



EMPLOYMENT TRIBUNALS

Claimant

Mr A Abuinsair

v

Respondent

Middlesex Learning Partnership

Heard at: Bury St Edmunds (by CVP)

On: 18 January 2022

Before: Employment Judge KJ Palmer (sitting alone)

Appearances

For the Claimant: In person.

For the Respondent: Mr Leonhardt (Counsel).

JUDGMENT PURSUANT TO OPEN PRELIMINARY HEARING

Application to Amend

1. Allegation 10 – Allowed
2. Allegation 11 – Refused
3. Allegation 12 – Refused
4. Allegation 13 – Allowed

Application to Strike Out

5. Allegation Number 4 – Struck Out
6. Allegation Number 5 – Not Struck Out
7. Allegation Number 7 – Not Struck Out

Deposit Order

8. The respondent's application for a Deposit Order is refused

REASONS

1. This matter comes before me today as an Open Preliminary Hearing conducted by Cloud Video Platform pursuant to an earlier preliminary hearing which took place before Employment Judge Manley on 7 September 2021. In the summary of that preliminary hearing described as a case management summary E J Manley sets out various considerations that need to be dealt with today at this preliminary hearing. Essentially those considerations arise out of applications pursued by the respondent in these proceedings.

History

2. The claimant pursues claims for direct discrimination and victimisation and originally presented an ET1 to the tribunal on 16 September 2020. In that ET1 the claimant pursues a claim for race discrimination. That form contained particulars in a detailed and lengthy narrative.
3. There was an earlier case management preliminary hearing on 2 July 2021 and after that a schedule was sent to the claimant for him to complete, that took the form of what is often known as a Scott Schedule, a table for the claimant to complete particulars relating to his claims. It was explained to him at that time as he was still in employment that he could not bring some of the claims which he sought and there were also jurisdictional issues and a number of claims were withdrawn. At that July preliminary hearing the claimant was ordered to complete the Scott Schedule and also provide further and better particulars which he did at the end of July.
4. Those further and better particulars extended to some considerable length of 16 pages and 101 paragraphs some of which were identical to the particulars of claim in the original pleading but there was also some additional information or allegations which did not appear to be in the original claim. The claimant in his lengthy narrative refers to case law and legal provisions and as Judge Manley sets out it was hard to understand what if anything the claimant was asking to be amended. It was clear therefore that Judge Manley did her very best to isolate what she thought were some 13 allegations that appeared in the claimant's claim and in his further particulars that were produced in July.
5. Pursuant to that the respondent made a range of applications to be addressed by the tribunal and Judge Manley isolated those to reflect that which should be dealt with by me today. Essentially she listed that the following should be dealt with today at this hearing:
 - (i) Consideration of whether amendments are needed so that the allegations numbered 10 to 13 in her accompanying list of allegations can proceed;
 - (ii) Whether the claims or any of them or any part of one of them should be struck out under rule 37(1) of the Employment Tribunals

(Constitution and Rules of Procedure) Regulations 2013 on the grounds that they have no reasonable prospect of success;

- (iii) Whether any allegations or arguments have little reasonable prospect of success and whether a deposit order should be made as a condition of allowing those claims to proceed under rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013; and
 - (iv) Whether any parts of the claims may have been presented out of time including consideration of whether there was conduct extending over a period and if not whether to extend time and the just and equitable basis under s.123 of the Equality Act 2010.
6. Judge Manley then very helpfully set out a list of 13 allegations and essentially the applications before me today deal with allegations 10-13 as highlighted by Judge Manley in her summary. There were a couple of preliminary points to deal with and we were able to deal with those fairly quickly.

Second Claim

7. Pursuant to the last preliminary hearing in this matter the claimant has sought to issue a fresh set of proceedings and those were presented to the tribunal in October 2021. Those proceedings include a claim for unfair dismissal as the claimant is no longer employed by the respondent, he was employed at the time that he issued the first set of proceedings. Without going into detail the second set of proceedings also include various further discrimination claims.

Consolidation of the Claims

8. The point that we were able to deal with quickly is that it seemed to make perfect sense to make an order for consolidation of both sets of proceedings bearing in mind that it is highly likely that both sets of proceedings raise very similar issues of fact and law and are likely to involve the same or similar witnesses and go over much of the same evidence.

Correct Name of the Respondent

9. The second point which was a preliminary point which ordinarily would be easy to deal with is that both of the claimant's claims are issued against Barnhill Community High School, the school that employed him. The respondent asks that the name of the respondent be changed to reflect the partnership which owns that school. There is a partnership which owns three schools and the partnership is called the Middlesex Learning Partnership. I am minded to make an order in those terms and I do so but it is with this caveat that I did not have before me today any evidence of who the claimant's employer was and it would have been helpful to see the contract of employment of the claimant. I make the order that the name of

the respondent be amended to Middlesex Learning Partnership with a caveat that if in due course if it emerges that that is incorrect and that they are not the employer of the claimant then it can be reversed.

10. Turning to the main applications before me today, it is necessary for me to consider the list put together by Judge Manley which appeared in a bundle that was before me at page 140. It is the allegations numbered 10-13 that I am concerned with. I heard submissions from both Mr Leonhardt and from the claimant personally with respect to the allegations.

Application to Amend

11. The first issue to determine is whether it is necessary for the claimant to pursue an application to amend to include allegations 10-13 in that I have to determine whether they constitute additions over and above the original claim which were not on the face of it apparent in the original pleadings. I do consider that the inclusion of 10-13 should be dealt with by way of an application to amend and it was on that basis that I heard submissions from Mr Leonhardt and the claimant in any event.

Allegation 10

12. This is that from 3 July 2020 to 6 November 2020 there was a flawed grievance process and this constitutes victimisation under s.27 of the Equality Act 2010 and direct discrimination under s.13. Mr Leonhardt says that this relates to the grievance process and that it is difficult to discern from the original pleadings that this appears anywhere. He refers me to aspects of the further and better particulars provided in July and very properly directs me to paragraph 56 of the further and better particulars provided by the claimant and he said that it does not appear in the original pleading. Paragraph 56 raises an allegation about the way in which the grievance process was conducted but does not directly indicate that those allegations are allegations of race discrimination and victimisation albeit that the following paragraph at paragraph 57 does mention acts of race discrimination and victimisation but not by specific reference paragraph 56. The claimant says that the two are connected and one follows the other and he was simply referring back to the immediately preceding paragraph 56 when he said that he had been subject to race discrimination and victimisation.
13. Looking at the original ET1 it seems to me also that there is some reference to the failure of the respondent in dealing with the claimant's grievance and some reference to the claims pursued by the claimant at paragraphs 59 and 60 of the original ET1. Mr Leonhardt tells me or submits to me and asks me to consider that it is a big leap to conclude that the claimant is making an allegation of race discrimination and victimisation in the further particulars at page 56 and 57 as on the face of it the two are not connected. I have to consider that first of all and then secondly consider whether that constitutes an amendment which I am prepared to allow. The first point is that I do think that on the face of it in the further and better particulars the claimant was

attempting to indicate that the failures during the grievance process were linked to the following paragraph and that those failures in his claim amount to claims for race discrimination and victimisation and therefore I do consider that by raising that in July requires an amendment. I need to consider whether I am going to allow that amendment to go forward.

14. The law on amendment is governed by authority and I also have to take into account the overriding objective at rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I do take into account that the claimant is unrepresented, and that his claims before this tribunal are homemade. He has clearly spent an awful lot of time and effort putting them together. I do have to take into account that I am duty bound under the overriding objective as far as I can and as far as is reasonably practicable to create a level playing field for both parties in these proceedings. There is also recent authority which tells tribunals that they are duty bound to assist unrepresented claimants in the way in which their claims are framed. Mr Leonhardt quite rightly points out that the tribunal has been pretty generous in that respect so far with the claimant and indeed Judge Manley and the Judge who heard the preliminary hearing in July being helpful to the claimant in trying to assist him in formulating his claim but I must also do the same. I have to have mind to the authorities of Selkent Bus Company v Moore and a very helpful authority of Transport and General Workers Union v Safeway Stores. What those authorities tell me is that I have to look at the type of amendment that I am being asked to consider and there are essentially three types of amendment as follows:
- (i) Amendments which are merely designed to alter the basis of an existing claim but without purporting to raise a new distinct head of complaint;
 - (ii) Amendments which add or substitute a new cause of action but one which is linked to or arises out of the same facts as was in the original claim; and
 - (iii) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim.
15. Looking at allegation 10 and the submissions that I have before me, it seems to me that there is reference in the original ET1 at paragraphs 59 and 60 to the same issue. The amendment that is sought at paragraphs 56 and 57 in the further and better particulars fall into category 2 above being amendments which add or substitute a new cause of action but which are linked to or arise out of the same facts as the original claim. I draw that conclusion because the grievance is clearly mentioned in the original claim and it is absolutely clear to me that one of the claimant's principal planks of unhappiness with the respondent is the way in which his grievance was dealt with Therefore it seems to me that this amendment allegation 10 must be a category 2 amendment and arises out of the same and is linked to the same facts as in the original claim and therefore as it is a category 2 amendment I do not need to consider time limitation issues and I am

therefore duty bound to allow the amendment. So I allow allegation 10 to proceed.

Allegation 11

16. Turning to allegation 11, I once again heard submissions from both Mr Leonhardt and from the claimant. Mr Leonhardt directed me to the only part of the pleadings which he said he could find an allegation which was akin to allegation 11 and allegation 11 says "3 June 2020 to 2 July 2020 Ms Presence carrying out risk assessment in a discriminatory manner, shifting the blame onto the claimant". This is said to be victimisation and direct discrimination.
17. I was directed by Mr Leonhardt to paragraph 65 on page 25 of the bundle in the original ET1 claim and Mr Leonhardt indicated that he could not in any of the other paperwork relating to the first claim being the Scott schedule or the further and better particulars find any reference to the specific claim relating to Ms Presence. I asked the claimant to explain where this appeared in the pleadings and in fact we had a short break of 10-15 minutes to enable the claimant to find it and he could not find it. Looking at paragraph 65 at page 25 this is an extremely vague allegation which in no way is particularised in the way in which allegation 11 appears in Judge Manley's list and therefore in the absence of any further evidence that there is such a claim it seems to me that there is no amendment that is being requested in because I cannot see anywhere in the pleadings where this particular allegation 11 appears. I remove it.

Allegation 12

18. Turning to allegation 12 which is that in January 2021 a worker Mr Gill was granted part time work and part time work was not granted to the claimant and that this is of itself evidence of victimisation and direct discrimination.
19. Mr Leonhardt submitted to me that this did not appear in the original pleadings and indeed it could not because the allegation post dates the original pleading allegedly occurring in January of 2021. It does appear in the schedule that was completed by the claimant but there is no further explanation as to nature of this claim other than its appearance in the schedule. It does not appear in the further and better particulars. It is specified to have occurred in January 2021 and therefore is a fresh claim and it is a fresh claim which was not in the original ET1 and therefore in my judgment it falls to be determined as an application to amend which falls into category 3 of the definition in the authorities that I have already cited namely an amendment which adds or substitutes a wholly new claim or cause of action which is not connected to the original claim at all. In those circumstances it is a new claim. It is a wholly new amendment and could have been included in claim 2 by the claimant but was not. It is manifestly out of time. The Claimant has not persuaded me that time should be extended to validate this new claim and it is therefore refused.

Allegation 13

20. Turning to allegation 13 which is that from 9 July 2020 to 30 April 2021 there was a flawed disciplinary process and this amounted to victimisation and direct discrimination.
21. I was directed by Mr Leonhardt to various parts of the claim where this might have been referred to. He said that the claimant could have included this in his second claim and in fact it seems to me looking at paragraph 69 at page 25 of the bundle it appears in the first claim by reference and therefore it falls into category 2 namely an amendment which adds or substitutes a new cause of action but one which is linked to or arises out of the same facts and I therefore allow allegation 13 as an amendment to go forward.

Strike Out

22. I then had applications before me that were put by Mr Leonhardt relating to other parts of the claims arising out of claims that were isolated in the list put together by the Judge Manley. There are three numbered claims which I am asked to consider in this respect. These are numbers 4, 5 and 7 and the application is put on the basis of rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. That rule 37 tells us that at any stage of the proceedings either on its own initiative or on the application of a party the tribunal may strike out all or part of a claim or response on any of the listed grounds. It is the first ground that I am concerned with today and that is at rule 37(1)(a) that it is scandalous or vexatious or has no reasonable prospect of success and it is the second part of that that I am concerned with. The fact that the claims may have no reasonable prospect of success.
23. All of the relevant authorities on strike out tell us that in discrimination claims which are largely very fact specific, it is very rare to strike out discrimination claims under rule 37. The reason is that in most such cases it will be necessary to hear evidence on those claims to be able to determine whether they had any reasonable prospect of success or not.

Number 4

24. Dealing with the first application which is to strike out number 4 of the allegations which relates to an e mail of 11 February 2021 from Mr San's in response to an e mail from the claimant.
25. I heard from Mr Leonhardt and I saw the email at page 100 and further email exchanges between the claimant and Mr San at page 101. It immediately became apparent that the claimant had misinterpreted the contents of the email from Mr San and it is as a result of that misinterpretation that he raised a claim that this amounted to discrimination. The email was a simple question posed to the claimant and it was the potential answers which are often flagged up as a potential answer to quickly click on and send back which the email server offers the recipient of such an email that caused the

offence which has led to the claimant bringing this particular claim. When asking him about it he admitted that if that was the case he would withdraw allegation 4. He then withdrew that admission. I assured him that in fact those options which were the ones that caused the offence had been placed on there by the server rather than by Mr San. He decided that he was not going to withdraw it.

26. Well I think this is one of the very rare instances where I can strike out a claim on the basis of the documentation before me. It seems to me that on any analysis it is plain as a pike staff that there is no reasonable prospect of that claim succeeding on the basis of the email that was sent by Mr San. Allegation number 4 is struck out.

Number 5

27. Turning to allegation number 5 which is that on 12 February 2021 there was a meeting with Mr Jones where he was unsympathetic to the claimant.
28. This appears at paragraph 44 of the original particulars of the ET1 and talks about Mr Jones' body language and the general unhappiness that the claimant felt as a result of that meeting. Paragraphs 44 and 45 talk in terms of the failure that the claimant sees of the respondent in dealing with his situation and the lack of support coming from Mr Jones who is head of school and Mr San. Reference is made to what he believes is Mr San misleading Mr Jones about an assessment and the general body language shown by Mr Jones towards him. He said when he left the meeting felt betrayed, let down and deeply saddened by aggressive and ruthless tactics.
29. I take the point Mr Leonhardt makes which is that nowhere in those two paragraphs is there anything which appears to tie those actions if proven to the Claimant's race and that there is no connection between the narrative in paragraphs 44 and 45 and a claim for direct discrimination or harassment.
30. Having said that I think the nature of this particular aspect of the claim suggests to me that no decision could be made on whether there is no reasonable prospect of this claim succeeding without hearing evidence from those who were at that meeting namely Mr Jones and Mr San and of course the claimant and that it would not be right for me to exercise my discretion under rule 37(1) and strike out allegation number 5. It seems to me that it is a very fact specific allegation and the facts will need to be teased out in evidence. I must take the Claimant's claim at its highest and therefore I think that claim must survive and does not fall to be struck out under rule 37.

Number 7

31. Turning to allegation 7, allegation 7 is that on 27 April 2020 Mr San invited the claimant to apply for his own post after expiry of a deadline. Paragraph 48 of the original ET1.

32. I had a discussion with the claimant about this and this arises out of the fact that the claimant is unhappy as a result of the fact that there was a competition for the job that he had been doing and that he was invited to apply for it beyond the deadline that had been set out for applications to be lodged.
33. The reason the respondent says he was invited beyond the deadline is that he was off sick at the time and therefore would not ordinarily have known about the deadline but they thought that it was wise to give him the opportunity of applying albeit that the deadline had passed.
34. He said that there was no consistency between the way in which the two jobs were dealt with, one in his department and one in another department. He said the one in the other department was simply handed to person who was currently in situ and he queries why that was not done in his case He also queries why he was not invited to apply until after the deadline when there was plenty of opportunity for the respondent to have invited him to apply within the deadline.
35. So it seems to me that once again we have got evidence that needs to be tested before we could conclude that there was no reasonable prospect of that amounting to a claim for direct discrimination. On the face of it I accept Mr Leonhardt's argument that on the pleadings it is difficult at this stage to see where the connection would be but it may be that that connection can be teased out during the course of evidence and therefore once again I do not think that this is an allegation which falls to be struck out under rule 37(1)(a) and therefore allegation 7 must survive.

Application for a Deposit Order

36. Therefore the only thing that remains for me to determine is an application for a Deposit Order which is being pursued by the respondent. Now this is an application that relates only to those aspects of the allegations in the numbered list that have survived this hearing and it relates only to those allegations appearing in what I will describe as claim one and not claim two.
37. An application for a Deposit Order is governed by the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and appears at rule 39. Essentially a tribunal can make a deposit order which determines that a payment shall be made in to the tribunal so that claims can proceed in circumstances where the tribunal has determined that the claimant's claims have little reasonable prospects of success. Rule 39 tells us that where at a preliminary hearing a tribunal considers that any such specific allegations 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 £1000 as a condition of continuing to advance that allegation or argument.

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38. Now Mr Leonhardt submits to me that all of the remaining surviving allegations in Judge Manley's list fall to be determined as having little reasonable prospect of success and he asks me to make a deposit order so that those can proceed.
39. I have considered this and I have considered the authorities and this matter largely falls within my discretion and I come to the conclusion that this threshold has not been passed. I do not think that I am in a position in light of that which is before me to determine that the claimant's claims that have survived have little reasonable prospect of success. They need to be tested in evidence, there is no obvious connection between the narrative and an act of discrimination but it may become more obvious once that evidence is tested. I must apply a similar albeit lower standard to that applied to strike out application and I have done so and I cannot find myself agreeing with Mr Leonhardt that on the face of it these claims have little reasonable prospect of success. We simply will not know until they are tested and the evidence is heard. For that reason I refuse the application for a deposit order and those claims that have survived the amendment and the strike out applications today must proceed.

Employment Judge KJ Palmer

Date: 11 February 2022

Sent to the parties on: 24/2/2022

N Gotecha
For the Tribunal Office