EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Morgan	**v**	DHL Services Limited

Heard at: Bury St Edmunds (by CVP) **On:** 20 August 2021

Before: Employment Judge KJ Palmer (sitting alone)

Appearances
For the Claimant: Mr J Wallace (Counsel).
For the Respondent: Ms A Smith (Counsel).

RESERVED JUDGMENT PURSUANT TO AN OPEN PRELIMINARY HEARING

1. The respondent's application for a strike out under rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Sch1 is refused. The respondent's application for a deposit order under rule 39 of the Employment Tribunal Rules of Procedure is refused.

2. There will be a further preliminary hearing to consider further case management issues. This will take place by telephone for which 3 hours will be allowed. This will take place on 8 December 2021.

REASONS

The history of this matter

1. This matter came before me today and has a lengthy history. The claimant presented his claim to the Employment Tribunal on 11 April 2018. The matter was in detail first considered by Employment Judge T Brown at a preliminary hearing on 26 October 2018. Pursuant to directions made by EJ Brown a further preliminary hearing to consider three issues took place before Employment Judge M Warren on 11 February 2019. Pursuant to EJ Warren's Judgment the claimant appealed to the Employment Appeal

Tribunal (EAT). An appeal hearing before His Honour Judge Auerbach sitting alone took place on 17 November 2020 with Judgment being handed down on 18 December 2020. Pursuant to that Judgment the matter came before me today on 20 August 2021.

The preliminary hearing before EJ Brown

2. In his claim presented on 11 April 2018 the claimant complains of race discrimination for which purposes he relies on his colour and his ethnicity which he describes as West Indian. The claim is ventured on the basis of direct discrimination because of race and harassment based on the protected characteristic of race and is therefore put under section 13 and s.26 of the Equality Act 2010. The claimant's pleading was home made. Prior to the preliminary hearing before EJ Brown with legal assistance the claimant provided a Scott Schedule purporting to give further and better particulars of his claims. EJ Brown helpfully listed the issues making up the claimant's claim in twenty bullet points set out in his summary. Of those twenty bullet points, ten were identified as issues originally raised in the ET1 and the other ten were identified as additional claims ventured after the ET1 in the Scott Schedule and put further at the preliminary hearing.

3. EJ Brown listed a further preliminary hearing for 11 February 2019 to consider:

   (i) Whether, having regard to s. 123, Equality Act 2010, an Employment Tribunal has jurisdiction to consider the claimant's complaints against the second, third, fourth and/or fifth respondent;

   (ii) Whether to allow the claimant to amend his claim, to pursue such parts of the claimant's table of further and better particulars as amount to new complaints;

   (iii) Whether any part of the claimant's claim should be struck out on the ground that it has no prospect of success;

   (iv) Whether any specific allegations or arguments in the claim have little reasonable prospect of success, in which case the Employment Tribunal may make an order requiring the claimant to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

4. Pursuant to that hearing and prior to the preliminary hearing on 11 February 2019 the claimant withdrew claims against the second, third, fourth and fifth respondents thus negating the need to consider EJ Brown's first bullet point at the 11 February 2019 preliminary hearing and leaving one respondent DHL Services Ltd.

5. It therefore remained for consideration on 11 February 2019 for the other three points to be dealt with.

6. The 10 points included in EJ Brown's summary which constituted the claim at that time notwithstanding the subsequent consideration of an amendment to validate the additional 10 claims were as follows:

   (i) On 3 January 2017 Kevin Morris and Harry Hodson followed the claimant to his car and later provided statements alleging that the claimant tried to hit Kevin Morris with his car;

   (ii) On 4 January 2017 Manesh Chhanya suspended the claimant;

   (iii) On 12 January 2017 Paul Nixon the investigating officer deciding that a matter in relation to alleged swearing should proceed to a disciplinary hearing;

   (iv) On 13 February 2017 the claimant not being referred to Occupational Health ("OH") by his employer having returned from sick leave because of stress and requesting to see OH;

   (v) On 5 April 2017 the claimant being suspended by David Churchill for an altercation he allegedly had with a Jaguar Landrover on site security supervisor;

   (vi) On 26 April 2017 the investigation meeting held by Greyson Nyakema taking place in the claimant's absence;

   (vii) On 19 May 2017 the claimant being given a sanction of a Final Written Warning following a hearing in his absence;

   (viii) On 6 June 2017, the claimant being sent the written outcome, namely a sanction of Final Written Warning;

   (ix) On 30 October 2017 the claimant not being seen by Occupational Health despite having returned from work and asking to see them;

   (x) On 26 February 2018 the claimant's request for referral to Occupational Health not being actioned.

The hearing of 11 February 2019

7. The preliminary hearing then proceeded on 11 February 2019 before Employment Judge Martin Warren. Before Judge Warren the claimant appeared in person and the respondents were represented by a Mr Caiden of Counsel. In a Judgment running to some 10 pages and 51 paragraphs EJ Warren concluded that he would refuse the claimant's application to amend meaning that the additional 10 claims set out in unboldened type in EJ Brown's summary could not proceed.

8. EJ Warren also concluded that the remaining 10 issues highlighted in bold in EJ Brown's summary as having been included originally in the claimant's

ET1 should be struck out under rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

9. That prompted an appeal which went to the Employment Appeal Tribunal and was heard by His Honour Judge Auerbach on 17 November 2020.

10. Judge Auerbach in a Judgment running to some 23 pages and 59 paragraphs allowed the appeal but only in so far as it related to the strike out of the 10 original issues raised in the ET1 and set out in bold in EJ Brown's summary. The decision of EJ Warren in respect of the 10 fresh allegations being a decision to disallow leave to amend was left untouched by the EAT.

11. The question of the strike out and/or the question of a deposit order was referred back to the Employment Tribunal and came before me on 20 August 2021.

The hearing of 20 August 2021

12. This matter came before me and was dealt with by Cloud Video Platform.

13. I did not have the file in front of me but was sent through an electronic bundle running to some 127 pages. I also had the benefit, for which I am most grateful, of two written skeleton arguments sent through electronically by Mr Wallace of Counsel on behalf of the claimant and Ms Smith of Counsel on behalf of the respondent. I heard further detailed submissions from both Counsels and Reserved this decision.

The issues before me

14. The only issue before me is whether to strike out all or any part of the claimant's claims under rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 and/or whether to make a deposit order in respect of all or any part of the claimant's claims under rule 39 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

15. Rule 37 states as follows:

> "**Striking out**
>
> (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;"

The remainder of that rule is of no consequence in this application.

16. Rule 39 states as follows:

"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.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

The Law relating to strike out under rule 37

17. I adopt His Honour Judge Auerbach's reference to the case of Malik v Birmingham City Council UKEAT/0027/19 21 May 2019. That case is a restatement of established principles concerning strike out on the basis of no reasonable prospect of success. It tells us that it is well established that striking out a claim of discrimination is considered to be a draconian step which is only to be taken in the clearest of cases see Anyanwu and another v South Bank University and South Bank Student Union [2001] ICR 391. Malik tells us that the applicable principles were summarised more recently by the Court of Appeal in the case of Mechkarov v Citibank NA [2016] ICR 1121.

18. Mechkarov is the authority for a proper approach to be taken in a strike out application in a discrimination case. That is:

    (i) Only in the clearest case should a discrimination claim be struck out;

    (ii) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

    (iii) The claimant's case must ordinarily be taken at its highest;

    (iv) If the claimant's case is conclusively proved by or is totally and inexplicably inconsistent with undisputed contemporaneous documents it may be struck out; and

    (v) A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

19. Authority for the proposition that these above cases do not mean that there is an absolute bar on the striking out of such claims include Community Law Clinics Solicitors and Others v Methuen UKEAT/0024/11 and ABN Amro Management Services Ltd and Another v Hogben UKEAT/0266/09.

20. It is important also in this matter to consider the case of Madarassy v Nomura International plc [2007] EWCA Civ 33. This case was cited and extensively discussed in both the Judgment of EJ Warren and His Honour Judge Auerbach.

21. Madarassy is authority for the proposition that a discrimination claim in tribunal cannot succeed on the basis of a finding of different treatment and different race (or indeed any other protected characteristic) without there being "something more" than just a difference in status and a difference in treatment.

22. This ties in with the law relating to the reversal of the burden of proof in discrimination claims under s.136 of the Equality Act 2010 and the case of Igen Ltd v Wong [2005] ICR 931. The principle there is that the claimant must essentially prove facts from which could in the absence of an explanation show that less favourable treatment because of the protected characteristic had taken place. If so then s.136(2) and (3) applies and the burden shifts to the respondent to show that the discriminatory act did not occur.

23. The "something more" need not be particularly substantial and can be an evasive answer or an untruthful explanation: Deman v The Commission for Equality & Human Rights [2010] EWCA Civ 1279.

The task before me

24. As indicated by His Honour Judge Auerbach EJ Brown's summary of the issues was not a substitute for the full contents of the table submitted by the

claimant prior to the preliminary hearing before him. Where matters stood at the end of the hearing before EJ Brown is that the claimant's live pleaded case was reflected in the original particulars of claim, as further particularised, in respect of those allegations highlighted in the summary given by EJ Brown in bold by the full content of the relevant entries in the claimant's table. In essence therefore a combination of the original pleading, the claimant's submitted table and the issues highlighted in bold by EJ Brown.

25. My task on the matter being remitted back to this tribunal is to consider the claimant's pleaded case as set out in his original particulars of claim and the relevant entries in the table and whether on a fair assessment it or any part of it passed the threshold of presenting a reasonably arguable case taking it at its highest. It is necessary for me therefore to consider the issues raised in the claimant's claim in light of the law relating to strike out and of course the comments of Judge Auerbach.

26. One thing which is clear is that Judge Auerbach quashed EJ Warren's decision on strike out and remitted this matter back to the tribunal for the strike out and/or deposit order application to be heard afresh. I do not accept the submissions of Ms Smith that the framework for the referral was limited by the EAT and confined to the two aspects she refers to namely:

    (i) Falsety of allegations.

    (ii) Proceeding with disciplinary hearing in absence.

27. I agree with Mr Wallace that nothing is off the table. I start afresh and must examine the 10 remaining issues augmented of course as indicated above by the further and better particulars relating to those issues in the original pleadings. In his Judgment His Honour Judge Auerbach rightly in my view highlights the two principal incidents as being the car park incident and the security gate incident. These appear at paragraphs 1 and 5 of the list set out in EJ Brown's summary. A number of the complaints then further advanced directly relate to the car park incident and the security gate incident and the associated disciplinary, grievance and appeal processes including the decision to suspend the claimant following the first incident and a decision to impose a Final Written Warning arising from the second incident. To an extent therefore the vast majority of the 10 issues as fleshed out in the table and in the pleading are intertwined. Whilst of course it is not impossible that on close scrutiny it might be the case that some of the complaints fall to be struck out for having no reasonable prospect of success, the issues relied upon are largely related.

Conclusions

28. Turning therefore to each of the 10 issues in turn.

    (i) On 3 January 2017 Kevin Morris and Harry Hodson (individual respondents) followed the claimant to his car and later provided

statements alleging that the claimant tried to hit Kevin Morris with his car.

29. I am very conscious that I have to take each of the claimant's claims at their highest. The claimant's claim here is that Kevin Morris and Harry Hodson falsely accused the claimant of deliberately clipping one of them with his car. The allegation was not ultimately pursued against the claimant but the fact of the initial false accusation is a significant plank of the claimant's claim.

30. Examining this and the documentary evidence in front of me I must bear in mind of course that the claimant was unrepresented both when he initiated his claim and at the preliminary hearing before EJ Brown. The earlier cited case of Malik is authority for the fact that I can take this into account. The claimant's claim is a claim in direct race discrimination and harassment on the grounds of race, the respondent argues that the claimant has failed to highlight anything which satisfies the Madarassy principle of something else which goes beyond simply a finding of different treatment and different status. The respondent's argument is that even if ultimately the claimant can show he was treated unfairly and falsely accused that would still not be sufficient and would still amount to a bare assertion.

31. It seems to me that on balance and on proper consideration whilst the initial pleadings and indeed the documentation thus far before the tribunal is not clear in that it bridges the Madarassy gap the deficiency is insufficient to constitute the standard required to strike out namely that there is no reasonable prospect of that gap being bridged and of the claim being successful. Therefore I do not consider that applying the Malik principles I can justifiably conclude that there is no reasonable prospect of success and strike out this claim.

(ii) On 4 January 2017 Manesh Chhanya suspended the claimant;

(iii) On 12 January 2017 Paul Nixon the investigating officer deciding that a matter in relation to alleged swearing should proceed to a disciplinary hearing;

32. Both issues number (ii) and (iii) relate specifically to the car park incident and cannot be separated from it in my judgment. Therefore to strike them out would be wrong, they too must be tested alongside facts and matters relating to the car park incident and issues that flowed from it.

(iv) *That on 13 February 2017 the claimant not being referred to Occupational Health by his employer having returned from sick leave because of stress and requesting to see Occupational Health.*

33. It seems to me that this is all part of the factual matrix of which is inextricably linked from the chain of events which kicked off on the 3 January and it would be wrong of me to conclude that this had no reasonable prospect of success for the reasons I have set out above.

(v) On 5 April 2017 the claimant being suspended by David Churchill for an altercation he allegedly had with a Jaguar Landrover on site security supervisor;

34. The same can be said of the security gate incident which is (v) in EJ Brown's list and numbers (vi), (vii), (viii), (ix) and (x) which essentially flow from it or from the original car parking incident.

(vi) On 26 April 2017 the investigation meeting held by Greyson Nyakema taking place in the claimant's absence;

(vii) On 19 May 2017 the claimant being given a sanction of a final written warning following a hearing in his absence;

(viii) On 6 June 2017, the claimant being sent the written outcome, namely a sanction of final written warning;

(ix) On 30 October 2017 the claimant not being seen by Occupational Health despite having returned from work and asking to see them;

(x) On 26 February 2018 the claimant's request for referral to Occupational Health not being actioned.

35. As to the security gate incident I am entirely persuaded by His Honour Judge Auerbach's analysis at paragraph 46 of his Judgment that in looking at that incident there was insufficient evidence and remains insufficient evidence before the tribunal to conclude that there was no reasonable prospect of this aspect of the claimant's claim succeeding because the claimant's colleague who was not of his race had also been suspended.

36. I do not think that there are any features of the respondent's case which can be reasonably viewed as tending to undermine the claimant's case as advancing a non-discriminatory explanation for the treatment complained of.

37. It seems to me that all of the issues must be tested at a full tribunal with the attendant detailed evidence which will accompany that process.

38. I reached this conclusion applying the principles set out in the authorities and by taking the claimant's case at its highest. I have also carefully considered the documents before me and the fact that the allegations involve a variety of alleged discriminators.

39. The respondent has not satisfied me on the no reasonable prospect test that rule 37 should be engaged and that the claimant's claim should be struck out. That application therefore fails.

Deposit order – Rule 39

40. Applying the above analysis I have also carefully considered whether the lesser test of little reasonable prospect of success is met. I do not propose

to analyse each issue in turn save to say that I do not consider that the lower test has been met for the same reasons I have set out above. There is simply too much to be explored in this case before such a conclusion could be reached.

41. That does not mean of course that ultimately a tribunal will not conclude that upon making findings of fact in the claimant's favour in respect of the allegations that survive that there has been different treatment but that it was not because of race or that it was not related to the protected characteristic of race. That will be for the tribunal to determine at the full merits hearing of this matter.

42. This matter will be set down for a further preliminary hearing to take place by telephone. During the course of that hearing case management matters will be considered including listing the matter for trial and disclosure, witness statements, bundles and the like. Consideration will also be given to finalising a list of issues and considering whether the respondent wishes to amend their ET3 in consequence of the finalising of those issues.

43. Agendas, draft lists of issues and draft directions should be submitted in the normal way to the tribunal in advance of that hearing. 3 hours will be allowed for that hearing.

44. It will take place on 8 December 2021.

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Employment Judge KJ Palmer

Date: 10 November 2021

Sent to the parties on:

18 November 2021

For the Tribunal Office