EMPLOYMENT TRIBUNALS

Claimant: **Mr D Godfrey**

Respondent: **Prospect**

Heard at: **London South Employment Tribunal (by CVP)**

On: **24.05.2022**

Before: Employment Judge Dyal

Representation:

Claimant: in person

Respondent: Ms Sidossis, Counsel

JUDGMENT

1. The Claimant has permission to amend the claim form to include the complaints as articulated in the further particulars of claim dated 30 June 2021.

2. The claims have more than little reasonable prospect of success. Accordingly they are not struck-out or made subject to a deposit order.

REASONS

Introduction

1. The matter came before the tribunal to consider the Respondent's applications to strike-out parts of the Claimant's claims.

2. *Documents before the tribunal*:

   2.1. Claimant's hearing bundle;
   2.2. Respondent's hearing bundle;
   2.3. Claimant's written submissions, authorities, EHRC Code of Practice.

Law

3. By rule 37 (1) (a) the tribunal has a power to strike-out a case or part of case if it has no reasonable prospect of success. This is a draconian power that must be exercised carefully.

4. To begin with the claim under consideration should be properly clarified before it can be struck-out, certainly if there is any issue about what it is that is complained of. In ***Cox v Adecco*** [2021] ICR 1307 HHJ Tayler said this:

> *30. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success'*

5. Cases should not, as a general principle, be struck out on when the central facts are in dispute. There are limited exceptions to this principle, none of which begin to apply here (see e.g. ***Ezsias v North Glamorgan NHS Trust*** [2007] EWCA Civ 330, [2007] IRLR 603, [2007] ICR 1126; ***Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly*** [2012] CSIH 46, [2012] IRLR 755.)

6. Central facts include not only issues such as what happened but also *why* they happened (this is obvious but if authority is needed see e.g. ***Romanowska v Aspirations Care Ltd*** UKEAT/0015/14.)

7. Upon a strike-out application of this kind, the Claimant's factual case should be taken at its reasonable highest (see e.g. ***Cox***).

8. All of these principles apply with the greatest force in discrimination claims because there is a particular public interest in them being heard. As Lord Steyn said ***Anyanwu v South Bank Students' Union*** [2001] IRLR 305:

> *"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."*

9. In ***Mechkarov v Citibank*** NA UKEAT/0041/16, [2016] ICR 1121, Mitting J summarised the law as follows at [14]:

> *(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.'*

10. By rule 39 the tribunal has a power to order a deposit in relation to any specific allegation or argument in a claim or response that has little reasonable prospect of success. This is a lower threshold.

11. In ***Van Rensburg v Royal Borough of Kingston-Upon-Thames***, UKEAT/0096/07 at [24 – 27], Elias P (as he was) made clear that when applying the 'little reasonable prospect' test the tribunal is not limited to legal matters alone. Elias P also made clear that there was more scope for exercising the power to order a deposit because of the improbability of essential facts being established than when exercising the power to strike out for that reason. For instance, he said:

> [27]… *the tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of a party being able to establish the facts essential to the claim or response.*

12. The substantive complaints in issue here arise under:

    12.1. In the case of direct sex discrimination, s.13 Equality Act 2020. The provisions in relation to comparators (s.24) and the burden of proof (s.136) are also in issues.
    12.2. In the case of part time worker discrimination, the claim arises under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('Part-Time Regs'). Regulations 2, 5, 6 and 8 are of particular relevance.

Discussion

13. By an application dated 2 June 2021 and a further application dated 13 January 2022 the Respondent applied to strike-out parts of the Claimant's complaints namely those of part-time worker discrimination and sex discrimination.

14. In part in response to that first application and also upon the orders of Employment Judge Sage, the Claimant gave further particulars of his claim. These must be read together with the very detailed particulars of claim attached to Form ET1. The further particulars clarify the sex discrimination and part-time worker discrimination claims. Arguably they, in part, seek to elevate some matters that were identified as mere background in the Particulars of Claim into allegations of unlawful acts. The Respondent initially took a pleading point to this effect today. In response the Claimant denied that permission to amend was

required but applied to amend in the terms set out in the Further Particulars of Claim if permission were required. I gave the Respondent time to consider that application and it very sensibly and fairly indicated that on reflection it consented to the application to amend because it was at most a relabelling exercise. I allow the application by consent and it is not necessary to decide whether permission to amend was strictly needed.

15. The Respondent in any event had indicated by a the letter dated 10 January 2022 that it pursued the application to strike out notwithstanding the Further Particulars, and, Ms Sidossis pursued the application today. She sought a deposit order in the alternative.

16. I will deal with the main submissions as I understood them and explain why I ultimately do not accept them.

17. Ms Sidossis rightly acknowledged the high bar that must be surmounted before a discrimination claim is struck-out. However, she submitted that this was a claim in which the core facts were not in dispute. This was because a good deal of what the Claimant alleges of the facts and the chronology in the Particulars of Claim is accepted. However, I pointed out that there did seem to be a dispute as to core factual issues including the reason why certain things happened. The Claimant's case is, to put it simply and in a nutshell, that if he had been a woman he would have been allowed to work the Senior Helpdesk Advisor role and/or the MCC Legal Advisor Role on a part-time basis. However, since he was a man he was required to undertake those roles full-time if at all. It seemed to me that the Respondent did not accept those matters at all, that they were factual issues and that they were core. I suggested to Ms Sidossis that the Respondent's position in reality was that much of the factual background was not disputed but that the core facts were. She accepted this as realistically she had to.

18. This is, in my judgment, a case in which the core facts are in dispute. Further it is not a case on which there is any basis upon which I could at this hearing decide those facts or assess the Claimant's chances of proving them as having no or little reasonable prospect of success.

19. Ms Sidossis did take me to the Respondent's letter to the Claimant of 6 March 2020 in which it answered the request that he made pursuant to regulation 6 of the Part-Time Worker Regulations. She submitted that this showed that the Claimant's case was ill-founded and that the treatment of him was justified on objective grounds. The difficulty is that there are factual disputes about the justification offered in that letter. Indeed, in his Particulars of Claim the Claimant gives a detailed explanation as to why the matters set out in the Respondent's letter of 6 March 2020, far from justifying the treatment complained of, support an inference of discrimination. I am in no position today to decide that issue one way or the other – it is simply a question of fact and judgment for trial having heard the evidence.

20. Ms Sidossis also submitted that the Claimant had done nothing more than assert discrimination and had not made a prima facie case of it. I do not think that is a fair analysis. Firstly, the Particulars of Claim do more than most pleadings to

actually explain some of the bases on which the tribunal at trial will be invited to draw inferences of discrimination. This is done with sufficient cogency to answer the 'mere assertion' point. Secondly, the Claimant does not have to satisfy the tribunal *now* that there is a prima facie case of discrimination. The burden of proof is something that applies at trial following the evidence. For the present, I need to be satisfied that the case is not a mere assertion of discrimination and I am. The case is well-reasoned albeit that I can also so major hurdles between the pleaded claim and the claim ultimately succeeding. Whether those hurdles will be surmounted I do not know but nor do I need to know at this stage.

21. There was some criticism of the choice of comparator in the sex discrimination claim, namely Ms Cusack. It was suggested that the true comparator was a man – namely the person appointed to the role, making the claim unsustainable. There are indeed some real issues here but they are issues for trial not for summary disposal of the case nor a deposit order. Firstly, it may be that Ms Cusack is not a proper actual comparator - I see initial force in the Respondent's points about that, but if she is not, I also see force in the Claimant's point that she may in that case be an evidential comparator. Secondly, the Claimant relies in the alternative upon a hypothetical comparator so Ms Cusack is not essential. Thirdly, the Claimant's case is that a woman would not have been required to undertake the role full-time but that a man would and he was. He has set out a fairly detailed basis for this submission (all evidential points). There is a good reason therefore why the most relevant comparator *may not* in this case, in this context, be the person that actually got the job (a man who worked full-time). These are all interesting arguments for trial.

22. Ms Sidossis initially took a point in relation to the comparators in the Part-Time Regs claims. However, to be fair she did not pursue them and it would appear that the comparators identified are relevant comparators for the purposes of reg. 2.

23. Finally, Ms Sidossis submitted that the Claimant had indicated that he was prepared to work full-time if the job was at Grade E and that he refused because it was at Grade F. Thus, she submitted, that money rather than part-time/full-time status was the real issue. In my view, that is an evidential point for trial not a basis for summary determination or a deposit order. I do not think that a person needs to show that there are no conditions upon which they would be prepared to work full-time before they can properly complain of part-time worker discrimination. No doubt in some cases where the incentives to work full-time are great enough, a worker can overcome the obstacles to full-time work but not otherwise. The significance of this for the particular case is in my view fact sensitive and a matter for trial.

Conclusion

24. Overall, this is a case which based on current information, I think has more than little reasonable prospect of success. However, I do emphasise that that is a low standard and nobody should confuse it with me saying that I think the case has good prospects. I say nothing at all more on prospects than that I consider them to be better than "little reasonable prospect of success".

Employment Judge Dyal
Date 24 May 2022