EMPLOYMENT TRIBUNALS

Claimant: Ms O Akinleye (C1)
Mr A Olumade (C2)

Respondent: Basingstoke and Deane Borough Council

RECORD OF A PRELIMINARY HEARING

Heard at: Bristol **On:** 24th / 25th / 26th November 2021

Before: Employment Judge Cadney

Appearances
For the Claimants: In Person
For the Respondent: Mr S Harding (Counsel)

Preliminary Hearing Judgment

The judgment of the tribunal is that:

i) The claimant C1's application to amend dated 6th November 2018 is granted in respect of allegation a) (See paras 19-22 below);

ii) The claimant C1's application to amend dated 8th February 2019 is granted in respect of allegation a) (See paras 23 - 26 below);

iii) The claimant C2s application to amend dated 6th November 2018 is granted in respect of allegations b) c) d) f) g) (see paras 28-32 below);

iv) The claimant C2s application to amend dated 8th February 2019 is dismissed (see paras 28-32 below);

v) The claimants' application to strike out the responses (tranche 1)is dismissed;

vi) R's application to amend its response is granted;

vii) R's application to strike out some or all of the claims is granted to the extent set out at paragraph 41 below) – C1 allegations 12 and 13 (as set in the Schedules supplied by the claimants during the hearing) are dismissed on the basis that the tribunal has no jurisdiction to hear them.

viii) R's application that some or all of the claimant's claims should be the subject of deposit orders is dismissed.

Reasons

The case came before EJ Midgley on 6th August 2021 when he set the case down for a Preliminary hearing to determine the following issues:

i) Whether the claimant or respondent should be permitted to amend the claim or response (claim numbers 1402852/2018 and/or 1402853/2018);

ii) Whether claim numbers 1402852/2018 and/or 1402853/2018 should be linked with the other claims;

iii) Whether any claim/response or allegation or part of it should be struck out on the grounds that the tribunal lacks jurisdiction to hear the claim as a consequence of s120(7) EQA 2010 (all claims);

iv) Whether a party should be required to pay a deposit to continue to maintain a claim or response or part of it (all claims);

v**)** Whether the claims should proceed on the basis of sample claims and, if so, which claims should be heard first (all claims);

vi) Whether the parties are interested in Judicial Mediation.

Background

1. In order to place the issues in context it is necessary to set out some of the background to the claims. The claimants identify as black African (of Nigeran origin).They have for many years been self-employed taxi drivers in Basingstoke for which the respondent is the licensing body. Although I have heard no evidence the claimants contend that they are currently the only black licenced hackney carriage drivers of a total of approximately seventy seven in Basingstoke although there was previously a third. It is not in dispute that the respondent is a qualification body within the meaning of s53 Equality Act 2010 and all the claims are brought against them in that capacity. The claimants (tranche 1) claims were summarised by Stacey J in the EAT as "..*allegations of discrimination amounting to a continuing state of affairs of creating a hostile environment seeking to make it difficult for the Claimants and to deter them from their ambition to be hackney carriage drivers….and of continuing to impede them and place obstacles in their way once they had obtained their licences."* Almost all of the claims are of race discrimination and/or victimisation save for a small number of allegations of sex discrimination made by C1; the claims in tranche 1 cover a period from 2009 to 2018; and the claims in tranche 2 all relate to events in 2020.

2. The respondent in its skeleton argument has divided the claims into those two tranches, which I have adopted, and which is a useful way of considering them.

Tranche 1

3. Claims 1 (C1 - 1402852/18 making twenty eight complaints from 2011) and 2 (C2 1402853/18 making ninety complaints from 2009) were both submitted on 30th July 2018. The respondent entered responses for both claims simply asserting that the claimants were not employees of the respondent (which it now accepts is not a defence to any of the claims given that they are brought against it as a qualification body). The claimants both made applications to amend in November 2018 and February 2019; and the respondent made applications to amend the response and seeking a strike out and/or the making of deposit orders.

4. Following case management hearings in January and May 2019 the cases came before EJ Gray at a preliminary hearing on 19/20 August 2019. He:

   i) Dismissed all claims prior to 22nd December 2017 as being out of time;

   ii) Gave permission to the C1 to amend in respect of one allegation;

   iii) Dismissed the respondent's application for strike out / deposit in respect of the remaining post 22nd December 2017 claims;

   iv) Gave permission to the respondent to submit amended responses in respect of the post 22nd December 2017 claims.

5. The claimants successfully appealed to the EAT. Stacey J set aside the Judgment dismissing the pre 22nd December 2017 claims; and remitted the claimants' remaining amendment applications for reconsideration by a different tribunal.

6. The issues for me to determine at this hearing in respect of the tranche 1 claims as a result both of the orders of Stacey J and EJ Midgely as set out above are :-

   i) To decide the remaining amendment applications;

   ii) To decide the respondent's application for permission further to amend the response in relation the pre 22nd December 2017 allegations in the light of the EAT decision;

   iii) To determine the respondent's application for strike out/deposit in relation to the pre December 2017 claims (which were not determined by EJ Gray);

   iv) To determine whether the tribunal has jurisdiction to hear the claims (s120 (7) EQA 2010);

v) In addition the respondent submitted that it is not clear from Stacey J's order whether the issue of time limits and/or continuing act remains a live issue (for the reasons given below in my view it does not).

7. Although those tasks are simply stated it is a very substantial undertaking. The parties supplied an agreed bundle of some 500 pages and an authorities / legislation bundle in excess of 600. The original bundle included schedules of the claims in which the claimants had taken EJ Midgely's advice and limited their claims by fifty percent from a total of some 220 to a "sample" of the 110 most significant claims. However in the course of the hearing they withdrew that concession and stated that they wished to rely on all the original claims which resulted in a further bundle of 150 pages being supplied on the second morning. It is fairly astonishing to note that this case has not got beyond a preliminary determination of some points in relation to tranche 1 and that a total of 650 pages contains very few documents beyond the pleadings, schedules and correspondence (some documents relating to the underlying claims were included in the second bundle from the claimants). In the light of this cascade of documents I will endeavour to keep these reasons as brief as is consistent with setting out my conclusions and the reasons for them.

8. Time Points – To take those issues out of order and to deal with the last first; it is clear from Stacey J's order and reasons, in my view, that she considered it clear that the allegation was of a continuing act and that this was an arguable point which would have to be determined at any final hearing. As a result she set aside the judgment dismissing the earlier claims; and this issue was not one remitted to the tribunal to reconsider. In those circumstances in my judgement the issue of time points has been resolved as a preliminary issue and will have to await any final hearing for their ultimate determination.

9. Jurisdiction - The claims are all brought under s53 EQA and the respondent submits that all, or at least some, are caught by s120 (7) .

53 Qualifications bodies

(1) A qualifications body (A) must not discriminate against a person (B)—
(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;
(b) as to the terms on which it is prepared to confer a relevant qualification on B;
(c) by not conferring a relevant qualification on B.

(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification—
(a) by withdrawing the qualification from B;
(b) by varying the terms on which B holds the qualification;
(c) by subjecting B to any other detriment.

(3) A qualifications body must not, in relation to conferment by it of a relevant qualification, harass—
(a) a person who holds the qualification, or
(b) a person who applies for it.

(4) A qualifications body (A) must not victimise a person (B)—
(a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;
(b) as to the terms on which it is prepared to confer a relevant qualification on B; by not conferring a relevant qualification on B.

(5) A qualifications body (A) must not victimise a person (B) upon whom A has conferred a relevant qualification—
(a) by withdrawing the qualification from B;
(b) by varying the terms on which B holds the qualification;
(c) by subjecting B to any other detriment.

(Subsections 6 and 7 relate to disability discrimination and are not relevant to these claims)

120 Jurisdiction

(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—
(a) a contravention of Part 5 (work);
(b) a contravention of section 108, 111 or 112 that relates to Part 5.

(7) Subsection (1)(a) does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal.

In its submissions to the tribunal the respondent contends :

"Under s.120(7) of the Equality Act 2010, the Tribunal has no jurisdiction to hear a claim brought under s.53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of the appeal.

Therefore, if there is a right of appeal by virtue of an enactment against a decision of the Respondent, the Employment Tribunal does not have jurisdiction to hear a claim about that issue. For example, under Part 2 of the Local Government (Miscellaneous Provisions) Act 1976 (LGMPA 1976) any person aggrieved by a decision of a Local Authority to refuse to grant a hackney carriage or private hire vehicle licence, or by any conditions attached to the grant of such a licence, or by the suspension or revocation of such a licence, may appeal to a Magistrates' Court. Therefore, the Respondent respectfully submits that the Tribunal does not have jurisdiction to hear any complaint by the Claimant which relates to those matters."

10. The respondent therefore contends that any complaint in respect of which the claimants would have a right of appeal to the Magistrates Court (in the refusal suspension or revocation of a licence or the attachment of conditions to one) the tribunal does not have jurisdiction.

11. The claimants' essential response, although they make a number of technical points about the application of LG(MP)A 1976, is that their complaints do not relate to any of those matters but to discrimination in the processes of the respondent as applied to them. There is no appeal to the Magistrates or anyone else pursuant to any enactment in relation to those matters and they rely on *Michalak v GMC [2017](UKSC)* and specifically at para 12 which they submit perfectly encapsulates their own position in relation to the respondent. Michalak is not strictly relevant to issue in this case as it concerned the question of whether the availability of judicial review was "in the nature of an appeal" within the meaning of s120(7), whereas in this case the question is whether a direct right of appeal to the magistrates under the LG(MP)A falls within s120(7).

12. In my view, firstly any appeal to the magistrates under the LG(MP)A is necessarily an appeal by virtue of an enactment, and on the face of it falls within the ambit of s120(7). However, and as paragraph 12 of Michalak illustrates it is only a defence if there is a right of appeal against "the act complained of". The question of whether there is a right of appeal necessarily, therefore, turns on the nature of the complaint and the identification of the individual complaint. As a result it is not in my view possible to give a blanket answer as to whether there is or is not a jurisdictional defence in this case.

13. Both for this reason, and for others set out below in relation to the application for deposit orders, I will have to consider each of the two hundred and twenty complaints individually.

14. Agency/Vicarious Liability - The respondent contends that many of the claimants complaints are in reality allegations against other taxi drivers who are also self-employed and for whose actions the respondent cannot bear any vicarious liability; and therefore, section 109(1) cannot apply to fix the respondent with any liability as the other taxi drivers are not their employees.

15. That leaves firstly the possibility that they could be liable under s109(2) if the allegations against the other taxi drivers were both proven factually, and were acts of discrimination, and they were acting as the agents of the respondent. As the respondent is simply a licensing authority there can be no basis for asserting that as a general proposition that the respondent is a "principal" or that taxi drivers were "agents" of the respondent; and it follows that there would need to be some specific evidence from which the tribunal could conclude that the taxi drivers were acting with the authority of the respondent which is a vanishingly improbable assertion and it follows that any such claim should at least be the subject of a deposit order.

16. Secondly the only other way of attaching any liability to the respondent would be via s111EQA instructing causing or inducing discrimination which has the same evidential difficulty. As with the jurisdictional point above this will have to be determined against each of the allegations individually.

17. As is set out below on my analysis of the allegations in fact the claimants are not in fact alleging claims dependent upon the acts of individual drivers (if they were the points set out above would be engaged and in my view any such claim

would have little or no reasonable prospect of success. rather that they were treated differently and less favourably than the other drivers, and if that analysis is correct the points set out above are not engaged.

18. Judicial mediation – At present neither party has expressed an interest in Judicial mediation.

19. Sample Claims – As set out above the claimants have supplied a schedule of sample claims. As set out below I have determined that some claims are suitable for deposit orders.

20. Claimants' Amendment applications- Before dealing with the applications individually as set out below in general terms I bear in mind that irrespective of the outcomes of these applications the claimants have hundreds of allegations in support of the broad case set out above. Whilst I have permitted some of the amendments there is in my judgement very little prejudice to the claimant's in the refusal of the others. Put simply if the already vast body of allegations is not sufficient to prove their claims adding more is unlikely to assist them; and if the existing claims are sufficient adding further examples will not materially alter the outcome. In addition both claimants are seeking to add wholly new allegations of discrimination based on protected characteristics not previously pleaded. Similarly it appears to me that I am entitled to take into account the vastness of the claims they already have to face in determining the degree of prejudice to the respondent in facing wholly new factual and legal claims by way of amendment.

21. First Claimant- I will deal firstly with C1s amendment applications. By a letter dated 6th November 2018 the claimant applied to amend to add the following claims:

    (a) Addition of immigration check on 06/06/2017
    (b) BDBC no longer controls the rank 17/10/2018
    (c) Protected disclosures from March 2016 - October 2018

22. To take the applications in reverse the respondent contends that (c) should not be permitted for a variety of reasons. Firstly it does not set out any of the alleged disclosures and/or detriments and is insufficiently particularised; and secondly it is bound to fail as by definition the claimants are neither employees nor workers of the respondent within the meaning of the Employment Rights Act 1996. They are simply self-employed individuals licensed by the respondent to drive hackney carriages and have no standing to bring a whistleblowing claim. I my judgement this must be correct and there is no purpose in permitting an amendment to pursue a claim which is bound to fail.

23. In respect of (b) the respondent contends that it should not be permitted as it does not on its face make any allegation of discrimination and/or not one within the jurisdiction of the employment tribunal, and/or that it is in any event incomprehensible. The second point is in my judgement the most compelling. The respondent contends is sued in its capacity as a qualification body. In that capacity and exercising those powers it does not and never has "controlled the rank" and did not cease to do so on 17th October 2018. If and to the extent

BDBC does control the rank by virtue of any other power it is not related to its activities as a qualification body and this claim would in this litigation be bound to fail in any event. Again it appears to that this must be correct.

24. In respect of a) this is a further claim which falls squarely within Stacey J's description of the claimant's claim and is a new factual allegation in relation to claims which are already before the tribunal. I my judgement there is very limited prejudice to the respondent in permitting this amendment which will be granted.

25. The second application was made on 8th February 2019 in which the claimant applied to add the following claims;

a) 01/10/18 Letter stating last DBS Enhanced Disclosure is dated 15/07/2014 **(25)**

(b) 06/06/17 Immigration check **(26)**

(c) 03/10/18 Admission by Respondent that its policies are advisory and not enforceable meaning longer controls the rank **(27)**

(d) 13/10/18 Respondents failure/refusal to investigate and enforce matters relevant to licence byelaws and conditions **(28)**

(e) 22/02/16 Assault caught on camera being basis for declaring vehicle unsatisfactory **(24)**

26. A) appears to me on the face of it to be simply a statement of fact. However, in the Schedule the details state that in fact the last DBS update was on 25th July 2017, and it appears to be an allegation that this was a deliberate act on the part of Mr Draper. This appears to fit squarely within Stacey J's description of the claimants' overall claims and I can see little prejudice to the respondent in permitting the amendment .

27. Allegations b) and c) are a repetition of the applications already made in the November application and are dealt with above; and d) is in effect another example of not an allegation of not properly controlling the rank which is bound to fail for the same reason set out at paragraph 21 above.

28. E) is a difficult allegation to follow. In the schedule the claimant states that C2 was assaulted on 19th February 2016 which was caught on CCTV in C1's vehicle. She complains that a letter about CCTV installation on 22nd February 2016 and appears to suggest that the letter was withheld from her "So that I cannot defend myself.." However she does state that her vehicle was declared unsatisfactory "due to convictions based on the evidence provided by the use of CCTV". However she also states that the allegation is that she has been treated less favourably "based on my relationship with Mr Olumade". This is clearly a wholly new allegation of marriage or civil partnership discrimination. different allegation to that set out above. The application is made some three years after the incident complained of and seeks to introduce a wholly new claim both legally and factually. In my judgement in respect of this application the prejudice

to the respondent does outweigh that to the claimant of refusing the application and I do not exercise my discretion to permit it.

29. Second Claimant- C2's first application to amend was made on 6th November 2018. He applied to amend to add claims of:

(a) Private Hire Driver Test failure around 21/12/09 - January 2010
(b) BDBC lost medical record on 23/03/2017
(c) DBS update issue 11/05/2017
(d) Immigration check on 11/05/2017
(e) BDBC no longer controls the taxi rank 17/10/2018
(f) Relabelling in Old issues No 45 (18 December 2018 to 2017)
(g) Chronology in Old Issues - No 23 and 24 swapped
(h) Protected Disclosures from 29 October 2009 to 26 September 2018

30. In respect of a) this appears to me to be a licensing issue to which an appeal would lie to the Magistrate's Court in the refusal to grant a license and the tribunal would not have jurisdiction in any event. Even if that is incorrect in my judgment the prejudice to the respondent of having to call evidence as to the failure of a driving test which took place ten years earlier clearly outweighs the prejudice to the claimant in the refusal of the application.

31. B) and c) appear to be allegations, similar to that of C1 at para 25 above. B) s an allegation that the respondent deliberate and falsely alleged that it had not received a medical report which it in fact had; and c) is effectively identical to C!'s complaint. These also appears to fit squarely within Stacey J's description of the claimants' overall claims and I can see little prejudice to the respondent in permitting the amendment. D) alleges conducting an illegal immigration check and falls into the same category and is allowed for the dame reasons as set out in paragraph 23 above. .

32. F) it is simply the correction of an error in a date and I can see no reason not to permit it, and (g) does not require any amendment as it simply involves re-ordering a chronology.

33. In respect of e) and h) exactly the same considerations apply as above and these applications are bound to be dismissed.

34. C2s second application was also made on 8th February 2019 when he applied to add claims of:

(a) - 21-Dec-09 - Between 21 December 2009 and 12 January 2010, I sat the Private Hire Driver License twice.
(b) - 25 February 2017 & (5 March 2017 should be [15 May 2017])
(c) - 23-Mar-17 - The Respondent asked me to submit a medical report.
(d) - 11-May-17 - The Respondent states that my last disclosure was dated 16 June 2014.
(e) - 11- May 2017 to 06-Jun-17 - I was at the council to complete the immigration check.

(f) - 23-Mar-18 - Respondent insensitive to my Christian faith. Persistent n asking question based on my faith, even when I have explained it to the interrogators

(g) - 01-Oct-18 - Publication of unlawful Taxi condition responsible for creating a hostile environment for African HC drivers at the ranks:

(h) 7-Oct-18 - BDBC no longer controls the taxi ranks.

"**Type and details of claim** ".

(a) I was discriminated against on the grounds of: **RELIGION**

35. There is a fundamental difference between this application and the others in that it is an application to add a wholly new claim of discrimination of the grounds of the protected characteristic of religion and belief (the claimant's Christian faith). No such claim as previously be brought so these are on the face of it wholly new claims legally. For the reasons set out above in the context of this case there is very significant prejudice to the respondent not simply legal claim and I am not persuaded that to permit the amendment is the appropriate exercise of my discretion.

Claimants' Application to Strike Out the Response/ Respondent's application to submit an Amended Response

36. These two applications may be taken together as they arise out of the same point. As set out above the respondent's initial response defended the claims on the basis that the claimants were not employees. It is accepted that this is not a defence to the claimants' claims. The claimant's assert that in consequence the response should be struck out and the respondent effectively debarred from defending the claims. The respondents seek permission to serve an Amended Response.

37. In the circumstances of this case in my judgement it would clearly not be in the interests of justice to prevent the respondent from defending the claims. In any event EJ Gray has already given permission to serve an amended response to the post December 2017claims and in reality all that is required is permission to lodge an Amended Response to the pre December 2017 claims which have been restored by the order of the EAT. IN my judgement it is in no one's interests to refuse the application given that it will assist both the claimants and tribunal to understand the points in dispute. Without it there would be no way of identifying the issues going forward.

38. Accordingly the claimants' application is dismissed and the respondent's granted.

Jurisdictional Strike Out / Deposit Orders –

39. As set out above in my view these matters have to be considered against each of the individual allegations which I have done below and which has proved an extremely time consuming exercise. The references are to the full schedules as set out in the second bundle supplied by the claimants, cross referenced where necessary to the claims in the reduced schedules in the original bundle. In addition to the matters set out above part of the respondent's

application for deposit orders is to focus the claim. They observe with some justification that the claimants have simply catalogued all the matters about which they make any complaint irrespective of whether they even arguably raise any allegation of discrimination, and that the only way of focussing the claims is for the tribunal itself to identify those claims which in reality have little reasonable prospect of success.

40. I have approached this by attempt to identify those claims in respect of which there may be a jurisdictional issue; those claims which appear in reality to be allegations against fellow drivers; and finally to see if there is some way in which the remaining allegations can be conveniently grouped together so as to focus he claims.

Jurisdictional Issues

41. The jurisdictional issue is that set out at paras 9-13 above. Having been through all the allegations there are only two which appear to me to fall into this category:

C1:
i) Allegation 12 – The licensing of the vehicle for 7 passengers.
ii) Allegation 13 – This appears to me in fact simply to be part of the factual matrix surrounding allegation 12.

Deposit Orders

42. The essence of the respondent's application is that the claimant's claims are unfocussed, and they have simply listed every event during the period covered by the claims and about which they are aggrieved and labelled them as acts of discrimination without identifying any basis for doing so.

43. The difficulty in my view is that, onerous as it may be, the only way of determining that will be at a hearing. The overall basis of the claimant's claims is that they have consistently been treated less favourably than white colleagues and that whilst here may on the face of it be an explanation for each incident that the whole picture has to be seen for the discrimination to be seen. This may be right or it may be wrong but it does not appear to me to be possible at this stage to identify any particular claims that have little reasonable prospect of success.

Complaints against Other Drivers

44. In my judgement the claimants that on the face of it rerated to the conduct of other drivers are at least arguably allegations that they were treated differently from other drivers.

Sample Claims / Claims Grouped Together

45. As set out above one of the purposes of this hearing was to identify sample claims. The claimants had in fact already done that but, as is set out above, withdrew that concession during the hearing. However it is in my view at least

possible to group some the claims by type or event which I have attempted to do below . As advised by EJ Midgely if the volume of the claims could be reduced that would be of benefit to everyone, not least the claimants themselves.

46. I have set out briefly below three of the main factual events which relate to claims brought by both claimants and which appear (at least to me) to encapsulate their complaints. It may be sensible for the claimants to consider these allegations in particular and to assess whether they would be happy for those claims to be determined first. That would at least allow both parties and the tribunal to focus on a limited number of factual allegations.

47. Reading BC incident February 2016 – C1 Allegations 4/5/6 - C2 allegations 7/8/12/13/14/15.

48. Ashwood Academy- 22nd December 2017 – C1 allegations 14/15 C2 allegations 52 -69 (and possibly 70/71)

49. Pace Interview - 23rd March 2018- C1 paras 17 -23 / C2 allegations 72 – 81.

50. I have given directions below for the provision of the Amended Responses and for a further TPH to give further directions.

Employment Judge Cadney
Date: 31 March 2022

Sent to the parties: 04 April 2022

For the Tribunal Office