Both parties produced a written skeleton argument and Ms Niaz-Dickinson talked to hers. Mr Anastasiades made very brief submissions on matters I raised with him. I do not rehearse the submissions here in great detail but took them fully into account in reaching my conclusions. In doing so, I took account of the Claimant's allegation that on 2 August 2019 Mr Wrighton called him a "funny Indian boy.

4. Ms Niaz-Dickinson essentially submitted that none of the allegations made by the Claimant could reasonably be said to indicate race discrimination on the part of the Respondent and neither could any of the actions taken by the Respondent. She further submited that these allegations amount to speculation or conjecture on the part of the Claimant in that he has failed to particularise how these matters are related to race. Mr Anastasiades submitted that there was sufficient information before the Tribunal to draw an inference that there had been discrimination on the grounds of race.

5. Ms Niaz-Dickinson further submitted that a number of the comments made by the Respondent's employees are in no way related to race. She made the

point that Mr Wrighton allegedly calling the Claimant a "funny Indian boy" on 2 August 2019 could not bring earlier comments into the discrimination arena. I disagree. A comment about a person's race can clearly relate back to previous comments or acts and effectively reinforce them as acts or words of discrimination.

6. I accept that much in this case will depend on whether the Tribunal finds as fact that the "funny Indian boy" comment was actually made by Mr Wrighton. If it does not so find, it is likely that the Claimant may have some difficulty with many of his allegations; but it is not for me at this hearing to find whether or not the comment was made. In **Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330,** Maurice Kay LJ referred to cases where "there is a crucial core of disputed facts … that is not susceptible to determination otherwise than by hearing and evaluating the evidence". This is a case where I find there is such a core of disputed facts. If the "funny Indian boy" comment is held to have been made, it will be easier for the Claimant to raise an inference as to the motivation behind it. But that is not a matter which can be decided without a properly constituted Tribunal listening to and evaluating the evidence. Consequently, I cannot find with any confidence that the claims have no or little reasonable prospects of success.

7. It was Ms Niaz-Dickinson's submission that, even if I was against her in respect of the discrimination and harassment claims, the victimization claim, standing alone, could not be said to have any or little prospect of success. I do not agree. She said that the Respondent calling the Police after an admission by the Claimant that he had assaulted his wife was an act of concern for his wife and not done because the Claimant had done the protected act of bringing a claim against the Respondent. Again, I find this is a question of fact to be decided at a hearing where the evidence can be properly evaluated.

8. The Respondent in this case seems to have ignored the fact, as pointed out by EJ Broughton at the last telephone hearing, that I must take the Claimant's case at its highest. I agree there may be gaps in his story but these may be filled by witness statements from both sides. It would be wrong for me to consider, as the Respondent would seemingly have me do, each of the matters relied on by the Claimant in isolation. Whether there are inferences to be drawn is a matter for a full Tribunal and this is the position taken by the Claimant in this litigation.

9. The Respondent is aware that the Claimant has made clear his intention to apply for costs if the Respondent's applications were dismissed. I did indicate at the hearing that I considered the applications to be ill-advised. These were always going to be matters which should be decided at a final hearing and the Respondent's pursuit of a strike out or deposit order is accordingly unreasonable and, accordingly, I consider it appropriate to make an order for costs to be paid by the Respondent.

10. Mr Anastasiades has submitted a schedule of costs. Although Ms Niaz-Dickinson questioned the amount of time he would have spent on preparation and attending this hearing, I consider the 3 hours claimed in total, to include this hearing of around one hour, to be both sensible and reasonable.

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Employment Judge Butler

Date 10 May 2021