



EMPLOYMENT TRIBUNALS

Claimant

Mr Louis Richardson-Cuffe

v

Respondent

Greggs plc

Heard at: Bury St Edmunds (by CVP)

On: 01 December 2021

Before: Employment Judge Laidler

Appearances

For the Claimant: Mr KW Perera (Legal Assistant).

For the Respondent: Mr S Liberadzki (Counsel).

RESERVED JUDGMENT

1. The allegations the subject of the respondent's application dated the 17 November 2021 (List of issues, paragraphs 2.1 (ii), (vi), (viii), (ix), (x), (xi) (xv)(A), 2.2 (a) (ii) & 2.2 (a)(iii) are struck out as having no reasonable prospects of success.
2. If the tribunal were found wrong in the above decision it would have ordered the claimant to pay a deposit of £50 each for advancing those nine allegations on the grounds that they had 'little reasonable prospect' of success.

REASONS

1. The claim form in this matter was issued on 3 June 2020 following a period of ACAS Early Conciliation between 15 April 2020 and 28 May 2020.
2. In the claim form the claimant claimed unfair dismissal and discrimination on the grounds of race. The only information given at section 8.2 was 'Management incompetence, Racism, bullying'
3. The respondent denied all the claims, stating that the claimant was dismissed for gross misconduct on the 16 January 2020. It applied in its grounds of resistance for a hearing on whether the claims should be struck

out on the basis that the claimant had failed to present any facts from which the tribunal could conclude that in the absence of any other explanation the respondent's actions were in anyway connected to the claimant's race. As such it was submitted the allegations had no reasonable prospects of success.

4. On 9 November 2020 the claimant's current solicitors advised the tribunal that they had been instructed. They filed a document headed "Particulars of Race Discrimination" in which it was stated that the claimant advanced claims of both direct and indirect race discrimination "because the respondent treated the claimant worse than other employees as he was black". It also stated the claimant advanced a claim of harassment because of the humiliating, degrading or intimidating environment created for the claimant.
5. On 9 May 2021 the parties were given notice of a Case Management Hearing to take place by telephone on 6 September 2021. The Case Management Summary sent to the parties on the 8 October 2021 refers to there having been detailed discussion of the issues in the case and of a draft prepared by the respondent. It was not set out in the summary as it remained in draft form. The judge recorded at paragraph (8) of her summary:

'...Further details including the names of the individuals identified by the claimant must be added as set out below. It was agreed between the parties that paragraphs [ix and xi and xii] relating to allegations that the claimant's route was changed have not been mentioned previously within the further and better particulars. I concluded that these allegations are not included within the litigation. Inclusion of these allegations would require an application to amend the claim on the part of the claimant. The importance of the list of issues was stressed to the parties and an agreed list of issues must be completed'

Unfortunately, the paragraphs cited in the extract above do not appear to fit with the numbering now in the list of issues this tribunal was given.

6. This judge did not have the tribunal file at the time of the hearing. She has considered it prior to finalising these reasons. There is no application to amend the claim. There is not on the file a finalised agreed list of issues. Whilst therefore the respondent's application to strike out included the allegation that the claimant had been called back during his route a judge had already determined that was not part of the pleaded case.
7. The following represents the list of issues in the bundle for this hearing which although still headed 'Respondents proposed list of issues' the claimant's representative did not take issue with

1 PRELIMINARY ISSUES:

1.1 Discrimination – Time Limits

- (a) Should any acts of discrimination complained of which are alleged to have occurred prior to 16 January 2020 (as extended by any period of EC) be struck out because they are out of time?
- (b) Is there a continuing act of discrimination?
- (c) If so, would it be just and equitable to extend the time limit for the submission of these claims?

2 SUBSTANTIVE ISSUES

Race Discrimination

The Claimant describes himself as Black and this is the protected characteristic relied upon in respect of his race discrimination claim.

Direct Discrimination

2.1 In relation to any claim for direct discrimination:

- (a) As compared with a hypothetical comparator, that is, an employee who was of a difference race to the Claimant, (but otherwise where there was no material difference between their circumstances and those of the Claimant including their conduct, role and responsibilities) or, in the alternative, a real comparator (where explicitly stated below), was the Claimant treated less favourably in respect of:
 - (i) On or around November 2018, Mr Glenn Callegari delayed the time that it took the Claimant to qualify, through delaying his induction course and stating that there was no one to cover the Claimant's route. The Claimant avers that he wanted the Claimant to remain working through the agency so he could be paid less. Whereas other white drivers: Mr Arkadiusz Jowelyk and Mr McGovern and Jason McGee were qualified quickly by the Respondent by being offered induction courses shortly after they had been employed. Mr McGee had multiple accidents during his probation period but qualified within 10 weeks. Mr Arkadiusz Jowelyk damaged the lorry tailgate prior to being qualified. Whereas the Claimant did not have any accidents but still took longer to qualify because of the Respondent's delays.
 - (ii) Between August 2018 – December 2018, the Claimant was accused by Mr Palushaj, of leaving his vehicle dirty with McDonald's packaging and a coke bottle. The Claimant's vehicle was always checked

after he returned to the depot after his deliveries going forwards. Whereas, the other white drivers', specifically: Mr Simon Gupta, Mr Elton Muho, Rob North, Caroline Greed, Gareth Boon and Mr Arben Tafa did not have their vehicles checked. These checks continued throughout the Claimant's employment. This happened every shift for two months. Mr Craig Lawrence and Mr Baptista were the two managers who checked the Claimant's vehicle.

- (iii) From August 2018 (Claimant was working through an agency) to December 2018, the Claimant was informed by Ms Nikki Mallet (Shop Manager, Rosehill, Ipswich) that he could not have a free coffee although it was company policy that all drivers were able to have a free coffee at any of the Respondent's stores. The Claimant avers that the driver the Claimant trained, Mr Jason McGovern (Driver), who is white, was offered and given coffee every time, although he was not a permanent member of staff at the time. Other white drivers on the same route that were given coffee including Mr Rob North and Mr Grzegorz Korelli.
- (iv) On or around December 2018, when the Claimant raised that he had been refused coffee with Mr Glenn Callegari (Team Manager) and Mr Artur Palushaj (previously Night Manager), the Claimant was informed that he should go get coffee from elsewhere or pay for the coffee at Greggs Rose Hill.
- (v) On or around December 2018, the Claimant was told to go home by Mr Palushaj, when he complained about the coffee incident.
- (vi) On 27 May 2019, the Claimant was told off in front of other colleagues by Mr Jose Baptista (Team Leader) for not wearing full uniform. The Claimant was wearing full uniform but he was also wearing a sweater on top as he was cold. Mr Gareth Boon (Driver) and Mr Alex Fairley (Driver), who are white, were around when the Claimant was told off, they were not wearing their full uniform, but they were not told off or reprimanded and are comparators.
- (vii) On or around October/November 2019, Mr Boon called the Claimant a "gay boy", "cunt", and said "they had to "get rid of 'em all". The Claimant understood that they wanted to get rid of black people. Mr Kora

was present at the time but did nothing to reprimand the driver that made the statements.

- (viii) On or around November 2019 – until date of dismissal, Mr Joao Alexandre, Mr Terry Ward (Transport Manager), Mr Sandro Pellicci and John Kora (Team Leader) gave the Claimant a vehicle without a satellite navigation system and 18 drops to do, whereas his white comparators: Ms Greed, Mr McGovern and Mr Boon and [Mr McGee (agency worker)], were given vehicles with a satellite navigation system.
- (ix) On or around November 2019 onwards, Mr Arben Tafa (Routerteam leader/supervisor) and Mr Kora called the Claimant back mid-way through his deliveries to collect more items that the Respondent had forgotten to load on his vehicle. Comparatively, Mr Boon, Ms Greed, Mr Darren Kaley and Mr Turner were not recalled and a separate driver in a van travelled to the necessary location with the missing items. The Claimant was reprimanded and questioned by Joao Alexandre, specifically he said “why do you keep coming back?”
- (x) On 19 December 2019, at 8:00am an employee texted the Claimant stating that he had to do route 88. This was a route that the Claimant had one night of training on. The employee did not provide the Claimant with a satellite navigation system for this route whereas, Mr Simon (surname – unknown), Larry Stone, Jason Turner and Ms Greed were given one route with no changes.
- (xi) On 8 January 2020, the Claimant was not placed on suspension by Alex Elferink (Logistics Manager) as he requested, and he was instead made a “driver’s mate”.
- (xii) On or around 8 January 2020, Mr McGovern said “working for Greggs is like black people in slavery” to the Claimant.
- (xiii) On 16 January 2020, the Claimant was dismissed by Mr Elferink because of his race.
- (xiv) On 27 February 2020, the Claimant was called an “asshole” by Mr Mitchley. The statement was made during the disciplinary appeal hearing. The Claimant had only been in the room for 10 minutes when this

was said by Mr Mitchley. The Claimant was meeting Mr Mitchley for the first time and the Claimant believes he was being malicious and racist.

(xv) On 27 February 2020, the Claimant became aware of an Employee Performance Log. The Respondent manipulated the Claimant's employee performance log in order to dismiss him. Specifically, the Employee Performance Log stated:

(A) On 13 January **2000**, the Claimant "left the canteen in a mess after spilling coffee all over the floor". The Claimant states that he began his contractual employment in November 2018 and was not present at the Respondent's premises during this date.

(B) On 20 January 2018, the Claimant had "left stales and dirties in the lorry on the ramp".

(C) On 08 August 2018, the Claimant was alleged to have left "rubbish in the lorry, and keys in the lorry".

(D) On 11 September 2019, the Claimant was alleged to have "damaged products (WYBIT) Shop S3770 [Greggs Rose Hill in Ipswich]". The Claimant avers that the event did not occur as the Claimant was suspended on 10 September 2019 with regards to the cage incident (see below).

- (b) Did the alleged treatment occur?
- (c) If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of his race?
- (d) If so, can the Respondent prove a non-discriminatory reason for any proven treatment?

Harassment

2.2 In relation to any claim for harassment:

- (a) Was the Claimant subjected to the following conduct:
 - (i) On 1 July 2019, Mr Arben Tafa (Team Leader/Router) threatened the Claimant that if the Claimant let him

down, he would rape him. Mr Boon who was also present at the time and agreed with Mr Arben Tafa.

- (ii) On 10 September 2019, the Claimant was involved in a work-related accident, specifically: the Claimant was loading his lorry with his earphones in; a trolley hit both him and a metal cage he was handling and caused his right hand to become jammed. The Claimant was shouted at by Guvindir Sandher (Warehouse Manager). Mr Arbena attended the scene later and asked the Claimant to apologise to the Warehouse Manager. The Claimant was suspended the following day whilst the Respondent investigated. After two weeks, the Claimant was informed that there was no case to answer.
- (iii) On 11 September 2019, Joao Menezes Alexandre (Team Leader) made a false claim against the Claimant, to get him dismissed, specifically with regards to the cage incident. The false claim was that the Claimant had sworn at Mr Sandher (Warehouse Manager) and that he had been using his phone at the time of the incident.
- (iv) On 28 October 2019, the Claimant was at a debriefing when Mr Alberto Pinto began laughing at his writing, as they could not read it. The Claimant was then asked by Mr Alberto Pinto to read his writing aloud. The colleagues passed his writing around, challenging each other to read it, whilst laughing at the Claimant. This continued to occur at every debriefing; debriefs happen at the end of every shift.
- (v) On or around late November/December 2019, the Claimant became aware, that staff at Greggs Stanway, specifically Stewart Lee, uploaded pictures and videos of the Claimant to a website. The website was a personal website and not connected to the employee's employment with the Respondent. The Claimant was informed by Mr Andrewlo Banton that the Claimant could not access this website. Mr Andrewlo Banton (Driver) informed the Claimant that staff at Greggs Stanway were laughing and ridiculing the Claimant as he was assaulted by a member of the public.
- (vi) Mr Elferink, subsequently, denied the Claimant access to the website, the picture or the video. Mr Elferink informed the Claimant that they could not do anything about this.

- (vii) On or around January 2020, during a tea break, the Claimant accidentally spilt coffee on the table in the staffroom. The Claimant cleaned the spillage up. However, Mr Vince Fox (Warehouse and Planning Manager) put a picture of the Claimant holding a newspaper that he is about to use to clean up the spilt coffee on a notice board, purposefully singling out the Claimant. All the bakery staff and everyone in the building laughed at the notice board.
 - (b) If so, was the conduct unwanted?
 - (c) If so, was any such treatment related to the Claimant's race?
 - (d) Did such treatment have the purpose or effect of violating the Claimant's dignity and/ or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? If so, was it reasonable for such treatment to have had such effect (taking into account his perception, the other circumstances of the case)?
- 8. At the case management preliminary hearing this Open Preliminary Hearing was listed to consider: -
 - (i) Any outstanding case management issues.
 - (ii) Any application made by the parties; the parties having been ordered to make any such applications in writing by 17 November 2021.
- 9. The respondent duly submitted its application for strike out and/or a deposit order by an email of that date. In addition to the actual application Counsel for the respondent prepared a Skeleton Argument in writing which was considered by the tribunal. No written document or other evidence was produced on behalf of the claimant. The tribunal read various documents and then heard submissions on behalf of both parties. The tribunal had a bundle of documents of 155 pages. This contained details from the claimant's investigation meeting, the disciplinary hearing minutes and investigatory meeting minutes with various representatives at the respondent.

The respondent's written application 17 November 2021

- 10. The initial written application comprised various elements: -
 - (i) *Jurisdiction*

The respondent contends that the tribunal does not have jurisdiction to hear part of the claimant's claim insofar as the claimant complains of discrimination relating to any allegations which pre-date the 3 month time limit for presentation of such claims (subject to any extension of time as a result of the claimant participating in early conciliation). The respondent contends that any act or omission which took place prior to the 16 January 2020 is out of time and it denies that the claimant's complaints form part of continuous act of discrimination.

(ii) *Prospects of Success*

The respondent contends that the claimant has raised several allegations of direct race discrimination and harassment on the grounds of race where he has failed to present any facts from which the tribunal could conclude that in the absence of any other explanation the respondent's actions were in any way connected to the claimant's race. As a result, it is submitted that those allegations have no reasonable prospects of success and the respondent sought an order striking them out. The respondent particularly relied upon the following allegations in the list of issues, all set out at 2.1 under the following numbers :-

(ii), (vi), (viii), (ix), (x), (xi) & (xv)(A) and 2.2(a)(ii) & (iii).

(iii) *Deposit*

In the alternative, the respondent applies for the claimant to be ordered to pay a deposit in relation to each allegation of discrimination pursued as a condition of proceeding to advance the claims.

11. Although the application was submitted in relation to certain specific allegations and Counsel maintained that position at this hearing it was argued for the respondent that it could indeed apply to all the allegations.

Respondent's submissions

12. Whilst acknowledging that there is a high bar to strike out of a claim and that the claimant's case should generally be taken at its highest, there are cases where the facts alleged are inexplicably inconsistent with contemporaneous documents or are inherently implausible.
13. In this case some allegations even if proven do not give rise to an allegation of discrimination such as to shift the burden of proof (Madarassy v Nomura International plc [2007] ICR 867 CA). There must be something more and the respondent submits that in this case there is not "something

more". The allegations themselves do not suggest it. The claimant is to a large extent saying he was treated unreasonably and that is not enough.

14. Whilst these points could address the entire claim Counsel did limit his application to the specific allegations raised in the original application of 17 November.
15. It was submitted that they are extremely wide-ranging allegations against over 20 different colleagues, some of whom are not even named. They worked at different sites, and it is highly implausible they were all acting in a discriminatory fashion towards the claimant. There was no complaint of discrimination brought until the final appeal stage.
16. In relation to allegation (ii) about the claimant leaving his vehicle dirty and it being checked after every shift it was submitted that four of the claimant's colleagues including two of his named comparators had stated in interview that they would have their vehicles checked at the end of a shift and that others would as well. Reference was made in Counsel's written submissions to the page numbers in the bundle of the respective interviews during the investigation process.
17. In relation to allegation (iv) about the claimant not wearing full uniform, the two named comparators have both stated that they have also been spoken to about not wearing the correct uniform.
18. In relation to (viii), (ix) and (x), being given no satellite navigation, being given too many drops and being re-called mid-route this also happened to others.
19. It was submitted that it is a bizarre allegation to suggest that the fact the claimant was not suspended was an act of detriment contrary to the Equality Act. It was suggested that the meeting notes show that the claimant said he felt too stressed to work and if that was the case he could and should have taken sick leave and suspension should not be used for that reason.
20. The claimant alleges that his performance log was manipulated in respect of an entry dated 13 January 2000. Counsel suggested that was obviously a typographical error.
21. The same remarks it was argued could be made about the harassment claims. The claimant has not demonstrated how the unwanted conduct was related to his race. This has no reasonable prospects of success.
22. Dealing with time limits, although accepting it is usually best not to deal with time limits at a preliminary stage the tribunal can consider on a strike out application whether the claimant has reasonable prospects of showing that there was a course of conduct by looking at the allegations and determining whether they can amount to a course of conduct. It is submitted on behalf of the respondent that in this case they are not. The

substance of each allegation varies, they are eclectic, they span over 2 years and in relation to the first in January 2018 the claimant was not even in employment but was working through an agency. There are large gaps between isolated incidents.

23. Even if some might be linked there are only two allegations in time namely the dismissal and the appeal manager's alleged comment. Those individuals are not named in other allegations. The events of the dismissal are not connected to the other allegations. The tribunal can therefore say there are no reasonable prospects of the claimant establishing there was a continuing course of conduct.
24. With regard to whether the claimant could persuade the tribunal it was just and equitable to extend time, the burden is on the claimant. Although the tribunal has a broad discretion there is no witness statement to explain the delay. If there is prejudice to the claimant then that it is submitted is self-inflicted. The respondent would be severely prejudiced by having to deal with the claim which involves a huge number of people, some of whom have left the respondent. Some of the allegations refer to verbal exchanges which are not documented. There was no complaint or grievance at the time, so the respondent was not able to investigate when the alleged matters were current.

Submissions on behalf of the claimant

25. Great caution should be exercised in dismissing a claim of discrimination. The claims are fact sensitive, and the witnesses have not been heard or cross examined.
26. Whilst accepting the authority of Madarassy that case does not suggest the claims can be dismissed at this preliminary stage.
27. The claimant must be given the opportunity of testing the evidence. Without that opportunity it would be unfair to dismiss the claim. The matter has already been listed for a 7 day Full Merits Hearing and to proceed at this stage would be in effect having a "mini trial" before all of the allegations have been explored.
28. There would be severe prejudice to the claimant. The claimant does say there was a continuing course of conduct. That cannot however be determined at this stage. The claimant has two voice recordings which provide some evidence of discrimination.

Deposit Application

29. No evidence had been produced by the claimant in connection with his means which clearly the tribunal can have regard to in considering a deposit application. His representative explained that he is working at the moment. He has seen three recent bank statements and at the end of September the claimant only had £6.99, at the end of October £1.34 and

his final balance at the end of November was £500 but that was exceptional. It was submitted it would not be equitable to order him to pay a deposit.

30. The claimant explained he had obtained a new job on 3 November 2021. Prior to that he had managed to obtain some agency work. It was only with the increased demand for lorry drivers that he was able to obtain employment. He is earning less than when he was at the respondent. He has two young children who are not living with him but who he has financial responsibility for. He does not own his own property but has rent to pay. His last take home pay was approximately £2,200. His rent is £500 a month, council tax i£100, mobile phone approximately £50, insurance £30, gas and electric £20 each a week and fuel £50 every two weeks to get him to work. The claimant confirmed he had no savings and he did not receive benefits now he is working.
31. The tribunal did not hear evidence but did have a bundle of documents containing notes of investigations that the respondent carried out at the time and notes of the disciplinary hearing and appeal. The tribunal is not therefore making findings but will record what it saw in the documents as they relate to each of the claimant's allegations which the respondent seeks to strike out.

Allegation (ii) – leaving his vehicle dirty and having it checked after every shift

32. At page 146 of the bundle Robert North a driver was interviewed on 5 October 2021 and confirmed he had his truck checked at the end of the shift to make sure it was clean. He believed this happened once a week and stated, "everyone does".
33. At page 147 Simon Gupta a driver confirmed he had his truck checked after his shift and stated this started 9 years ago. He did not think it was very often and had not seen others have their trucks checked.
34. At page 148 Alex Fairley a driver recalled having his vehicle checked once every 6 months. He had also been spoken to about his uniform.
35. At page 149 Jose Baptista (the alleged discriminator) did not specifically recall the claimant's truck being checked but confirmed that if he was in the yard he would check all the lorries to make sure they are left clean and stated he did not just check the claimant's but other drivers as well. He spoke to the claimant and others about their uniform.

Allegation (vi) – not wearing full uniform

36. Gareth Boon confirmed in his interview at page 142 that he also was spoken to about his uniform.

Allegation (viii) – that the claimant was given a vehicle without a satellite navigation and had to do 18 stops

37. The respondent referred to records seen at pages 79, 83 and 93 for September 2019 all of which showed routes of 17 stops.
38. At page 144 Caroline Greed a driver and one of the claimant's named comparators did not recall having her truck checked but stated that lots of the satellite navigation systems did not work and she rarely had one.
39. In the respondent's grounds of resistance at paragraph 33(h) it was pleaded that the site had a minimal number of satellite navigation systems.

Allegation (ix) – being recalled mid-route

40. Caroline Greed recalled being asked to do this stating "occasionally it would happen". She recalled others having this happen to them. She stated that you could be called back to the site for missing stacks/cages and that this had happened "quite a few times".
41. Alex Elferink, of the respondent, in his interview at page 151 on 7 October 2021 stated that the decision to recall is entirely based on the location of the driver at the point in time that the left stack is discovered. It would depend how far away the driver is as to whether they are recalled. If someone else is available the stack might be driven out to the driver.

Allegation (viii) – route 88 was given to the claimant without satellite navigation and only one night's training

42. The respondent's records in the bundle (pages 66 and 88) confirm that the claimant had one days training on the route and one day on the route itself.

Allegation (xi) – not being suspended when he requested this

43. The disciplinary hearing took place on 8 January 2020 and notes were at page 129. The meeting was chaired by Alex Elferink. The meeting was adjourned for further investigation to be carried out. The claimant asked whether while they did that was he going to be suspended and stated he would like to be suspended. He is noted as stating:

"I can't work in these conditions and it is causing me stress. I'm having accidents."

44. Mr Elferink is recorded as stating he could not be suspended for stress but if driving was an issue he could be put on other duties as a driver's mate or something "to take pressure off driving". The claimant's representative at the meeting Peter Pyne is recorded as stating "that's fair enough". No submissions were made at this hearing on behalf of the claimant about the accuracy of those notes.

Allegation (xv)(A) – that the claimant’s performance log was manipulated

45. The log was seen at page 154 of the bundle and the first entry is shown as 13/01/00 and records the claimant being spoken to, to clean up “his mess” in relation to spilling coffee all over the floor in the canteen. The claimant himself refers to this incident as an allegation of harassment at issue 2.2(a)(vii) when he puts the incident at around January 2020. The respondent therefore argues that he knows that this must have been a typographical error in the performance log.

Harassment

Allegation (ii) – 10 September 2019, the claimant was involved in a work related accident.

46. The tribunal saw at page 116 the invite to an investigatory meeting dated 17 September 2019 referring to an incident on 10 September 2019 “during which you were seen by Guvindir Sandher, Warehouse Manager using a mobile phone in the loading corridor”. It was also suggested that the claimant was observed using inappropriate and abusive language. The claimant was suspended on full pay as of 11 September 2019.
47. At page 119 was a statement by Guvindir Sandher the Night Manager. There were also statements from Joan Alexander and Arben Tafa who heard swearing.
48. At the investigatory meeting held with the claimant on 20 September at which he was accompanied by Peter Pyne the claimant confirmed he was using his phone on bluetooth. He did not remember swearing.

Relevant Law

49. The relevant provisions in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 are:-

“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;
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
- (c) for non-compliance with any of these Rules or with an order of the Tribunal;

- (d) that it has not been actively pursued;
 - (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
- (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
 - (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.”

“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.”

50. The authorities have made it clear that there is a high bar to strike out a claim particularly in relation to discrimination complaints which are to a large extent fact sensitive (Anyanwu & Other v South Bank Student Union & Another [2001] UKHL14). In Ezsias v North Glamorgan NHS Trust (CA) [2007] ICR 1126 it was stated that an example of when it might be possible to strike out would be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

51. In Chandhock v Tirkey [2015] ICR 527 (CA) it was made clear as follows:-

“There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ in Madarassy v Nomura International plc [2007] ICR 867, paragraph 56);

“Only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”

The court went on to emphasise however that the exercise of a discretion to strike out a claim should be “sparing and cautious”.

52. In relation to time points it was made clear by the EAT in Caterham School Limited v Mrs K Rose UKEAT/0149/19 that jurisdiction points may be determined at a preliminary hearing either substantively or at “summary level” upon consideration of whether a prima facie case is made out taking the claimant’s case at its highest (paragraph 66).

53. In Aziz v FDA [2010] EWCA Civ 304 it was made clear that the claimant must have a reasonably arguable basis for the contentions that the various complaints are so linked as to be a continuing act or to constitute an ongoing state of affairs. This would involve having regard to whether the same or different individuals are involved as a relevant but not conclusive factor. Further, does the claimant link earlier acts to the decision to dismiss? In E v X, L & Z UKEAT/0079/20 and 0080/20 the EAT stated at paragraph 48 referring to the case of Sridhar v Kingston Hospital NHS Foundation Trust UKEAT/0066/20 that where at a preliminary hearing the issue is whether the acts complained of are capable of amounting to a continuing act, the facts are to be assumed to be as pleaded by the claimant. Caution is to be exercised in deciding time points at a preliminary hearing having regard to the difficulty of disentangling them

because there may be no appreciable saving of preparation or hearing time by deciding them: because of the acute fact sensitivity of discrimination claims; the high threshold for strike out and the need for evidence to be prepared if facts are not agreed. In Sridhar it had been clear from the claimant's witness statement that the claimant was alleging a continuing act. It was held that the tribunal should only have struck out the complaints at the preliminary hearing stage if "on the material before it, the claimant had not established a prima facie case relating to the continuing discriminatory state of affairs, the claimant's claims were not capable of being part of such a continuing discriminatory state of affairs, and it was not reasonably arguable that there was such a continuing discriminatory state of affairs."

54. The court went on to set out the key principals distilled from the case law at paragraph 50:-

- “1 In order to identify the substance of the acts of which complaint is made it is necessary to look at the claim form: (Sougrin)
- 2 It is appropriate to consider the way in which a claimant puts his or her case, and in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as difference species of discrimination (and harassment) is immaterial: (Robinson v Royal Surrey County Hospital NHS Foundation Trust UKEAT/0311/14)
- 3 Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated either in the claim form or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: (Sridhar)
- 4 It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked (1) to consider whether a particular allegation or complaint should be struck out because no prima facie case can be demonstrated, or (2) substantively to determine the limitation issue: (Caterham)
- 5 When faced with a strike out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: (Lyfar)
- 6 An alternative framing of the test to be applied on a strike out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an ongoing state of affairs: (Aziz, Sridhar)
- 7 The fact that different individuals may be involved in the various acts of which complaint is made is a relevant, but not conclusive factor: (Aziz)

- 8 In an appropriate case, a strike out application in respect of some part of a claim can be approached, assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required – the matter will be decided on the claimant’s pleading: (Caterham (as qualified at paragraph 47 above)
- 9 A tribunal hearing a strike out application should view the claimant’s case at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: (Robinson and paragraph 47 above)
- 10 If a strike out application succeeds, on the basis that, even if all of the facts were as pleaded, the complaint would have no reasonable prospects of success (whether because of a time point or on the merits) that will bring the complaint to an end. If it fails, the claimant lives to fight another day at the full merits hearing: (Caterham)
- 11 Thus, if a tribunal considers (properly) at a preliminary hearing that there is not reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, form part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: (Caterham)”

Conclusions

55. As the respondent’s application focused on specific allegations, even though it was submitted that the arguments made could apply to the entirety of the claim, this tribunal’s focus has been on those specific allegations and therefore not the entirety of the claim.
56. This tribunal is required by the authorities to take the claimant’s case at its highest as pleaded. The claimant in his particulars of claim makes allegations of what he asserts to be different treatment to others. He does not in accordance with the guidance in Madarassy point to something more than a difference in status and a difference in treatment.
57. Although evidence has not been heard, in a consideration of contemporaneous interview notes (which the claimant’s representative did not seek to challenge or cast doubt upon), it seems that in many instances (as set out above) the claimant was not the only one to be treated in a particular way and in some cases his named comparators received the same and not as alleged different treatment.
58. It is not sufficient for the claimant’s representative to state in submissions it would be unfair to dismiss the claims without the claimant having an opportunity to test their evidence in cross examination. It is highly unlikely that if called, the various employees who were interviewed by the respondent, are going to state in cross examination something different to what they said at the time.

59. It was not explained in submissions on behalf of the claimant how the act of not suspending him could be a detriment under the Equality Act on the grounds of his race. The notes of the disciplinary meeting have been considered and relevant parts set out above. The respondent did not intend to suspend but the claimant asked to be suspended due to the stress of the disciplinary proceedings. It was explained to him that was not a reason for suspension but sick leave in appropriate circumstances. Taking on board though his concerns about driving whilst so stressed he was moved from driving to being a driver's mate. In his own pleadings the claimant has not advanced any case as to how that could amount to less favourable treatment on the grounds of his race. A hypothetical comparator would be a white employee in the same circumstances as the claimant (including therefore asking to be suspended due to stress) and the claimant does not assert a positive case in his pleadings as to why that hypothetical comparator would have been treated in any different way to the way he was.
60. The authorities are clear that in considering a strike out application the tribunal may also consider, even though it has not heard the evidence, whether the claimant has any reasonable prospect of success in establishing that the matters relied upon amount to 'conduct extending over a period' within the meaning of s123 Equality Act. In this case the claimant makes allegations against 20 different employees and managers and does not explain in his pleaded case the connection between them only that they are other employees of the respondent.
61. The first matter of which the claimant complains was in August 2018 when he was employed by an agency. After December 2018 there is no other allegation until 27 May 2019. The disciplinary and appeals managers do not feature until those actual processes are undertaken by them.
62. For these reasons the tribunal has concluded that the claimant has no reasonable prospect of success in establishing a continuing course of conduct from 2018 to the date of his appeal hearing. Neither does he have a reasonable prospect of establishing that allegations (ii), (vi), (viii), (ix), (x), (xi) (xv)(A), 2.2 (a) (ii) & 2.2 (a)(iii) could amount to less favourable treatment on the grounds of race. Relying on what may come out of cross examination is not enough to suggest to this tribunal that there are facts from which the tribunal could conclude less favourable treatment on the grounds of race.
63. Those allegations are therefore struck out. (notwithstanding as set out above that allegations relating to the claimant's route were found by the earlier tribunal not to be part of the claimant's case and no application to amend has been made to include them.)

64. This does not affect allegations:

Direct discrimination

- 2.1 (i)
- 2.1 (iii)
- 2.1 (iv)
- 2.1 (v)
- 2.1 (vii)
- 2.1 (xii)
- 2.1 (xiii)
- 2.1 (xiv)
- 2.1 (xv) B, C & D

which were not the subject of this application and include the allegations concerning the actual dismissal and the appeal

Harassment

- 2.2 (a) (i)
- 2.2 (a) (iv)
- 2.2 (a) (v)
- 2.2 (a) (vi)
- 2.2 (a) (vii)

Deposit

65. If the tribunal were found wrong in the above conclusion it would have ordered the claimant to pay a deposit of £50 each for advancing those nine allegations on the grounds that they had 'little reasonable prospect'. For all the above reasons the claimant has little reasonable prospect of establishing he was an employee and entitled to bring an unfair dismissal claim, that there was a continuing course of conduct and that there are facts from which the tribunal could conclude that he was treated less favourably on the grounds of his race.
66. The effect of these conclusions is that the claims that proceed are as at paragraph 64 above.
67. The full merits hearing was listed for 9 to 17 May 2022 (7 days). It remains as listed. The parties are to advise the tribunal within 14 days of the date on which these reasons are sent to them the number of witnesses they each intend to call; the extent of the documentation and their agreed time estimate for the hearing of the issues which remain. The judge will then determine by how many days the listing should be shortened.

68. They are also by that date to agree and file a revised and up dated list of issues to reflect this decision.

Employment Judge Laidler

Date: 10 January 2022

Sent to the parties on:

17 January 2022

For the Tribunal Office