EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102031/2020 (V)

Held via Cloud Video Platform on 20 October 2021

Employment Judge Brewer

Mr O Akin	**Claimant** **In person**
Greater Glasgow Health Board	**Respondent** **Represented by** **Ms N Meikle,** **Legal Adviser**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the applications for the claims to be struck out or in the alternative for the claimant to be ordered to pay a deposit as a condition of continuing his claim fail.

REASONS

Introduction

1. This. case was listed for an open preliminary hearing before me. The purpose was to consider the respondent's application to have the claimant's claims struck out or alternatively have him pay a deposit.

2. The claimant represented himself and the respondent was represented by their legal adviser Ms Meikle.

3. I explained to the claimant the procedure we would be following. I also explained in brief the burden of proof in discrimination claims and referred him in particular to the important case of **Madarassy** (below).

4. I was presented with a bundle of documents but I consider that it was not my role to make findings based on evidence but to consider the claimant's pleaded case at its highest in order to establish whether either of the threshold in Rule 37 or 39 (see below) are met. In that context I heard submissions from Ms Meikle and given that the claimant is a litigant in person and that English is not his first language, rather than ask him to make submissions I asked him a series of questions based on his pleaded case and then gave him the opportunity to say anything else he considered useful.

Issues

5. The issues in this hearing were whether to strike out the claimant's claims as having no reasonable [prospect of success or, alternatively whether to order the claimant to pay a deposit as a condition of the claims continuing on the basis that they have little reasonable prospect of success.

Law

6. The material parts of the Tribunal Rules 2013 are as follows:

"Striking out

37.—*(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…

Deposit orders

39.—*(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…"

7. In relation to **direct sex discrimination**, for present purposes the following are the key principles.

8. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

9. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

10. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

11. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

12. In **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed.

13. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

14. Finally, turning to the strike out provisions of the Rules, I note that claims of discrimination are rarely struck out where there is a factual dispute between the parties (**Anyanwu v South Bank Student Union** 2001 UKHL 14, and also see **Mechkraov v Citibank NA** 2006 ICR 1121). However, the test is of course whether there is no reasonable prospect of success, even if there are factual disputes.

15. Having said that, I note that I should, when considering strike out, take the claimant's pleaded case at its highest however, I do not lose sight of the fact that in many, indeed almost certainly in most claims of discrimination the Tribunal will need to draw inferences from disputed findings of fact which I am not in a position to, and indeed nor should I, do. Those inference may be critical in many cases.

16. Caution should be exercised if a case has been badly pleaded, for example, by a litigant in person whose first language is not English. Taking the case at its highest may well ignore the possibility that it could have a reasonable prospect of success if properly pleaded. In ***Mbiusa v Cygnet Healthcare Ltd*** UKEAT/0119/18 *(7 March 2019, unreported)* it was held that in view of the lack of clarity as to the claimant's arguments, the proper course of action would be to establish more precisely what the claimant was arguing, if necessary make amendments and then, if still in doubt about chances of success, make a deposit order. At paragraph 21 Judge Eady provided useful guidance about the problem of imprecise pleading, particularly by litigants in person, as follows:

> "Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see ***Hassan v Tesco Stores Ltd*** UKEAT/0098/16 at para 15. An ET should not, of course, be

> deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where – as Langstaff J observed in ***Hassan*** – the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."

17. Particular caution needs to be exercised before striking out a discrimination claim without a hearing where, even though the primary facts may not be in dispute, there is nevertheless a dispute about the inferences to be drawn from them. As Simler J explained in ***Zeb v Xerox (UK) Ltd*** UKEAT/0091/15 *(24 February 2016, unreported), 'the* question of what inferences to draw forms part of the critical core of disputed facts in any discrimination case' (para 21), as do the respondent's explanations for alleged less favourable treatment (para 23); accordingly, employment judges need to be alert to the possible inferences that might be drawn and the lines of enquiry that will need to be pursued at a hearing before striking out such claims.

Findings in fact

18. My brief findings are that the claimant presented his claim on 3 April 2020. The claimant is Turkish and a Muslim. His claims were for direct race and religious discrimination and harassment related to race and religion.

19. The pleaded case was set out in the ET3. Following the respondent's application to strike out the claims or for a deposit order, the claimant was ordered to provide further details of his claims which he did [pages 52 – 55 of the bundle. He provided another version of his claims on 30 September 2020 [see page 76].

20. In truth, all versions of the pleadings are similar. The claimant's case is that his Team Leader asked him about shaving off his beard which made the claimant very uncomfortable. He says the beard is part of his racial and religious identity. He says that his Team Leader also said that the claimant

would look younger without a beard and that when the claimant refused to participate in the conversation she said “you’ve lost the plot”.

21. The claimant says that present during this conversation was a white, male, non-Muslim employee who also had a beard.

Respondent’s submissions

22. The respondent’s submissions were to the point – the clamant had now had three opportunities to explain why he says there is a connection between a conversation about him looking younger without a beard and his race or religion. In short Ms Meikle said that the claims do not pass the **Madarassy** test, that is they do no more than say that there was a difference in treatment and a difference in race/religion.

Claimant’s submissions

23. The claimant’s case is that he has suffered disparaging and discriminatory comments about his beard since he joined the respondent and that his Team Leader’s comments were a continuation of that. He will in effect, invite the Tribunal to draw adverse inferences from the history and context within which the comments were made. This, he says, explains why he was so badly affected by what might seem to others somewhat innocuous comments.

Decision

24. It may have been preferable for the clamant to have been questioned about how he puts his case at an earlier hearing rather than simply asking him to explain something in writing which can be difficult for some lawyers to understand let alone a litigant in person who does not have English as a first language. It may seem obvious to a litigant why he was upset about a conversation without that person being able to properly express that in writing by for example, reference to asking the Tribunal to draw inferences from the history, surrounding circumstances of the case and the context of his lived experience.

25. My judgment is that having heard how the claimant puts his case I cannot see that it has no reasonable prospect of success, nor can I see that it has little reasonable prospects of success and the respondent's applications fail.

Employment Judge: Martin Brewer
Date of Judgment: 20 October 2021
Entered in register: 25 October 2021
and copied to parties