

EMPLOYMENT TRIBUNALS

Claimant: Mr M Kumi

Respondent: Birkin Cleaning Service Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: London South **On:** 18 April 2023

Before: Employment Judge Taylor

Appearances

For the claimant: In person

For the respondent: Ms Moles, HR Adviser

JUDGMENT having been sent to the parties on 5 May 2023 and written reasons having been requested, by the claimant, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant presented a claim form identifying Birkin Cleaning Service Ltd as respondent. Early conciliation started on 1 October 2021 and ended on 11 October 2021. The claim form was presented on 23 November 2021.
2. The claimant is a litigant in person. The respondent was represented by Ms Moles, HR Adviser.
3. The claimant was an agency worker engaged by Red Rock Agency. The Agency has not been joined to this claim and is not a party to the proceedings.
4. The claimant was not directly employed by the respondent, a company that provides cleaning services.
5. The claimant was hired as a Cleaning Operative, to assist cleaning of new residential buildings (Fairview New Homes) located in Charlton, London.
6. The claimant worked on the site for two consecutive days, the 4 and 5 August 2021. The claimant decided not return to working for the respondent

after the 5 August 2021.

7. The respondent submitted grounds of resistance on 30 December 2021. The respondent resisted the entire claim.

The claim form

8. The claimant indicated the type of claims he was making as 'sexual orientation', 'discrimination' and 'disability discrimination', by ticking those boxes at 8.1 of the claim form. At box 8.2 claimants are invited to set out the background and details to the claim. In this section the only information provided by the claimant was:

'My claim is for whistleblowing, sex discrimination and disability discrimination.'

9. The claimant did not provide any other details of his complaint.
10. At box 9.2 where claimants are asked to provide what compensation they are seeking the claimant set out:

'The Claimant is seeking £27,000 as at now.'

11. As additional information the claimant added.... 'ACAS is still assisting with conciliation but there has still been no agreement so the Claimant is escalating the claim for the Employment Tribunal to look at the claim.'

The response form

12. The respondent stated that the claimant had worked as a cleaner for two days. During this short period of time the claimant had raised grievances against a Cleaning Supervisor and another agency worker. As the respondent were not his employer, it did not initially investigate his complaints, but initially referred the claimant to his employers, Red Rock Agency.
13. Eventually the respondent decided to investigate the claimant's grievance. The claimant had contacted ACAS and the respondent states that an ACAS conciliator had encouraged the respondent to also hear the claimant's grievance. The claimant's grievance was investigated by a Birkin Cleaning Specialist Operations Manager. The respondent contacted the claimant to arrange his attendance at a grievance meeting. The claimant declined to attend such a meeting with the respondent.

14. The respondent responded to the claimant's grievance in writing on 26 October 2021, notifying him that the grievance was not upheld.
15. The claimant was granted seven days to appeal the decision. The claimant did not appeal. The respondent offered to hold a meeting to discuss the purported complaint of whistleblowing, on several occasions in November and December. The claimant has also refused to attend such a meeting.
16. The claimant, after having made his complaints to the respondent, asked the respondent for a payment of 'compensation' of £50,000 as a 'settlement' figure. The claimant sent a further grievance in the form of an email to the respondent on 11 October 2021 and stated that he would now be seeking £20,000 'compensation' from them.
17. The claim form did not provide any details to support the claims. The claim of whistleblowing was denied, the claimant had not attended any meetings so there appeared to be no substance to the claim. The claim of sex discrimination was denied, there being no evidence following several investigation meetings to substantiate the claim. The claim of disability discrimination was denied because there was no evidence or information to substantiate this claim.

Application to strike out claim and the claimant's reply

18. The respondent applied for the claim to be struck out on the ground that the claimant did not have employment status to present a claim and no information was provided to the respondent with regards to the allegations of disability discrimination, sex discrimination and the whistleblowing claim in the claim form. The claim was frivolous and had no prospect of success.
19. On 22 March 2022, the claimant was ordered by a Judge to provide details of all of the complaints and alleged detriments. The claimant provided further and better particulars of his claim and a response to the strike out applications on 5 April 2022.
20. The claimant stated that the respondent was his employer under section 43K(1)(a) Employment Rights Act 1996. He had made a protected disclosure to the respondent under section 43B(1)(d) Employment Rights Act 1996 because his health and safety was being endangered. The protected disclosure was that he had been asked to use a wet cloth to clean the main electricity wire by his supervisor and he told her that he felt scared of electrocution and that he may die. He refused to clean the wire and was subjected to detriments. Also on 6 August 2021 he was asked to clean birds mess without gloves and clean the pipes on a 4th floor balcony. There was no protection and he thought he could fall off the balcony. He told his supervisor that he would not do that job and was subjected to detriments. He was also subjected to harassment due to his disability when on 9 August 2021 his supervisor said she feels bad with her thrombosis (section 26 Equality Act 1996). The respondent's strike out application should be

dismissed and his case be heard by a tribunal because of disputed facts.

21. On 25 November 2022 the parties were notified that the respondent's application for the claim to be struck out would be decided at a hearing.
22. The claimant subsequently withdrew the claim of sex discrimination. The claim of sexual orientation discrimination was not pursued.

The Respondent's submissions

23. It is relevant that the claimant has chosen to bring a claim against the respondent although the respondent is not the claimant's direct employer. The claimant was employed by Red Rock Agency and as their employee the Agency should have come to a resolution with him.
24. The claimant was engaged to work as a cleaner. All of the work the claimant was required to do was safe. The claimant's allegations were investigated none of the allegations were upheld. In particular, the claim he was required to use a wet cloth to clean cables was not upheld. In any event the claimant was moved to another job when he complained.
25. The entire claim has no substance and is frivolous. The claimant has made several employment tribunal claims brought against other companies, making similar allegations against these other companies. There seems to be a pattern to the claimant's behaviour - a modus operandi. That pattern includes that the claimant has been employed by a recruitment company and has brought a claim against the client company who he has worked for. He has alleged various breaches after carrying out work for very brief periods of time and has followed these allegations with bringing employment tribunal claims. The claimant has made several claims of unlawful discrimination. In several cases he has secretly taped recordings of conversations with those he worked with. The claimant has then requested substantial fees to settle the employment tribunal claim made by him.
26. In the present case after having attended work for only two days the claimant asked the respondent to pay him £50,000. In another case after nine days of working for the company he asked them to pay him £20,000 to settle the case. The Judge in that case found the claim was frivolous.
27. After considering the claimant's history of frivolous litigation, investigating and dismissing the claimant's grievances and after considering his request for large amounts of compensation, the respondent believes that this claim is frivolous and should be struck out. The claimant's motivation in bringing this claim is to try to financially exploit the situation he has created. This is demonstrated by the fact that all attempts to engage with the claimant during the grievance process have been rejected by him. He has refused to attend any meetings with the respondent.
28. Finally, the entire claim does not have any chance of success. The respondent was unaware that the claimant had a disability and therefore he cannot

succeed in a claim of disability discrimination. The sex discrimination claim was withdrawn. The other allegations are frivolous. This is a frivolous claim only brought by the claimant because he was looking for a substantial payout from the respondent.

The claimant's documents and submissions

29. In addition to the further particulars, in support of his submissions, the claimant provided a number of documents on the morning of the hearing. These included two extracts from WhatsApp messages and email trails of correspondence concerning his grievance headed: 'Birkin not engaging with grievance' and 'Birkin Grievance response', as referred to above, and an extract entitled 'HSE Diseases' and a photographic image of a block of flats.
30. The claimant submitted that he was employed by Red Rock which was an employment business. Red Rock and the respondent determined the terms under which he was engaged. He is an agency worker and the respondent were employers for the purposes of section 43 Employment Rights Act 1996.
31. The claimant stated he has brought eight employment tribunal claims over a period of five years. The respondent is pointing at the fact that he has brought claims against other organisations, however, the only claim that is relevant in this instance is the one about the respondent.
32. The reason this claim has been brought is because the people working on the respondent's sites have been telling lies. They asked him to use a wet cloth, not a dry cloth, to clean a cable. When he said it was dangerous he suffered detriments. When he put in a grievance, these workers lied to the investigators. Had the respondent's workers been genuine the claimant would not have brought this claim. He was glad he has [secretly] recorded them.
33. The claimant denied that he had demanded payment of £50,000 from the respondent. He agreed he had *asked* for a payment in that amount. The request for payment was eventually reduced to £10,000. He knows that it is wrong to ask for a big amount, but the respondent is complicit in lies. The claimant only has claims because of the respondent's treatment of him.
34. The claimant explained his discrimination claim. It is a harassment claim. He has a disability discrimination claim because when he started work on Thursday 4 August 2021 the respondent asked him to do the job of cleaning a cable. He raised his concern about using a wet cloth to clean a cable. He could have been electrocuted. Then the following day, Friday 5 August 2021, the respondent asked him to do the same thing again. Then they asked him to clean bird excrement without gloves from an outside on a balcony rail. He refused to do this because he was being put at risk of catching diseases. They also wanted him to clean a [drain] pipe. He refused to clean the pipe because he thought he could fall off the balcony. This treatment had a negative impact on his diabetes. He told his supervisor he needed to see his doctor on the

Monday. His supervisor said in response was that she felt bad with her thrombosis as well.

35. The claimant provided a copy of the short WhatsApp message:

'Monday 9 August 2021

Claimant: Good Morning Asta. The issues at work on Friday has had a negative impact on my diabetes. I need to see my doctor today. Will come in tomorrow. Many thanks Martin.

Supervisor: I feel bad with my thrombosis after Friday as well.

Martin: I wish you a speedy recovery.'

36. The claimant did not return to working for the respondent after the Friday 5 August.
37. As for the respondent's allegation that he did not engage in the grievance procedure, the claimant submitted that he did not need to attend a grievance meeting. He informed the respondent that everything was set out in his written grievance, and he asked them to put any questions they had for him in an email. He received the written response to his grievances on 26 October 2021.
38. The sex discrimination claim has been withdrawn.
39. The claimant is bringing a disability claim even though he accepts the respondent did not know he had a disability (of diabetes).
40. The whistleblowing claim concerns his belief that his health and safety was being endangered by being asked to clean an electric cable with a wet cloth, by being asked to clean up bird excrement and by being asked to clean a pipe located on the outside of a building. He was subjected to a series of detriments when he brought this belief to the respondent's attention.

The evidence

41. The Tribunal is not expected to conduct a mini-trial when considering an application to strike out. It must nevertheless consider the available information and evidence.
42. In addition to the documents provided by the claimant at the hearing, part of the evidence available to the Tribunal included the claimant's grievance complaint and the respondent's conclusions sent to him by email on 26 October 2021. The respondent's email sets out the original complaints and allegations made by the claimant (in bold). The paragraphs relevant to the claimant's claim are set out (without correction) as follows:

'I have taken the points out raised in your letter(s) and for ease of reference I have listed them below along with the points obtained in the investigation meetings held:

1. **“Being treated bad by Asta (cleaning supervisor) because I will not clean the paint off the power cables that brought electricity into the plots we were working on in the boiler rooms due to dear of electrocution”**

Please see the response: Asta requested Martin to clean the circuit board box with a dry cloth. Martin responded that he is scared of cables, and he will not complete the task. He then started shouting and used inappropriate language with Asta and created a scene. He shouted at Asta and said, “you can do this yourself” (Clean the circuit box). Asta then stated, “we all do this task and we do not have a problem with this... what is stopping you from completing this task.” Birkin Senior Supervisor Abdelilah then walked into the scene. He informed Martin that there is nothing to be afraid of and it’s safe to use the Dry cloth on the circuit box to give a wipe down. However due to Martin feeling uncomfortable Abdelilah found an alternative task for him and advised him to wipe down the skirting board.

2. **“I was also treated bad by Asta because I feared I may fall off the balcony if I attempted to clean the paint off the drain pipe on the balcony that Asta was contemplating on me cleaning”**

Please see the response: Asta requested Martin to clean the Balconies as on the handrails there was bird faeces that needed to be cleaned. Martin stated that he did not bring his gloves and he will not do it. Asta then informed him that she will find gloves after break so he can complete the task. However, in the meantime she requested him to clean the balcony floor with water and brush only. Asta warned Martin not to use excessive water on the balconies as the site manager had previously warned them. Martin did not follow this instruction and used excess amount of water to clean the balconies. When Asta noticed this, she approached him and said, “I informed you that we should not use excess water” he then replied and said, “ If you do not let me use this amount of water, I will not be able to complete my job, move from my site as I need to brush”.

Abdelilah then arrived at the scene as there was a lot of noise and questioned Martin on what happened. Martin explained to Abdelilah that he did not clean the handrails because there were bird faeces. Abdelilah then provided him with gloves to complete the task. Martin further explained to Abdelilah that he needed to use excessive amount of water to clean the balcony despite being told by Asta that the site manager told them not to use. Martin further argued with Abdelilah and said I need to use excessive amount of water to clean the balcony. Abdelilah then stopped him from working on the balcony and instructed him to wipe down doors and surfaces. Abdelilah informed him to stay away from cables, balconies and from Asta and Alina.

3.....

4. **“Asta then asked me to clean the railings on the balcony with bird’s mess on it but failed to provide me with gloves to carry out that task.”**

Please see the response: Abdelilah then provided him with gloves to complete the task.

5.

6. **“Judie, from Red Rock said that it was argument and everything else that is why they don’t want you back on the site. Can you please let me know who at Birkin mentioned this alleged everything else to Red Rock, what everything else is and the details surrounding that everything else”**

Please see the response: *This was sent by our Senior Management team as we had an email from the client informing us that they did not want you on site.*

7. **“Birkin did not provide me with any risk assessment and method statement briefing or toolbox talk for the Fairview project at the Charlton before I started work so I will like to know why”**

Please see the response: *As your employment is through Red Rock agency, we are notified that you are fully trained. A discussion was held prior to your duties commencing on site.*

8....

Conclusion

We are unable to substantiate this grievance following the investigations held due to insufficient evidence to support your allegations. If you feel that I have missed any part of your grievance, please email me and I will investigate this.

You have the right to appeal my decision and will need to do so within 7 working days from the date of this email in writing to

Please note – the reason as to why the grievance was delayed was because your employment is with Red Rock Agency. I had liaised with them directly and they had informed me that they will be responding back to you regarding your concerns. I had also personally advised them that Birkin will support any investigations with our employees. As advised above Selina is not an employee of Birkin and she is employed through another agency.’

The Applicable Law

Striking out claims

43. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 provides that 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 grounds that it is scandalous, vexatious or has no reasonable prospect of success.
44. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances. In *Balls v Downham Market High School & College* [2011] IRLR 217 EAT Lady Smith held:

“The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word ‘no’ because it shows that the test is not whether the Claimant’s claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be

satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral submissions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect”.

45. A case shall not be struck out where there are relevant issues of fact to be determined. Those occasions on which a strike out should succeed before the full facts of the case have been established are rare, particularly so where the claim is one of discrimination as the Tribunal will be required to consider why the employer acted as it did, evaluating the evidence and drawing any necessary inferences particularly as it is unusual in discrimination claims to find direct evidence.
46. Nevertheless, it was held in *Chandhok v Tirkey* UKEAT/0190/14/KN that there may still be occasions when a claim can properly be struck out, such as where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which, without more, is insufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent has committed an unlawful act of discrimination. In *Community Law Clinics Solicitors Ltd & Ors v Methuen* UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail." In the case of *ABN Amro Management Services Ltd & Anor v Hogben* UKEAT/0266/09, it was stated that, "If a case has indeed no reasonable prospect of success, it ought to be struck out."
47. The term frivolous and vexatious are interchangeable. A 'vexatious' claim is one that is not pursued with the expectation of success but to harass the other side or out of some improper motive (*ET Marler Ltd v Robertson* 1974 ICR 72, NIRC). A vexatious proceeding is one that is an abuse of process in that it has 'little or no basis in law. The intention and/or effect of the proceedings is to subject the respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant.
48. The proper approach to be taken in a strike out application in a discrimination case is as set out below (*Mechkarov v Citibank N.A* [2016] ICR 1121). The principles of fairness can be adopted in respect of similar claims:
 - (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."

Disability Discrimination

49. Section 26 of the **Equality Act 2010** provides that a person (A) harasses another person (B) if

A engages in unwanted conduct related to a relevant protected characteristic (section 26(1)(a)), and

the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment (section 26(1)(b)).

50. Section 136 of the Equality Act deals with the burden of proof and provides that where a claimant proves primary facts from which the Tribunal could conclude in the absence of other explanation that there has been an act of discrimination, the burden will pass to the respondent to show that the protected characteristic played no part whatsoever in their reason for acting.
51. An employer has a defence to a claim of disability discrimination under section 15 of the Equality Act 2010 if it did not know that the claimant had a disability. Section.15(2) provides that subsection (1) does not apply if the employer shows that it 'did not know, and could not reasonably have been expected to know', of the employee's disability.

Whistleblowing

52. Section 43B **Disclosures qualifying for protection.**

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(d) that the health or safety of any individual has been, is being or is likely to be endangered..

53. Section 43B Employment Rights Act 1996 defines what is a qualifying disclosure. For whistleblowers to qualify for protection they must be workers, as defined, and they must have made a disclosure of information, (generally) to their employer, that meets the statutory requirements for protection. The Tribunal must consider whether the disclosure has sufficient factual content and detail to be capable of showing one of the five categories above or an attempt to conceal one of them. The claimant must also be able to show that the disclosure was in the public interest.

The Tribunal's deliberations and conclusions

54. In arriving at its decision, the Tribunal considered the submissions of the parties and all the available documentary material.
55. In accordance with the authorities referred to above, The Tribunal bears in mind the need for caution when considering a strike-out application. Nevertheless, that does not prohibit realistic assessment where the circumstances of the case permit.

Sex discrimination and sexual orientation

56. The claimant's complaint of sexual orientation discrimination was not mentioned and was not pursued. The claim of sex discrimination was withdrawn by the claimant.

Disability discrimination

57. The claimant complained that when he told his supervisor he needed to see his doctor she mentioned her own medical condition, thrombosis. The claimant claims that this was an act of harassment because of his disability.
58. The claimant also agreed that the respondent did not know and could not have known that he had diabetes before he came to work for them.
59. For a complaint of harassment to succeed it is necessary to conclude that there was a link between the alleged harassment and the disability.
60. The claimant agreed that the respondent was not informed that he had diabetes until he told his supervisor on 9 August 2021. The claimant did not return to work 5 August 2021 and therefore could not have been harassed while in employment within the meaning of section 26 of the Equality Act.
61. The Tribunal is also satisfied that the allegations on which the claimant relies is insufficient to found a successful claim of disability discrimination. Harassment generally involves a series of acts. The claimant's supervisor made a brief one off comment and there is no direct or indirect evidence to support the claimant's claim that it related to his disability (if proven) or was an act of harassment because of his disability.
62. The respondent submitted that it has a complete defence to any potential claim of disability discrimination under section 15 of the Equality Act 2010 because it did not know that the claimant had a disability. While it is not necessary in a claim of harassment to show less favourable treatment, it is important evidence that respondent did not know the claimant was disabled and the requests for him to carry out cleaning jobs could not possibly have been linked to his disability.

63. Having regard to all of the materials and submissions, the Tribunal considered that in the circumstances the claim of disability harassment has no prospect of success.

Whistleblowing claim

64. The claimant was engaged as a cleaner and was required to carry out routine cleaning duties, which he refused to do.
65. The first routine job the claimant refused to do was to clean a circuit board box. The respondent investigated the complaint. The scene was attended by a cleaning supervisor and senior cleaning supervisor who confirmed the job was safe to do. The respondent records that the claimant's version that he was asked to clean 'power cables' was incorrect. Even if the claimant was asked to clean a circuit board box or power cables with a damp cloth, it is not disputed by either party that he did not carry out the task in any event. He was asked to clean skirting boards instead. The Tribunal considers that in the circumstances the claimant would not be able to show that he had a reasonable belief that his health and safety was being or was likely to be endangered, by imminent electrocution.
66. The other routine cleaning tasks the claimant refused to carry out were cleaning railings that were soiled by bird faeces. The claimant provided a WhatsApp message sent to him before he started work instructing him to attend work with appropriate equipment, including, gloves. The claimant attended work without any gloves. There is no dispute that despite this he was provided with gloves by the respondent for him to carry out the cleaning tasks he was asked to do. In those circumstances the claimant would not be able to show that he had a reasonable belief that his health or safety was being endangered.
67. The claimant also claims that he was asked to clean a pipe on a balcony and this was also put his health and safety at risk. The claimant provided photographs of the balconies. There is nothing remarkable about the balcony that would suggest he was in danger. The Tribunal considers that the claimant would not be able to show that he had a reasonable belief that he was expected to work in a way that his health or safety was being endangered.
68. A qualifying disclosure must, firstly, be a "disclosure of information" made by the worker bringing the claim. The disclosure made must be based on the belief of the worker and that belief must be a reasonable belief. The Tribunal considered that the claimant's disclosure of information that routine cleaning jobs endangered his health and safety were wholly unsubstantiated and frivolous. The Tribunal concludes that the claimant had no prospect of satisfying the statutory burden of establishing that he had made a qualifying disclosure.

69. The judgment of the Tribunal that the claimant's claim that he made a qualifying disclosure has no reasonable prospect of success.
70. The claimant's case as set out in his further particulars and his submissions are no more than a series of bare and unsubstantiated assertions. The claimant did not dispute that he sought to obtain £50,000 from the respondent after working for it for two days. He also does not dispute that he has brought multiple claims against other businesses who have engaged him from an agency and has sought large amounts of money to settle these claims. Having regard to the large sum the claimant sought from the respondent after two days work, the Tribunal accepts the respondent's submission that this is a claim that is frivolous in the sense that the claimant's improper motive for bringing it was to extract compensation from the respondent. The judgment of the Tribunal is that in bringing the claim the claimant behaved unreasonably.
71. The claim is struck out because it is vexatious and has no reasonable prospect of success.

Employment Judge Taylor

Dated: 18 May 2023