EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110423/2021

Preliminary Hearing held remotely by Cloud Video Platform on 21 June 2022

Employment Judge A Kemp

Ms B Burgyan	**Claimant** **In person**
Nexus Workforce Ltd t/a Flow Logistics	**Respondent** **Represented by:** **Mr J Meehan,** **Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal (i) refuses the respondent's application under Rule 37 for a strike out of the Claims of discrimination under sections 13 and 26 of the Equality Act 2010 and (ii) refuses the claimant's application for strike out of the Response.

REASONS

Introduction

1. This is a further (fourth) Preliminary Hearing to address applications for strike out and follows that on 21 April 2022. It was conducted on a similar basis to that hearing.

Submissions

2. Mr Meehan argued in effect that the claimant was acting vexatiously (he argued that it was an abuse of process) in pursing the claims when emails that had been sent indicated that if an invoice and deposit were paid, that would resolve the matter. He also argued in effect that he was unaware of the nature of the discrimination claims against his company, such that they had no reasonable prospects of success.

3. The claimant's position in general terms was that she had not been paid the full deposit, which she said was £500, not the £300 the respondent alleged, and denied, in effect, that the claim was vexatious. She said that the claim for sex discrimination was based on the conduct towards her of Paul Bryant, and then the failure of her manager Lubomir to address it, and his failure to support her. She confirmed that there was no other basis to that claim. There was a discussion as to her claim for race discrimination, and I explained that what she alleged to be unreasonable conduct was not sufficient in law, there required to be some basis to connect the treatment with her protected characteristic being her Hungarian nationality. I gave her until 4pm on 23 June 2022 to provide further detail of that. She did so by email. In brief summary she alleges that she was not treated the same way as Scottish drivers, was given less beneficial routes, such that she was not able to complete them as others were able to do on their routes. It appears that she argues that that was deliberate. She also sought a strike out of the respondent's Response on the basis that the documents had not been compiled in an Inventory and that was a breach of the order.

The law

4. This is largely but not completely as set out in the last Note, but is repeated, with amendments, for ease of reference. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

> "2 **Overriding objective**

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

(i) Strike out

5. Rule 37 provides as follows:

> "**37 Striking out**
>
> (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 prospects of success……
>
> (c) for non-compliance …..with an order of the Tribunal……."

6. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In ***Hassan*** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit' (paragraph 19).

7. As a general principle, discrimination cases should not be struck out on the grounds of no reasonable prospects of success except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 24:

> "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."

8. Lord Hope of Craighead stated at paragraph 37:

> " … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

9. The Tribunal requires to consider all the material available to it when assessing the issue of strike out. As the EAT explained in ***Balls v Downham Market High School and College [2011] IRLR 217***:

> "I would add that it seems only proper that the Employment Tribunal should have regard not only to material specifically relied on by parties but to the Employment Tribunal file. There may, as in the present case, be correspondence or other documentation which contains material that is relevant to the issue of whether it can be concluded that the claim has no reasonable prospects of success. There may be material which assists in determining whether it is fair to strike out the claim. It goes without saying that if there is relevant material on file and it is not referred to by parties, the

> Employment Judge should draw their attention to it so that they have the opportunity to make submissions regarding it but that, of course, is simply part of a Judge's normal duty to act judicially."

10. The EAT more recently emphasised the need for a tribunal when considering an issue of strike out on the basis of no reasonable prospects of success 'roll up its sleeves' to interrogate the papers and determine whether an arguable case exists even if not clearly pleaded, ***Cox v Adecco [2021] ICR 1307*****.** Whilst that concerned the issue of no reasonable prospects of success, similar considerations do I consider arise when assessing the issue of breach of orders, in particular the second stage as to the exercise of discretion.

Discussion

11. I take into account that the claimant is a party litigant for whom English is a second language. It appears to me that there is, just, sufficient set out for the cases of discrimination to proceed. In essence the claimant argues that she was treated inappropriately by a colleague, and insufficient was done to address that. That is potentially at least on the basis of her sex, and a case that is adequate to proceed to a final hearing. The discussion at the last hearing will have given the respondent an indication of what is being argued, so that it has fair notice of that and can prepare for the hearing. So far as the claim on the basis of race is concerned whilst what is stated is not as clear as it might be, again I consider that there is sufficient. The test for a strike out is a very high one, as the case law makes clear. The respondent again in my judgment has fair notice to enable it to prepare for the hearing. The claimant argues that the allocation of routes was deliberately designed to be difficult for her, more so than for others. The respondent can give evidence as to how routes were allocated, and on what basis decisions were taken.

12. So far as the claimant's own claim for strike out is concerned I explained during the hearing that I did not accept the argument she made. It was clear from the email exchanges that Mr Meehan did not understand what documents the claimant wished to be provided in the Inventory, and I shared at least some of his difficulties. It was only when the hearing took place that the claimant clarified which emails had documents she wished

to include. He had set out his position in a manner that meant that it was not proportionate to strike out his response. The claim may or may not have merit, and as there is a public interest in having the claim heard so there is also a public interest in having the response to that heard.

13. I have therefore refused both applications

14. I would also record that I was concerned at the claimant's command of English being sufficient for the hearing and she accepted the suggestion that a translator be engaged. That will be arranged. I also record that the documents for the hearing remain not yet finalised. If the claimant wished to provide more than those in the emails she referred to during the hearing that required to be attended to by 4pm on 23 June 2022. Thereafter the respondent should complete the Inventory as soon as possible but I encouraged the parties to seek to agree that, avoiding duplication or irrelevant documents, and agreeing the text of WhatsApp or similar messages so that they were easily legible. The documents should be finalised and sent to the Tribunal in accordance with the case management orders granted earlier.

Employment Judge: **A Kemp**
Date of Judgment: **24 June 2022**
Date sent to parties: **24 June 2022**