



EMPLOYMENT TRIBUNALS

Claimant: Janet Nyame-Bekyere

Respondents: (1) The Commissioner of Police of the Metropolis
(2) Donald Brown

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 25 November 2021

Before: Employment Judge Housego

Representation

Claimant: David Gray-Jones, of Counsel, instructed by Suleiman Obaseki, Solicitor

Respondents: Kara Loraine, of Counsel, instructed by Olivia Geary of Capsticks LLP, Solicitors

JUDGMENT

- 1. The claims for sex discrimination are struck out, on withdrawal by the Claimant.**
- 2. The race discrimination claims are struck out.**
- 3. The Claimant's application to strike out the Response is refused.**

REASONS

1. At the start of the case management hearing on 25 November 2021 the Claimant withdrew the claims of sex discrimination.
2. In the case management hearing the race discrimination claim was discussed at length. The Claimant identifies herself as "black". She makes claims of disability discrimination. At the start of the hearing it was asserted that these matters were also race discrimination.
3. I asked who was the comparator. Counsel asked for a further 45 minutes to

take instructions from the Claimant, who was with her solicitor, and I afforded that opportunity.

4. After the hearing resumed, Counsel said that there was just one allegation of race discrimination. It was the refusal to process and grant ill health early retirement, on 13 November 2019. The comparator was Richard Boham who is white and who was given ill health early retirement when suffering from a terminal illness, and who had a double lung transplant.
5. I considered the following cases relevant to the application to strike out claims:
 - Malik v Birmingham City Council & Anor (STRIKING-OUT: DISMISSAL) [2019] UKEAT 0027_19_2105: cases must be taken at their highest and race discrimination cases are seldom struck out (and citing Mecharov v Citibank NA [2016 ICR 1121 with approval]);
 - Daniel Cox v Adecco & Others [2021] UKEAT/0339/19/AT (V): a case should not be struck out without first finding out what it is;
 - Marrufo v Bournemouth Christchurch And Poole Council (PRACTICE AND PROCEDURE) [2020] UKEAT 0103_20_0312 (to the effect that there is a limit to how far a Tribunal has to go to find out what a claim is about);
 - O EMUEMUKORO v 1) CROMA VIGILANT (SCOTLAND) LTD 2) MISS C HUGGINS & OTHERS EA-2020-000006-JOJ (previously UKEAT/0014/20/JOJ): cases can be struck out for non-compliance with orders of Tribunals even where a fair hearing is still possible; and
 - Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913: citing with approval Laing v Manchester City Council [2006] ICR 1519, and Bahl v Law Society [2004] IRLR 799, at paragraph 39
39. *"However, it should be noted that, in Laing v Manchester City Council [2006] ICR 1519, the EAT made it clear that there is an important distinction in this context between "facts" and "explanation". The judgment was given by Elias J (President), sitting with lay members. At para. 51 Elias J said:*

"We note in particular three features of this section [section 54A of the Race Relations Act]. First, the onus is on the complainant to prove facts from which a finding of discrimination, absent an explanation, could be found. Second, by contrast, once the complainant lays that factual foundation, the burden shifts to the employer to give an explanation. The latter suggests that the employer must seek to rebut the inference of discrimination by showing why he has acted as he has. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with race: see Glasgow City Council v Zafar [1998] ICR 120 and Bahl v The Law Society [2004] IRLR 799." (Emphasis in original)"
6. The remaining race discrimination claim was said to be direct discrimination, only.

7. The claim was filed on 09 April 2020. The Acas EC period was 09 February 2020 – 09 March 2020. 13 November – 09 April is nearly 5 months. The Acas EC period started within 3 months, and the claim was lodged within a month of its end, so the claim is not out of time.
8. I enquired what case was put forward to link the refusal to grant ill health early retirement to race. It was suggested that it could be inferred. But from what, I asked? It surely had to be accepted that early retirement on ill health grounds would require medical evidence. It was accepted. That was then put forward to the trustees of the pension fund. There was nothing to suggest that the medical evidence was in any way tainted by considerations of race. The trustees are individuals unknown to the Claimant and there was nothing to suggest that they would be influenced by considerations of race. The Claimant did not have a terminal illness, as did her chosen comparator, and it was obvious that someone with a terminal illness would be likely to be granted ill health early retirement. Counsel was only instructed recently and was not able to offer any response to these matters.
9. The Respondents' submissions were that on face of it there was no prospect of success. It was common ground that the ill health retirement request was processed and rejected. The complaint in the disability discrimination claim is that it was rejected not that it was not processed. There was nothing that explains why this was to do with race. There were no facts pleaded from which such an inference could be drawn. It was accepted that there did not need to be a prima facie case, but the Claimant did need to say what facts, if found proved, could lead to such an inference. Here there was no assertion as to why it is anything to do with race, and nothing shown as to why an inference should be drawn. It was a heading only - for race and sex all pleaded was the same, and the sex discrimination claim was withdrawn. The Claimant had no genuine belief in her race claim. She had repeatedly been asked to set out the basis for the allegation, and that had never been forthcoming, and so there was no reasonable prospect of success.
10. I agree with those submissions. With the factors set out above in mind, there is nothing to suggest any link between race and refusal to grant ill health early retirement. The Claimant must prove facts from which a Tribunal might infer discrimination (and then the Respondent must show it was not). To prove facts there has to be an allegation and some reason to think it might be causatively connected with the protected characteristic. Here there is nothing asserted that might suggest any such link, let alone any matter which might be provable fact to support the assertion. Here there is only "*I was refused ill health early retirement and I am black, so it must be because I am black*". That is not an arguable case, and so I strike out the claim of race discrimination.
11. The Claimant has not complied with orders of this Tribunal in multiple ways. That was suggested as a reason to strike out the claims in total. Realistically, the Respondents accepted that this was only going to be arguable if progress was not made today on the issues. It was, so this is not a *Marrufo* situation. The failures in *Emuemukoro* were raised at the start of the hearing, which is a rather different position to today, when the hearing

of the case will inevitably be many months ahead. I do not strike out the claim by reason of non compliance with Tribunal orders.

12. However, if there is continued non compliance a subsequent application may be successful for failure to comply with the overriding objective and under Rule 37 for unreasonable conduct of proceedings as well as non compliance.
13. Shortly before the hearing the Claimant's solicitor made an application for "summary judgment pursuant to CPR Part 24.2(ii) and (b)". This is misconceived and Counsel advised that a strike out application in respect of the Response was not pursued. For the avoidance of doubt I refuse that application (if that was what it was).

**Employment Judge Housego
Date: 6 December 2021**