EMPLOYMENT TRIBUNALS

Claimant: **Miss A Adegbite**

Respondent: **London Road Surgery**

Heard at: **East London Hearing Centre (by telephone)**

On: **12 September 2022**

Before: **Employment Judge Tegerdine**

Representation
Claimant: In person
Respondent: Mr Kennedy (Counsel)

JUDGMENT having been sent to the parties on 28 September 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. An open preliminary hearing by telephone took place on 12 September 2022. The purpose of the hearing was to consider whether the claimant's claim should be struck out on the basis that it had no reasonable prospect of success, whether a deposit order should be made on the basis that the claim had little reasonable prospect of success, and to make case management orders for the future management of this case in the event that the claim was not struck out.

2. An agreed bundle of documents was provided to the Tribunal for the preliminary hearing. After hearing submissions from the claimant and the respondent's representative, Mr Kennedy, the Tribunal delivered its oral judgment on the matter of whether the claimant's complaints should be struck out, and whether a deposit order should be made in respect of the claimant's complaints. The respondent's representative requested written reasons for the Tribunal's judgment in respect of those matters. The Tribunal now gives its reasons for the judgment that was reached.

Background

3. The claimant lodged her ET1 on 14 March 2022. At box 8.1 of the ET1 the claimant indicated that she wished to pursue the following complaints: unfair dismissal, race discrimination, notice pay and holiday pay.

4. Although the claimant indicated in her ET1 that she was pursuing an unfair dismissal complaint, the details contained in the ET1 suggested that the claimant did not have two years' service.

5. On 8 April 2022 the Tribunal wrote the claimant to explain that she was not entitled to bring an unfair dismissal complaint unless she had been employed for two years or more, unless specific circumstances applied which did not appear to apply in this case. The Tribunal invited the claimant to write to the Tribunal by 22 April 2022 to provide written reasons why her unfair dismissal complaint should not be struck out.

6. On 22 April 2022, 3 May 2022, 9 May 2022 and 27 May 2022 the claimant provided some additional information about her claim, including why she believed her unfair dismissal claim should not be struck out. The claimant said that there was no requirement for a qualifying period of service in her case because her dismissal violated her basic employment rights and was therefore an automatically unfair dismissal.

7. On 25 April 2022 and 4 May 2022, the respondent wrote to the Tribunal to say that the claimant had not provided sufficient reasons as to why her unfair dismissal claim should be struck out and invited the Tribunal to strike out the claimant's unfair dismissal complaint.

8. On 20 May 2022 the Tribunal wrote to the parties to say that the claimant did not appear to have identified an exception to the two year service requirement for unfair dismissal complaints, however the question of whether the claimant's unfair dismissal claim should be struck out would be dealt with at the preliminary hearing which was already due to take place for the purposes of case management on 12 September 2022, as this would give the claimant the opportunity to make oral representations to a judge. The claimant was also asked to provide some information about her race discrimination claim, including the specific acts relied on, by 27 May 2022. Some additional information was provided by the claimant.

9. On 22 July 2022 the Tribunal wrote to the parties to confirm that the telephone hearing on 12 September 2022 had been converted to an open preliminary hearing to decide whether the claimant's claim should be struck out on the basis that it had no reasonable prospect of success, or whether a deposit order should be made on the basis that it had little reasonable prospect of success. The Tribunal's letter stated that case management orders might be made at the conclusion of the hearing.

The law

<u>Continuous service requirement for unfair dismissal claims</u>

10. Under section 108 of the Employment Rights Act 1996 an employee is not entitled to bring an unfair dismissal complaint unless they had been employed by the relevant employer for at least two years on the "Relevant Date" (usually the date their employment came to an end), although in certain limited circumstances which are set out in the Employment Rights Act, the two years' service rule does not apply.

Strike out orders

11. Under rule 37 of the Employment Tribunal Rules of Procedure 2013, a Tribunal may strike out all or part of a claim or response on the grounds that it has no reasonable prospect of success.

12. In **Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT**, the EAT remarked that, in suitable cases, applications for strike-out may save time, expense and anxiety. However, in cases that are likely to be heavily fact-sensitive (such as those involving discrimination or public interest disclosures) the circumstances in which a claim will be struck out are likely to be rare.

13. In **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL**, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases, as they are generally fact sensitive, and require full examination to make a proper determination.

14. Tribunals should be slow to strike out a claim brought by a litigant in person on the basis that it has no reasonable prospect of success. In **Mbuisa v Cygnet Healthcare Ltd EAT 0119/18** the EAT commented that strike-out is a "draconian step that should be taken only in exceptional cases". The EAT said in that case that particular caution should be exercised if a case is badly pleaded by a litigant in person, especially one whose first language is not English, or who does not come from a background such that they are familiar with articulating complex arguments in written form.

15. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126, CA**, the Court of Appeal held that the same or a similar approach should be taken in protected disclosure cases, which have much in common with discrimination cases, and stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute.

16. When determining whether a discrimination or whistleblowing claim has no reasonable prospect of success, the Tribunal must take the claimant's case "at its highest". In **Silape v Cambridge University Hospitals NHS Foundation Trust EAT 0285/16** the EAT held that an Employment Tribunal had erred in striking out a claim of direct race discrimination because the claimant had failed to show a basis for concluding that the alleged discriminatory treatment was because of the protected characteristic of race, and had failed to identify appropriate comparators. There was sufficient in the claimant's pleaded case – when taken at its highest – for both of those aspects of the claim to be established.

17. When dealing with strike out applications involving litigants in person, the onus is on the judge to consider the pleadings and other core documents that explain the case. The Tribunal must take reasonable steps to identify the claims and issues; it is not possible to decide whether a claim has reasonable prospects of success if the Tribunal does not know what the claim is (**Cox v Adecco and others EAT/0339/19**).

18. Mr Kennedy referred the Tribunal to the case of **Baker v The Commissioner of Police of the Metropolis UKEAT/0201/09/CEA**. In that case the EAT held that an Employment Tribunal had been entitled to find that an ET1 in which a box indicating disability discrimination was ticked, but which did not give particulars of a disability discrimination claim, did not disclose a disability discrimination claim.

19. In **Baker**, the ET1 also included a race discrimination claim, and the Employment Tribunal found that although the history of events was recognisably a claim for race discrimination, and the details of claim referred to "discrimination", the details of claim did not say that the discrimination had anything to do with the claimant's disability.

20. The EAT held that the Employment Tribunal had correctly considered the ET1 and had come to a conclusion that was open to it. The EAT said that whilst a technical approach to the question of whether a particular claim was raised in an ET1 was inappropriate, on the facts the Employment Tribunal had not erred or come to a perverse conclusion.

21. However, in **Dodd v British Telecommunications Plc [1988] ICR 116**, the EAT held that an ET1 which specified the acts complained of, referred to the Sex Discrimination Act and the Race Relations Act, but did not state whether it was alleged that the acts were of sex or race discrimination or both, was an effective application under both acts.

Deposit orders

22. Under rule 39 of the Employment Tribunal Rules of Procedure 2013, where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

23. A deposit order provides a less draconian alternative to a strike out where a claim or response is perceived to be weak but could not necessarily be described as having no reasonable prospect of success. The test of "little prospect of success" is not as rigorous as the test of "no reasonable prospect" and the Tribunal has a greater leeway when considering whether to order a deposit. Nevertheless, the Tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response (**Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames and ors EAT 0096/07**).

24. Even if a Tribunal concludes that a claim has little reasonable prospect of success, that does not mean a deposit order must be made. The Tribunal

retains a discretion, and the power to make an order under rule 39 has to be exercised in accordance with the overriding objective – to deal with cases fairly and justly – having regard to all the circumstances of the particular case (**Hemdan v Ishmail and anor 2017 ICR 486, EAT**).

25. In **Anyanwu** the House of Lords said that "discrimination issues… should, as a general rule, be decided only after hearing the evidence" and held that it would be illogical to require an Employment Judge to take different approaches depending on whether they were considering striking out or making an order for a deposit as either order was, on any view, a serious, and potentially fatal, course of action.

Submissions

26. Mr Kennedy submitted that the claimant's unfair dismissal claim should be struck out because the claimant did not have two years' continuous service.

27. Mr Kennedy also argued that the claimant's race discrimination claim should be struck out because although the claimant had ticked the "race discrimination" box in box 8.1 of the ET1, and had made various complaints about the way she had been treated by the respondent in box 15 of the ET1, she had not explained in box 15 which of the matters complained of were acts of race discrimination, or explained the reason why she believed any of the acts relied on amounted to race discrimination.

28. Mr Kennedy also pointed out that the claimant had not explained in her ET1 what holiday pay or other pay was missing, and suggested that as the claimant had resigned, she was not entitled to any notice pay.

29. The claimant argued that she was allowed to pursue her unfair dismissal complaint even though she didn't have two years' service because she was also bringing a claim under the Equality Act 2010.

30. During the hearing the claimant explained which alleged acts she says amounted to race discrimination. The allegedly discriminatory acts are:

    30.1 Work the claimant had done was altered by colleagues to give the impression that the claimant had made errors;
    30.2 The claimant's colleague Sharon Hinds threatened the claimant whenever they were in a room together;
    30.3 Sharon Hinds asked the claimant for a letter opener in order to make the claimant angry;
    30.4 When the claimant asked the respondent to conduct an audit trail nothing was done about it; and
    30.5 The claimant was forced to resign because of the discriminatory treatment she had been subjected to by the respondent.

31. The Tribunal accepted that although the claimant had ticked the "race discrimination" box in her ET1, she had not explained in box 15 that she believed the complaints which were set out within that box amounted to race discrimination. However, the Tribunal was satisfied that all of the alleged acts which are set out at paragraph 30 were contained in the claimant's ET1.

32. During the hearing the claimant explained that the reason she believed she had been the victim of race discrimination was because she was the only black person employed in the respondent's administrative team at the relevant times. In addition, the claimant says that when she complained to the respondent about what was happening nothing was done about it, whereas the respondent did listen to the claimant's colleague Sharon Hinds, who is white.

Conclusions

33. Applying the legal principles to the issue of whether the claimant's claim should be struck out, and whether a deposit order should be made, the Tribunal reached the following conclusions.

34. In most cases an employee must have two years' continuous service in order to bring a complaint of unfair dismissal. The claimant did not have two years' continuous service when her employment with the respondent terminated. Nothing which is contained in the ET1, or which was said by the claimant in her correspondence with the Tribunal or during the hearing, suggested that her case fell within any of the exceptions to the two years' service rule. Accordingly, the Tribunal did not have jurisdiction to hear the claimant's unfair dismissal complaint, and it was dismissed.

35. The claimant has represented herself throughout these proceedings. The claimant indicated in her ET1 form that she wished to pursue a claim for race discrimination claim by ticking the relevant box. The claimant also set out a number of ways in which she says she was badly treated by the respondent in box 15 of the ET1. However, it was not clear from the ET1 which of those matters were, according to the claimant, acts of race discrimination, or the basis on which the claimant believes she was discriminated against on the grounds of race.

36. The circumstances in which a discrimination claim will be struck out are rare. Discrimination claims should not be struck out except in the most obvious cases, and Tribunals should be particularly slow to strike out a claim brought by a litigant in person on the basis that it has no reasonable prosect of success. Where a strike out order is being considered in the context of a case being pursued by a litigant in person, the Tribunal is required to take reasonable steps to clarify the issues.

37. A deposit order provides a less draconian alternative to a strike out where a claim is perceived to be weak, however the Tribunal must still have a proper basis for doubting the likelihood of a party being able to establish the facts essential to the claim. The power to make a deposit order must be exercised in accordance with the overriding objective.

38. When the Tribunal gave the claimant the opportunity to clarify her race discrimination complaint during the hearing, she explained that she believes that the matters set out at paragraph 30 were acts of race discrimination. The claimant also explained the reasons why she believes those matters were acts of race discrimination. The claimant is not bringing any other

discrimination complaints and has confirmed which acts she says amounted to acts of race discrimination at an early stage in these proceedings.

39. The claimant is representing herself in these proceedings. As all of the factual allegations were included the ET1, and the claimant clearly indicated in the ET1 that she wished to bring a complaint of race discrimination, little or no prejudice has been caused to the respondent by the fact that the claimant's race discrimination complaint was not set out very clearly in her ET1. For these reasons the Tribunal was satisfied that it was not in the interests of justice to strike out the claimant's race discrimination complaint, or make a deposit order in respect of that complaint. Accordingly, the claimant's race discrimination complaint was not struck out, and no deposit order was made.

40. The Tribunal did not find any basis on which to strike out the claimant's claim for holiday or notice pay, or on which to make a deposit order in respect of those complaints.

41. The claimant has been ordered to provide further information in respect of her race discrimination complaint and claim for holiday pay.

Employment Judge Tegerdine
Date: 31 October 2022