EMPLOYMENT TRIBUNALS

Claimant: **Ms Bonsu**

Respondent: **Anchor Hanover Group**

RESERVED PRELIMINARY HEARING JUDGMENT

Heard at: Birmingham via CVP **On: 2nd June 2023**

Appearances
For the Claimant: **Dr Ibakakombo (lay representative)**
For the Respondent: **Ms Swords-Kieley (counsel)**

JUDGMENT

1. The respondent's application to strike out the claimant's claim of Direct Race Discrimination against the respondent pursuant to Rule 37 (1)(d) of the Employment Tribunal Rules of Procedure 2013 on the ground that is has no reasonable prospect of success, is refused.

2. The respondent's application for deposit orders on each of the claimant's 24 allegations of Direct Race Discrimination pursuant to Rule 39 of the Employment Tribunal Rules of Procedure 2013 on the grounds that the claimant's allegations of Direct Race Discrimination have little reasonable prospect of success is granted. A separate Deposit Order is issued in this respect.

3. Continuing with each allegation of Direct Race Discrimination is subject to the payment of a deposit of **£50.00 per allegation**, on the basis that the claims have little reasonable prospect of success.

4. The claimant's claims of constructive unfair dismissal contrary to s.95(1)(c) of the Employment Rights Act 1996, victimisation contrary to s.27 of the Equality Act 2010, holiday pay shall proceed to a final hearing already fixed for 2 – 12 October 2023.

Background

5. The claimant, a black woman from Ghana, worked for the respondent as a Home Care Assistance from October 2016. The claimant went on maternity leave on 12 September 2020 and was due to return to work on 10

September 2021. The claimant's right to work documentation (a residence permit) was due to expire on 28 August 2021. From 2 August 2021 the respondent and the claimant were in contact while the claimant was making her application and obtaining her right to work documentation. By 7 September 2021 the claimant had not provided the right to work reference number and a meeting took place on 16 September to discuss the situation. The claimant has not received her reference number as yet but provided the receipt of her application. The respondent submitted an ECS check through the government portal and advised the claimant that she should arrange shifts for the following week while the ECS check was being processed. A Positive Verification Notice (PVN) was received on 2 October 2021 confirming the claimant had the right to work while her application was processing. There was delay in this being actioned. The claimant submitted a grievance on 5 October 2021 alleging race discrimination and breach of contract in relation to the right to work process. On 12 October the respondent contacted the claimant to organise her return to work. The claimant was not willing to return to work while her grievance was outstanding. A grievance meeting took place on 26 October 2021, the claimant said that she felt she had been discriminated against because of her Ghanaian nationality and because she was not British. The claimant was signed off sick from 27 October 2021 with work related stress until her resignation on 29 December 2021.

6. At a Preliminary Hearing on 28 October 2022, Employment Judge Harding, went through the claims and issues producing an agreed List of Issues. The claimant confirmed that her direct race discrimination claim was not based on her immigration status. She asserted that the acts of less favourable treatment happened because she is not British (she is of Ghanaian nationality).

7. The 24 allegations of Direct Race Discrimination for the Tribunal to determine are as follows, did:-

7.1. Sam Varney and/or Kelly Adams and/or Leanne Kaocharoen fail to comply with or fairly follow the Respondent's right to work procedure;

7.2. Tina McGowen and/or Sam Varney confirm the Claimant was on unauthorised absence in a letter dated 18 October 2021;

7.3. Kelly Adams place the Claimant on unpaid leave, AWOL or unpaid suspension without a meeting or supporting reason on 11 September 2021;

7.4. Kelly Adams instruct Tina McGowen to cancel the Claimant's contracted shift and scheduled return to work training and fail to allow the Claimant to continue to work despite her ongoing immigration application on 16 September 2021;

7.5. Kelly Adams fail to comply with the Claimant's request that she record that the Claimant shifts were being cancelled until the right to work checks were completed in writing on 16 September 2021;

7.6. Kelly Adams fail to record the Complainant's complaint that she felt racially discriminated against by Kelly Adams (who had cancelled her shifts and training and suspended the Claimant) on 16 September 2021;

7.7. Kelly Adams fail to check whether the Claimant was still able to work whilst her immigration application was being processed by the Home Office on 16 or 17 September 2021;

7.8. Kelly Adams fail to contact the Claimant to confirm that she had checked with the Home Office whether the Claimant was still able to work whilst her immigration application was being processed on 16 or 17 September 2021;

7.9. Kelly Adams fail to arrange for the Claimant to return to work on 17 September 2021 when she was told that it should be fine for the Claimant to remain in work;

7.10. Kelly Adams delay contacting the Claimant to arrange her return to work until 10 October 2021 when the Positive Verification Notice **("PVN")** was received on 2 October 2021;

7.11. Leanne Kaocharoen tell the Claimant on 18 October 2021 that she had been on unpaid leave because her right to work had expired and that the Respondent had been unable to allow her to continue to work until she had provided the correct documentation to prove her right to work;

7.12. Leanne Kaocharoen refuse to allow the Claimant to sign the grievance meeting notes and refuse to give the Claimant a copy of the grievance meeting notes on 26 October 2021;

7.13. Leanne Kaocharoen shout at the Claimant to leave her office because the Claimant asked to sign the notes/and or have a copy of the notes on 26 October 2021;

7.14. Leanne Kaocharoen fail to provide the Claimant with a copy of the PVN on 26 October 2021;

7.15. Leanne Kaocharoen fail to carry out a proper/full investigation of the Claimant's grievance;

7.16. Leanne Kaocharoen fail to provide the Claimant with copies of all of the investigation evidence despite the Claimant requesting the same on 2 October 2021;

7.17. Leanne Kaocharoen conclude that the Claimant was placed on unpaid leave as a safeguard in view of a legislative requirement and/or the Home Office approved Right to Work Procedure without providing detail of that requirement and/or procedure;

7.18. Leanne Kaocharoen fail to provide the Claimant with the number of colleagues who were put on unpaid leave while their application was being processed by the Home Office;

7.19. Leanne Kaocharoen fail to provide the Claimant with the names and nationality of colleagues who were put on unpaid leave while their application was being processed by the Home Office;

7.20. Leanne Kaocharoen reject the Claimant's grievance without carrying out a proper investigation and reach findings and conclusions that were not supported by any of the investigation documentation and with the express intention of covering up acts of race discrimination and/or protecting perpetrators of race discrimination and/or protecting the interests of the Respondent;

7.21. Sarah Roe fail to provide the Complainant with copies of all written evidence and documents on which the decision to reject the Claimant's grievance was made, despite the Claimant requesting the same on 12 November 2021;

7.22. Sarah Roe reject the Claimant's grievance appeal without carrying out a proper investigation and reach findings and conclusions that were not supported by any of the investigation documentation and with the express intention of covering up acts of race discrimination and/or protecting perpetrators of race discrimination and/or protecting the interests of the Respondent;

7.23. Sarah Roe fail to give any reason as to why, when there was a conflict of evidence, she accepted the evidence of other witnesses over the Claimant;

7.24 Sarah Roe fail to answer the Claimant's questions as to why: (i) she was not informed she was moved from unpaid leave to unauthorised absence; (ii) the number of colleagues put on unpaid leave whilst their application was being processed; and (iii) the names and nationality of such colleagues.

8. It is the claimant's case that the above 24 incidents were less favourably treatment, and she relies upon a hypothetical comparator, a British citizen. That is that, she asserts that the acts of less favourable treatment happened because she is "not British".

The hearing

4. The respondent was represented in the hearing by Counsel, Ms Swords-Kieley, and the claimant was represented by Dr Ibakaombo, a lay representative.

5. The respondent served a hearing bundle of 120 pages. The claimant served a 'statement and argument' at 22:03 on 31 May 2023 and a list of issues and Agenda at 10:08 on the morning of the hearing. The claimant provided financial means documentation during the hearing.

6. EJ Wedderspoon had listed the Preliminary Hearing to determine whether:

   6.1 The claimant's direct race discrimination claim against the respondent has no reasonable prospect of success and should be struck out.

6.2 Whether a despoit order in each of the claimant's 24 allegations should be made if the allegations have little reasonable prospect of success.

6.3 Any other case management.

7. The claimant had been ordered to provide details of her financial circumstances to the respondent 14 days prior to the Open Preliminary Hearing. The claimant had not done so. Rule 39 (2) obliges me to make reasonable inquiries into the party's ability to pay a deposit and to have regard to such information in deciding the amount of the deposit. It was agreed that the claimant would give oral evidence of her financial means and that she would provide supporting documents during the hearing. Delay was caused of half an hour while the claimant sought to send over documentation regarding her financial means. Ms Swords-Kieley was given to opportunity to cross examine the claimant.

Law

Strike-out

8. Rule 37 of the ET Rules provides:

"*(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;

(b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

(c) *for non-compliance with any of these Rules or with an order of the Tribunal;*

(d) *that it has not been actively pursued;*

(e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*"

9. The effect of a strike-out is to terminate the claim or the part of the claim. It is a draconian jurisdiction, and the relevant case authorities underlie its exceptional nature. This is particularly so where the substantive case features allegations of unlawful discrimination, as it is "a matter of high public interest" that such cases are heard (as per Lord Steyn in *Anyanwu v South Bank Students' Union* [2001] IRLR 305).

10. The application here is made under Rule 37(1)(a), and Ms Swords-Kieley clarified that the respondent's argument is based on the third category in that rule, that each of the Race Discrimination Claims "has no reasonable prospect of success".

It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A

strike out is the ultimate sanction and for it to appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

"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 words "no" because it shows 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 the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"

10. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal at a full hearing will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested (see **Anyanwu v South Bank Student Union [2001] ICR 391** and **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**.

11. Plainly, on the wording of the Rule, the threshold for the respondent to persuade me that the Race Discrimination Claims have 'no reasonable prospect of success' is a high one, and the EAT has cautioned against doing so (in *Mbuisa v Cygnet Healthcare Ltd* EAT 0119/18) where the claimant is a litigant in person (which she was at the time of submitting the claim and at the previous preliminary hearing), and who does not come from a background such that she is accustomed to articulating complex arguments in written form – these features apply to the Claimant here.

12. Furthermore, the cases of *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330 and *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] IRLR 755 indicate that it would be wrong to make a strike-out order where there is a dispute on the facts that needs to be determined at trial.

13. As HHJ Eady put it in *Mbuisa* at [20]: "S*uch an exceptional case might arise where it is instantly demonstrable that the central facts in the claim are untrue or there is no real substance in the factual assertions being made, but the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents, see* Ukegheson v London Borough of Haringey *[2015] ICR 1285 at para 21 per Langstaff J at para 4*".

14. Mitting J summarised the law in *Mechkarov v Citibank NA* UKEAT/0041/16, [2016] ICR 1121 as follows at [14]:

"*(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."

15. However, taking the claimant's case its highest does not mean that there is no burden on the claimant at this stage – Lord Justice Underhill in the Court of Appeal case of *Ahir v British Airways* [2017] EWCA Civ 1392 at [19] observed that "*where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it.*"

Deposit orders

16. Rule 39 of the ET Rules provides:

"*(1) Where at a preliminary hearing (under rule 53) 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 ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument*".

17. By contrast with a strike-out order, the effect of a deposit order is that the party subject to it is required to pay the deposit value by a specified date in order to continue to pursue their claim or response (or any allegation or argument in their claim or response). Consequently, it is a less extreme measure, and (assuming the deposit amount is set appropriately) prompts the party who is the subject of the order to engage with the merits of that claim or response (or part of their claim or response) so as to decide whether to pay the deposit and maintain it, or to see it struck out (Rule 39(4)).

In the case of *Hemdam v Ishmail* [2017] IRLR 228 the Court of Appeal gave guidance to tribunals on the approach to deposit orders. The guidance included:-

(1) The test for ordering a deposit is different to that for striking out under Rule 37(1)(a).

(2) The purpose of the order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and creating a risk of cost. It is not to make access to justice difficult or to effect a strike out through the back door.

(3). When determining whether to make a deposit order a tribunal is given a broad discretion, is not restricted to considering purely legal questions, and is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and reach a provisional view as to the credibility of the assertions being put forward.

(4). Before making a deposit order there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence.

(5). A mini trial on the facts is not appropriate.

18. Any order to pay a deposit must be one that is capable of being complied with, and so the value of any order (not exceeding £1,000 per each specific allegation) must be such that the party that is the subject of the order is able to pay it, and therefore Rule 39(2) requires the Tribunal to make reasonable enquiries into the paying party's ability to pay the deposit and have regard to that information when deciding the amount of the deposit.

19. That does not necessarily mean any deposit order should be for a nominal amount - it should also be high enough "to bring home... the limitations of the claim" (*O'Keefe v Cardiff and Vale University Local Health Board* ET Case No.1602248/15).

20. In addition to the "pause for thought before paying" effect of a deposit order, it has some consequences for the paying party if the deposit is paid and that claim/part of it is then decided against them at the substantive hearing. Rule 39(5) sets those out.

"*(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76 [When a costs order or a preparation time order may or shall be made], unless the contrary is shown; and (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded."

21. Here, the Respondent asks me to consider making a deposit order in respect of each of the 24 Race Discrimination Claims, and so it is appropriate for me to consider not only the propriety of each individual deposit order sought, but also whether the total sum awarded is proportionate (*Wright v Nipponkoa Insurance (Europe) Ltd* EAT 0113/14).

22. A conclusion that any of the claims has "little reasonable prospects of success" does not mean the requested deposit orders must be granted – it simply means the Tribunal's discretion to do so is engaged. Caution must still be exercised, particularly given the public interest in having discrimination allegations aired, given the potential for a deposit order to terminate a claim, but this should be considered alongside the need for case management and for the parties to focus on the real issues in the case. The purpose of a deposit order is not to restrict access to justice but to further the overriding objective – in this instance, to deal with this case in a way which is proportionate to the importance of the issues, and to save expense.

<u>Direct discrimination</u>

23. Section 13 (1) of the Equality Act 2010 defines Direct Race Discrimination in the following terms:

"because of race, A treats B less favourably than A treats or would treat others".

Submissions

24. The respondent applied for a strike out or deposit of the direct discrimination claims, on the basis that the claims have no or little reasonable prospect of success. The basis of the application is that the claimant's pleaded case does not disclose a claim for race discrimination in that the claimant's claim concerns alleged treatment alleged to be because of/or related to the claimant's immigration status. Immigration status is not a protected characteristic under the Equality Act 2010 **(Onu v Akwiwu and anot; Taiwo v Olaigbe and anor 2016 ICR 756, SC)**. The respondent asserts that the claimant is conflating "non British" with "those who are subject to immigration control and/or require a right to work", which they argue is misconceived.

25. The respondent asserts that the claimant, contends that every act or omission relating to her right to work is race discrimination, because her right to work relates to immigration status. The respondent argues that the claimant cannot show (and has not shown) primary facts from which the Tribunal could reasonably and properly conclude, in the absence of any explanation to the contrary, that there has been unlawful discrimination.

26. The respondent states that the claimant has not particularised any actual or hypothetical comparator and that any comparator that the claimant seeks to rely on would need to have the same Immigration Status (and restrictions) as the claimant – and when applying such a comparator it highlights that the claimant's claims of direct race discrimination has no reasonable prospect of success. The claimant addressed the point of comparator in her response stating that she relies on a hypothetical comparator who is a home care assistant who is a British citizen. At the Preliminary Hearing, she sought to assert that her case further that it is because she is Ghanaian rather than any other nationality, and gave the example of someone from Pakistan, required to go through the right to work checks – who she alleges would not have been treated as she was. The respondent's position is that this is not pleaded and would need an amendment application. For the avoidance of doubt, to the extent that this clarification of the claimant's claims amounts to an amendment, then no permission to amend has been granted.

27. The claimant asserts that there are disputes of fact and evidence must be heard from the respondent in order to determine if and why they the alleged acts. The claimant states that she is not pleading her that she was racially discriminated against on the ground of immigration status. The claimant argued that it is rare to have open evidence of direct discrimination, and the evidence needs to be heard and tested at a final hearing.

28. During the hearing the claimant provided documents on relation to her means and gave evidence under oath. I found that the claimant's evidence on her means lacked clarity and credibility in terms of how much income she is in fact receiving from various different sources, she did not provide the full picture.

Conclusions

<u>Strike Out</u>

29. I have taken into account that the claimant, up until shortly before the Preliminary Hearing, is a litigant in person and her representative who is now assisting her is a lay representative. I have considered each of the allegations

and agree that the claims may be very difficult to prove and that the initial burden rests of the claimant. In determining the application, I am taking the claimant's case at its highest and have decided that without hearing the full evidence for the reasons for the treatment I cannot say that the claim has no prospect of success. I therefore do not consider it appropriate to strike out any of the allegations.

Deposit Order

29. However, I do consider that the claimant will likely have real difficulties in splitting immigration status, which is not a protected characteristic (Onu v Akwiwu and anot; Taiwo v Olaigbe and anor 2016 ICR 756, SC), from the reason for the treatment she complains about. The relied upon reason of non-British, is so closely linked to immigration status. If the claimant was British, she would not have been required to go through the right to work process which is what the focus of her claims centre on. In the circumstances of the alleged unfavourable treatment, it is difficult to see how the claims will succeed on the basis that she was treated as she was because she was non-British, as opposed to because of her immigration status. My assessment for each of the allegations is that they have little reasonable prospect of success and in having regard to the financial means information which has been provided, I order a deposit to be paid in sum of £50 for each of the 24 allegations, making a total of £1,200 if the claimant pays to proceed for all 24 allegations.

Employment Judge L Knowles
24 June 2023