



EMPLOYMENT TRIBUNALS

Claimant: Mr A Murphy

Respondents: (1) Il Baretto; and (2) Ms P Piovesan

Heard at: London Central Employment Tribunal (in public; by CVP)

On: 23 February 2023

Before: Employment Judge Gordon Walker (sitting alone)

Appearances

For the claimant: represented himself

For the respondents: Ms N Hausdorff, counsel

JUDGMENT

1. The first respondent's application to strike out the claim pursuant to rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 is dismissed.

REASONS

1. Written reasons were requested by the claimant in accordance with rule 62 of the Employment Tribunals Rules of Procedure 2013.
2. Oral reasons were given at the preliminary hearing. These addressed each of the claims that the claimant appeared to be advancing at that stage. After oral reasons were given, the claimant clarified that he did not intend to bring a claim of direct disability discrimination (section 13 Equality Act 2010 ("EA")) or discrimination arising from disability (section 15 EA). These written reasons are confined to the claimant's actual claims, namely:
 - a. Direct race discrimination (section 13 EA);
 - b. Indirect race discrimination (section 19 EA) and
 - c. Victimisation (section 27 EA).

3. The first respondent made a written application dated 7 February 2023 which speaks for itself. The first respondent produced a bundle of authorities and a bundle of correspondence. The first respondent made oral submissions at the hearing.
4. The claimant made written submissions by email dated 17 February 2023 and in a written document dated 20 February 2023. These speak for themselves. He produced a “mini bundle” of documents and made oral submissions at the hearing.

Legal principles

5. The first respondent applied to strike out the claims pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013, which states:

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 prospect of success.

6. Discrimination claims should not be struck out except in the very clearest of circumstances: **Anyanwu v South Bank Students' Union** [2001] IRLR 305:
7. Choundhury P (as he then was) in **Malik v Birmingham City Council** (unreported) 21 May 2019 provided a summary of the relevant legal principles, at paragraphs 30-33.
8. In **Cox v Adecco** [2021] ICR 1307 HHJ Tayler analysed the case law, including the guidance from **Malik**, and provided a summary of the general propositions (at paragraph 28):

- (1) No one gains by truly hopeless cases being pursued to a hearing.*
- (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.*
- (3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.*
- (4) The claimant's case must ordinarily be taken at its highest.*
- (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.*
- (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.*
- (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.*
- (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.*
- (9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test*

of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

Conclusion

9. This case is about the first respondent's decision not to appoint the claimant to the role of pizza chef in May 2022.
10. There are core disputes of fact in this case, including:
 - a. What was the claimant told at the trial shift by Riccardo? In his claim form, the claimant says that Riccardo informed him that *"he had seen enough of the claimant's capabilities (or skill or experience) of making pizzas and was persuaded that the claimant could do the job and would be offered employment by the first respondent. Riccardo explained on a number of occasions that the next stage would be that he Head Chef ... would be in touch the following day to discuss remuneration and start date."* In its response, the first respondent denies that the claimant impressed Riccardo with his capabilities. The first respondent does not expressly deny these italicised statements were made.
 - b. Whether the first respondent had knowledge of the claimant's previous Employment Tribunal claims. The claimant does not say that he informed the first respondent of this. The claimant infers this from the first respondent's decision not to progress his application. Employment Tribunal judgments are available to the public and are searchable by name.
 - c. The first respondent's case is that two potential pizza chefs undertook a trial shift, and the other candidate was preferred. The claimant points to the advert for the role which says that there were two vacancies. This is a potential contradiction in the first respondent's case; there is a factual issue to determine.
 - d. Whether the claimant was able to work in a fast-paced environment, which was the first respondent's contemporaneous stated reason not to progress the claimant's application. The claimant denies this and says that this was not capable of being tested at the trial shift in any event.
 - e. The first respondent does not deny that it knew that the claimant was English, and that he did not speak Italian. The first respondent says that 18 of its 28 employees are not Italian. The first respondent says that the candidate that was appointed to the role of pizza chef instead of the claimant was not Italian, and he did not speak Italian. This is a further potentially relevant factual issue.
11. The claimant stated at the preliminary hearing that he found it difficult to identify his claims as he did not know why he was not offered the role, or what specific type of discrimination was at play. He inferred that there was discrimination from the fact that he was not appointed to the role, contrary to the statements from Riccardo at the trial shift.

12. The claims of direct discrimination and victimisation turn on the disputed facts set out above. It is therefore highly unlikely that strike out would be appropriate. Taking the claimant's case at its highest, the statements attributed to Riccardo must be accepted, and there is also a contradiction between the job advert (which stipulated two vacancies) and the first respondent's pleaded case. There may be a non-discriminatory reason for the first respondent's decision not to appoint the claimant to the role, but this is a matter for evidence at the final hearing. I therefore do not strike out these claims on grounds of having no reasonable prospects of success.
13. The claim of indirect race discrimination may fail on the basis that those who are not English and also not Italian may be similarly disadvantaged by the application of the alleged PCP (requiring employees to be able to speak Italian). The success of the claim will turn on the composition of the pool. This will be a matter for evidence at the final hearing. I therefore do not strike out this claim on grounds of having no reasonable prospects of success either.
14. The first respondent submitted that the claim was scandalous and or vexatious as evidenced by the claimant's tone in inter partes correspondence, and the fact that he had brought earlier Employment Tribunal claims. The claimant would be wise to use a more moderate tone in correspondence, but I do not find that this makes his claims (or the manner in which they are conducted, although this was not expressly submitted by the first respondent) vexatious or scandalous. The claimant has brought other Tribunal claims, but I am looking at this claim, which includes a claim of victimisation for making earlier claims. I do not find that the existence of the earlier claims makes the present claim scandalous or vexatious. I find that a fair trial is still possible, and it would not be proportionate to strike out the claims.

Employment Judge Gordon Walker

Date 23 February 2023

JUDGMENT SENT TO THE PARTIES ON

22/03/2023

FOR THE TRIBUNAL OFFICE