



EMPLOYMENT TRIBUNALS

Claimant: Mr L Johnston

Respondent: Telecom Service Centres Ltd T/a Webhelp UK Trading

HELD at Hull by video (CVP)

ON: 9 September 2022

BEFORE: Employment Judge Miller

REPRESENTATION:

Claimant: In person

Respondent: Mr A Maxwell, Solicitor

JUDGMENT in the respondent's application to strike out the claimant's claim and the **CASE MANAGEMENT ORDER** amending the claimant's claim and refusing the respondent's application for a deposit order having been sent to the parties on 9 September 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The respondent made an application to strike out the claimant's claims as having no reasonable prospects of success, or, in the alternative, that the claimant be required to pay a deposit to continue his claim on the grounds that it has little reasonable prospects of success and the claimant applied to amend his claim to a claim to one of indirect race discrimination.
2. I heard all applications – the application to amend first, followed by the respondent's application to strike out the claimant's claim or for a deposit to be paid by the claimant in the alternative.

Amendment application

3. The claimant's claims were identified by EJ Drake at a preliminary hearing as being for direct discrimination only. The claimant says that either there was a claim for indirect discrimination in his claim from the outset or, in the alternative he seeks to amend his claim, on the basis of the same facts pleaded in this claim form, to include a claim for indirect discrimination.
4. In identifying the claims brought by the claimant I need to look at the ET1. This is the document that sets out the claim. While a list of issues identified in the case management hearing is a useful tool and often the best place to identify the claims, the Tribunal is not bound by it.
5. The claimant's claim form is brief because the facts are limited. IN summary, he says he applied for a job with the respondent and then, in a telephone interview, the interviewer discovered he was based in Northern Ireland and terminated the interview. He concludes by saying "I believe I was discriminated against on the grounds of nationality and being excluded for applying for this job." He does not specify in the claim form if he is claiming direct or indirect discrimination.
6. The case management summary of Employment Judge Drake does record that the claimant is making a complaint that he has been subjected to direct race discrimination and elsewhere, as part of an Order, it records that the claimant confirmed he was bringing a claim of direct discrimination. The claimant disputes that he agreed this and Mr Maxwell said in submissions that the claimant did in fact refer to the case of *BBC v Souster* (*BBC SCOTLAND v SOUSTER* - [2001] IRLR 150). The case, Mr Maxwell said, relates to indirect discrimination. The claimant says he asked if he had to bring the claims direct or indirect but did not get an answer so he was making enquiries he says rather than agreeing to what was said.
7. I cannot go behind the Order of Judge Drake. I have therefore considered the claimant's claim form as set out and whether that does initially include a claim of indirect discrimination and if not whether it should be amended to do so. I have considered the balance of prejudice and hardship in allowing or refusing the claim and the three tests set out in **Selkent Bus Company v Moore** 1996 ICR 836.
8. The question of whether the claim includes a claim of indirect discrimination is addressed as part of the test of the balance of prejudice and hardship. Particularly, is the prejudice to the claimant in not being allowed to now bring a claim that is (potentially) included on the face of his claim despite what is set out in the case management summary greater than the prejudice to the respondent in having to answer that claim?
9. Addressing the three *Selkent* tests, the first one is the nature of the amendment. The claimant does not seek to expand on the facts on which he relies in his pleaded claim. He says he was discriminated against on the grounds of nationality. That could obviously encompass direct or indirect discrimination. In my view the claim is simply being relabelled as an indirect discrimination rather than direct on the facts that are already set out in the claim form.

10. To the extent that additional information might be argued to now be being provided, including the identification of the provision criterion or practice (PCP), in my view all those matters are implicit from the claim form and from the response. The obvious PCP being alleged to apply is that the respondent does not employ people who are based in Northern Ireland.
11. The second *Selkent* test is about the timing and manner of the application. The claimant did wait until four weeks after the case management order was sent to make his application. However that the claimant's explanation was that it was only when reviewing it for the purposes of this hearing and obtaining advice or doing his own research that he realised what had happened. I note the order also does not require, as is common, that the claimant must write within 14 days of the order being sent out if he does not agree with the issues set out therein. The manner of the application is that it is clear and precise as was the way the claimant made his submissions to the tribunal. In my view the manner and timing of the application was wholly reasonable.
12. In respect of the statutory time limits, again it is my view that the claim of indirect discrimination appears to be discernible from the facts set out on the face of the claim. The claim was therefore brought in time.
13. As Mr Maxwell helpfully agreed, at this stage there is no real additional prejudice to the respondent in allowing the amendment beyond having to deal with the claim which might otherwise have disappeared on the strike out of the direct discrimination claim. Conversely the prejudice to the claimant arises from having no claim if the direct discrimination claim is struck out. In this case the prejudice to the claimant is significant.
14. In addressing the balance of prejudice I refer also to the merits of the claim. This is a complex case as the arguments before me today identified. There are arguments about the identification of a pool of comparators to be considered in an indirect discrimination claim. I refer to the case of **Naeem v Secretary of State for Justice** [2017] UKSC 27 about the potential for justification; the complex issues of the common travel area; and possibly, although no one raised this and I didn't hear any argument about it, the Northern Ireland protocol. It also raises difficult issues about cross-territorial remote working generally which are likely to arise in many cases and as far as I am aware are as yet unresolved.
15. In light of these complex arguments, I certainly cannot say at this stage that the claim has little or no reasonable prospect of success or it is so unmeritorious that it provides significant prejudice to the respondent in having to incur costs in dealing with an obviously hopeless case. For these reasons the prejudice to the claimant in not being allowed to progress the indirect discrimination claim outweighs the prejudice to the respondent in having to deal with the claim it was always facing albeit under a different label.

Strike out application/application for a deposit order

Indirect discrimination

16. The respondent maintained its application to strike out/deposit the claimant's claim if it was amended to be an indirect discrimination claim. Initially, Mr Maxwell did not dispute the claimant's application to amend his claim to

indirect discrimination on the basis that he thought it would make no difference to the overall merits of the claimant's claim, because of the pool of comparators that would apply. When I raised the suggestion that the pool of comparators might itself be a matter of argument, Mr Maxwell did make submissions objecting to the amendment.

17. I understand the claimant's claim to be as follows. The respondent had a PCP of not employing people who live in Northern Ireland. This subjected people of Northern Irish nationality to a particular disadvantage compared to other people who live in the UK as, if a job applicant is Northern Irish they are more likely to be prohibited from working with the respondent on the basis that they are more likely to be living in Northern Ireland.
18. The claimant was subjected to that disadvantage, he says, on 31 January 2022 and in fact that is not disputed. The respondent disputes the pool of comparators as the UK but says they will say that the appropriate pool is people who live in Northern Ireland. They also say, or will say, that they have a legitimate aim of ensuring employees are afforded appropriate employment rights on the basis of where they live, and that not employing people in Northern Ireland is a proportionate means of achieving that aim on the basis they have no knowledge or experience of Northern Irish Employment Law.
19. So this means that the issues to be decided in this case will include the correct pool of comparators, the differences in employment law (or at least there will be arguments about its scope or relevance), what law applies for remote workers working in a different territorial jurisdiction, the applicability of the common travel area agreement and potentially any other international; agreements and whether the respondent's PCP is a proportionate means of achieving their asserted legitimate aim. This isn't intended to be an exhaustive list, there are likely to be other issues that come up as well.
20. I cannot therefore say that the claimant's case on indirect discrimination has little or no reasonable prospect of success. Taking the claimant's claim at its very highest, he appears to have some not insignificant prospects of succeeding. The respondent's application to strike out the claimant's claim under rule 37 as having no reasonable prospects of success is unsuccessful and is refused. The respondent's application that the claimant be required to pay a deposit to continue his claim under rule 39 on the basis that it has little reasonable prospects of success is also refused.

Direct discrimination

21. In respect of the claimant's direct discrimination I do strike out the claimant's claim as having no reasonable prospects of success. The claimant's claim is that he was treated less favourably because of his nationality. The claimant describes his nationality as Northern Irish. The respondent agrees that they do not recruit people who live in Northern Ireland but say that this applies to all people who live in Northern Ireland, not just Northern Irish people. The reason they say for the treatment of the claimant was because of where he lives not his nationality.
22. When the claimant was making submissions about this he effectively set out the elements of the claim for indirect discrimination. This isn't a criticism of the claimant. For the reasons I have already set out above the claim of

indirect discrimination is coherent and makes sense. But it does identify the difficulty the claimant has with a claim of direct discrimination.

23. There is no reasonable prospect in my view and on the basis of the parties' cases of the claimant showing that the reason for his treatment was because he was Northern Irish rather than because he happened to be living in Northern Ireland. Particularly, I have heard nothing to suggest the claimant would be able to show that non-Northern Irish people living in Northern Ireland have been recruited or that Northern Irish people living in Great Britain have been refused to be recruited. Taking the claimant's case for direct discrimination at its highest therefore the facts that he set out in this claim form do not evidence direct discrimination. For these reasons the claimant's claim of direct discrimination is struck out as having no reasonable prospects of success.

Employment Judge Miller

28 September 2022