



# EMPLOYMENT TRIBUNALS

**Claimant**  
Ms S Smith

v

**Respondent**  
Lee Hecht Harrison Penna Limited

Heard at: Central London Employment Tribunal

On: 25 October 2021

Before: Employment Judge Norris, sitting alone (via CVP)

Representation:

Claimant – In person

Respondent – Ms K Taunton, Counsel

## RESERVED JUDGMENT WITH REASONS

### Background to the claim

1. The Claimant was employed by the Respondent as an Accounts Payable Assistant between August 2019 and December 2020, when she was dismissed for gross negligence. She entered ACAS Early Conciliation (EC) between 11 March and 21 April 2021 and lodged a claim to the Tribunal on 23 April 2021. The Respondent defended the claim by response lodged on 4 June 2021.

### Issues for the Preliminary Hearing

2. A Preliminary Hearing (Case Management) (PHCM) took place before EJ Joffe on 23 June 2021. The parties were represented as they were before me, i.e. the Claimant was a litigant in person, although it appears that she had had legal assistance from a solicitor from December 2020, including in the submission of her claim, until shortly before the PHCM.
3. EJ Joffe went through the claim in some detail and set out the issues in a Case Management Summary sent to the parties later that day, at the same time listing the Full Merits Hearing for 24-28 January 2022 and making directions to progress the claim so that it was trial ready by that date.
4. On 15 September 2021 however, following an application by the Respondent, EJ Joffe listed the case for a Preliminary Hearing (PH) to consider the following:
  - a) Whether the Claimant's claims have been presented out of time;
  - b) Alternatively, whether the Claimant had any reasonable prospect of showing they were in time or time should be extended;

- c) Whether they should be struck out as having no reasonable prospect of success; or
  - d) Whether they should be the subject of deposit orders as having little reasonable prospect of success.
5. The PH took place before me on 25 October 2021. I spent some time (the first hour of the hearing) initially confirming the basis for the Claimant's claims, which I was satisfied still reflected the complaints and issues as drawn up by EJ Joffe; then the Claimant answered a very small number of questions from Ms Taunton before she confirmed on oath that everything she had said up to that point was the truth. I then heard evidence from Mr Leung, HR adviser for the Respondent, who was cross-examined by the Claimant. We heard submissions from Ms Taunton. Following a break for the Claimant to consider her response, we looked briefly at an additional authority and then the Claimant made her submissions. She also added that her means to pay any deposit ordered were limited; she has not been successful in finding other work.

I reserved my decision.

6. I summarise the preliminary issues as follows:

a) **Direct race discrimination**

The Claimant, who for the purposes of the claim identifies her race as black, brings a complaint of direct race discrimination. She says that on 7 July 2020, she and the Respondent's Head of Accounting and Tax, Mr Punn, were discussing the appointment of a colleague, Mr Nankani, to the role of Assistant Management Accountant. The Claimant told EJ Joffe that Mr Punn said to her, "Come on Sabrina. Look in the mirror. It was a no brainer that Darshan [Mr Nankani] was going to get the job over you".

The Claimant says that this comment was direct race discrimination, the inference being that it was an oblique reference to race. Importantly, the Respondent observes that there is no complaint of race discrimination in the appointment itself, only the comment ascribed to Mr Punn (which the Respondent does not admit was made).

The Respondent contends that Mr Punn had had no involvement with the appointment of Mr Nankani to the role; and it also says that Mr Nankani had skills and experience for the role (including being a qualified accountant). Taking the Claimant's claim at its highest and assuming that the comment was made, it contends that the complaint is in any event substantially out of time.

b) **Victimisation**

The Claimant says that she raised Mr Punn's comment with Mr Leung during a conversation on 12 August 2020 and told him that it had affected her mental health; and she contends that doing so led the Respondent to believe she had done or might do a protected act. As a consequence she says she was victimised by the Respondent:

- i) not applying the formal disciplinary process before suspending her,
- ii) not telling her that she could appeal her suspension and
- iii) dismissing her without considering other sanctions.

The Respondent says that the Claimant's case as articulated both before EJ Joffe and at the PH does not disclose a protected act. Further, or alternatively, it contends that the complaint of victimisation does not stand reasonable prospects of success and should be struck out or, if little reasonable prospects, a deposit ordered.

c) **Breach of contract**

The Claimant says finally that the Respondent's failures in not giving her the opportunity to appeal her suspension and not following its capability policy amount to breaches of contract.

The Respondent says that the disciplinary, capability and grievance policies in place are non-contractual.

**Evidence and discussion of the issues**

7. The Claimant had not produced a witness statement for the PH and for that reason, after she had answered the questions from me and Ms Taunton, I asked her to take the oath so that I could therefore take into account as evidence what she had said to me about the issues.
8. In relation to the time point on the race discrimination complaint, the Claimant said she did not approach ACAS for EC sooner than 11 March 2021 because she believed she could resolve the issue internally and also that she wanted to avoid creating a hostile working environment. She agreed that she had had a Trade Union representative at the internal hearings that she attended, and that from her dismissal in December 2020 until June 2021 she was legally represented. She also confirmed that she did not make any allegation of race discrimination until after she had been dismissed.
9. Mr Leung also took the oath. His witness statement was very brief and said that he had sent the Claimant an email (which was in the bundle) as a record of what they had discussed after they had spoken on 12 August 2020, with an invitation to the Claimant to make any amendments. She did not suggest any. I set out below the relevant section of that email (so far as it relates to discussion of the appointment of Mr Nankani and the Claimant's assertions of what Mr Punn had said):

*"To summarise our conversation, the two main reasons for your stress/anxiety are as follows:*

*1. Pressures & stresses in relation to performance issues & a perceived lack of management support*

*a. You have felt generally dissatisfied in your role as it does not fit with your career goals.*

*i. You have wanted to move into a GL focused role and applied for the*

*Assistant Management Accountant role when it became available*

*ii. A conversation with Parmjit in relation to your application for the role on 7th July 2020 greatly upset you – you said Parmjit said “Obviously, Darshan was going to get the role” due to your lack of experience. This led to you questioning why they allowed you to apply for the role & do an interview if you were never going to be able to have a chance – this led to you feeling “crushed, demotivated & degraded”.*

The Claimant confirmed in the PH that this was “more or less accurate” as to the discussion she had had with Mr Leung on 12 August. She went on to add however that she had had a phone call before she returned from her sick leave and was unclear why nothing had been done about the words “Look in the mirror”.

10. In relation to the breach of contract complaint, Ms Taunton took the Tribunal to the sections of each of the policies where they are expressly stated to be non-contractual. The Claimant accepted that this is what it stated in each of the policies themselves and did not suggest that this has been countermanded elsewhere.

### **Findings and conclusions**

11. I note that some of the evidence is disputed. In reaching my findings and conclusions at this preliminary stage however, I have taken the Claimant’s case at its highest.
12. Dealing first with the complaint of direct race discrimination I find that it is substantially out of time and it would not be just and equitable to extend time. This is an area where I have taken the Claimant’s case at its highest and assume for the purpose of the PH that she could show a fact (that Mr Punn said, “Look in the mirror”) **and** that this was a fact from which the Tribunal could draw an inference of race discrimination so that the burden of proof would pass to the Respondent to disprove a breach of the Equality Act 2010 (EqA).
13. Since this is the only complaint of direct race discrimination, the Claimant had until 6 October 2020 to enter EC in this regard. She did not do so until 11 March 2021 and hence cannot take advantage of the extension to the time limit ordinarily afforded by the EC process. Accordingly, the complaint is over six and a half months out of time when applying the three-month time limit set out at section 123(1) (EqA). There is no continuing act of direct discrimination alleged that would bring this complaint in time and therefore the Claimant has no reasonable prospect of success of showing that it was.
14. The Claimant has also not given any satisfactory explanation<sup>1</sup> for the delay in bringing the claim. While the Tribunal has a broad discretion to allow discrimination complaints out of time, Ms Taunton rightly points out that some explanation must come from the Claimant, who should not assume that time will be extended.

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<sup>1</sup> In accordance with the obligation as summarised in *Bexley Community Care v Robertson* [2003] EWCA Civ 576, among other cases

15. The allegation of discrimination was raised in December 2020 in the Claimant's appeal against dismissal, but she did not enter EC for around eleven weeks after that, notwithstanding first trade union and then legal representation.
16. I also consider that the Claimant's reasons for not approaching ACAS sooner (that she believed the point could be addressed internally and that she did not want to create a hostile working environment) do not withstand scrutiny in that she does claim to have raised it with Mr Leung as early as mid-August but accepts she did not raise it as an issue of discrimination until after she had been dismissed.
17. While there is undoubtedly prejudice to the Claimant in not extending time, there would be prejudice to the Respondent in doing so. The Claimant will (given my findings below) have no remaining complaints and her claim therefore fails at this preliminary stage. The Respondent however would be faced with a claim that stands very little prospect of success (also addressed further below) for something that was not raised contemporaneously. Ms Taunton is again right to submit that the cogency of the evidence in the circumstances is very likely to have been adversely affected, which would be to the Respondent's prejudice.
18. Had I extended time, I record for completeness that I would have ordered the Claimant to pay a deposit under Rule 39 (Schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) as a condition of proceeding, though in light of her lack of means it would have been a modest sum. There would be the evidential difficulty of the Claimant showing that the remark was made at all by Mr Punn, given the way in which she is said to have reported their conversation a month later to Mr Leung.
19. Even if the Tribunal accepted the comment was said by Mr Punn as the Claimant now alleges, there is no overt connection between the protected characteristic of race and Mr Punn's comment. For instance, the Claimant's sex is also different from that of the successful candidate. Perhaps more pertinently, I consider that the Claimant would struggle to show that the "reason why" the comment was made was race rather than Mr Nankani's suitability for the role in terms of his qualifications and experience as against her own comparative lack of both.
20. I would therefore consider it more likely than not that if the burden of proof passed to the Respondent in the first place, it would be able to discharge it by showing that the comment was not made "because of" race. However, since the alleged comment ("look in the mirror") superficially at least refers to a visual comparison between the Claimant and Mr Nankani, whose races are, it is inferred, visibly different, it could not be said that the complaint had no reasonable prospect of success. Nonetheless, it would stand very little reasonable prospect.
21. So far as the victimisation complaint is concerned, that is in time since the last act complained of is the Claimant's dismissal on 15 December 2020. She went to ACAS EC within three months and lodged the claim two days

after the EC Certificate was issued.

22. It is acknowledged that the general rule in relation to strike out claims in the discrimination arena is to be exercised cautiously and sparingly. There are ample authorities reminding the Tribunal that it does not have the opportunity at a PH to hear all the evidence in a discrimination case and where there is a central core of disputed facts, those facts will usually require evidence to be given before any definitive finding is made. I am also mindful of the authority to which Ms Taunton referred after the adjournment (Tayler J in *Cox v Adecco & Others*)<sup>2</sup> in which it was observed that the Tribunal cannot decide whether a claim has no reasonable prospect of success and hence whether to strike it out, until reasonable steps have been taken to identify the claims and the issues contained within them.
23. Nonetheless, I do not consider that this complaint has any reasonable prospect of success. I am satisfied that the claims have been identified by EJ Joffe based on the Claimant's claim form (lodged on her behalf by a solicitor who had been advising the Claimant for several months) and based on scrupulous enquiry in the PHCM on 23 June 2021, as well as my own further enquiries resulting in confirmation that those are indeed the claims and issues that the Claimant seeks to advance.
24. If Mr Leung's account of their conversation as set out in his near-contemporaneous email on 12 August is accurate (which the Claimant agrees it broadly is), what the Claimant told him was that she was greatly upset by the comment that Mr Nankani's appointment was inevitable due to her own lack of experience, and that this had led to her feeling demotivated. The Claimant did not, even on her own account, suggest to Mr Leung in August 2020 that the comment by Mr Punn had been racist. On the contrary, she told him that the comment had referred not to her or anyone else's race but to experience necessary for the role of Assistant Management Accountant.
25. Therefore, even if the Tribunal finds as I must assume it will after hearing all the evidence, that in July 2020 Mr Punn did say to the Claimant "Look in the mirror" and accepts that a month or so later, the Claimant reported the whole of the passage now relied on to Mr Leung, that conversation between the Claimant and Mr Leung neither discloses that the Claimant did a protected act nor suggests any reason why Mr Leung or any of the Respondent's managers might have believed the Claimant would do one.
26. Accordingly, and disregarding for these purposes the reasons that the Respondent has given for its suspension and eventual dismissal of the Claimant, the claim falls at the first hurdle in that the Claimant cannot bring herself within the parameters of section 27 EqA: she had not at this stage brought proceedings under the EqA; nor had she given evidence or information in connection with proceedings under the EqA; nor had she done any other thing for the purposes of or in connection with the EqA; nor, finally, had she made an allegation, whether express or implied, that Mr Punn (or anyone else) had contravened the EqA.

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<sup>2</sup> UKEAT/0339/19/AT

27. Therefore, the victimisation complaint is struck out under Rule 37(1)(a).
28. Finally, the breach of contract complaint is also struck out. I am satisfied, and the Claimant acknowledged, that the policies on which she seeks to rely are expressly non-contractual. In fact, even if the policies had been contractual, the Claimant did not resign in response to the breach and she therefore suffered no loss, later being paid in lieu of notice despite being notionally dismissed summarily.
29. Accordingly this complaint would also inevitably fail and similarly therefore stands no reasonable prospect of success under Rule 37(1)(a). I make this observation however: if the policies, or any of them, were not followed, as to which I did not hear evidence, the Respondent may well wish to reflect on the fact that even though the Claimant did not have two years' service and hence could not claim unfair dismissal in the Tribunal, adherence to a fair process, often as set out in internal policies or by reference to the ACAS Code of Practice is always to be preferred. A failure to do so will often give rise to an understandable sense of injustice on the part of an affected employee even if, as here, the claim of discrimination as articulated does not succeed.

**Summary Outcome**

30. In the circumstances:

- a) The complaint of direct race discrimination was presented out of time and it would not be just and equitable to extend time;
- b) The complaints of victimisation and breach of contract stand no reasonable prospect of success and are struck out under Rule 37;
- c) The claim accordingly stands dismissed and I do not go on to consider the making of a deposit order;
- d) The full merits hearing listed for 24-28 January 2022 is vacated (cancelled) as are the Orders made by EJ Joffe in relation to preparations for the case; no further directions are necessary.

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Employment Judge Norris  
Date: 25 October 2021  
JUDGMENT SENT TO THE PARTIES ON

26/10/2021.

FOR THE TRIBUNAL OFFICE