



EMPLOYMENT TRIBUNALS

Claimants: Mr M Akromah

Respondent: Praxis Care

Heard at: Leicester

On: 23 May 2023

Before: Employment Judge Fredericks-Bowyer

Appearances

For the claimant: Mr Boateng (Lay representative)

For the respondent: Mr Jones (Counsel)

JUDGMENT AT PRELIMINARY HEARING

The claimant's claim in respect of less favourable treatment on the basis of his race is struck out under Rule 37(1)(a) Employment Tribunal Rules of Procedure because it has no reasonable prospect of success.

WRITTEN REASONS

Introduction

1. These reasons are produced at the claimant's request following an oral decision at the hearing.
2. The claimant worked at the respondent, a charity providing care and support services, as a part time night support worker from 1 July 2021 to 22 February 2022. In that role, he supported children and young people in a residential setting. He was not dismissed from the employment, but his probation was extended and his employment ended when he did not pass that extended probationary period.
3. The claimant was represented by his friend, Mr Boateng and he also made submissions in his own cause. The respondent was represented by Mr Jones, a barrister. I had access to a bundle of documents which ran to 115 pages.

The claim and the strike out application

The claim

4. The claimant's claim is set out in his claim form (pages 2 to 10) and the written document attached to the form (pages 11 to 14). It sets out the agreed position that his probation was not passed for four reasons, and the claimant makes comments about it on page 11 and 12 (which are summarised below):-

4.1. A period of unauthorised absence from 4-14 February 2022

The claimant agrees he was absent for these days and he acknowledges (page 11) that this period of leave did not follow respondent procedures. His claim document contends that he saw enough hours appear in his work rota and so he requested then took the holiday beginning on 17 January 2022 (the claimant does not argue that this leave was authorised, and he admitted in the hearing that it was not authorised).

4.2. Failure to complete mandatory workbook

The claimant admits (page 11) that the mandatory workbook was not completed at the end of his probationary period and was around 70% complete. He then pleads:-

"I have been assigned someone to help me called 'Brittany' who was very good and assisted me for one session over the last four months. I realise that this needs completing to bring me up to standard and I will continue with it. I need further help from her or anyone willing to assist me".

4.3. Failure to listen to reasonable work instructions

In response to this point, the claimant pleads (page 12):-

*"There are broad accusations that I do not listen to reasonable work instructions and that is again hurtful – I normally get on with shared assignments/jobs to do and I don't understand why I'm being treated this way – there are two sides to every story **and I fear racism is a factor here**".*

4.4. Not appropriately supporting colleagues with a number of issues eg medication.

The claimant raises a specific incident in response to this point in his claim documents (page 12) and denies that he failed to support a colleague administering medication because he was not trained. He said he was available to support. To explain why this has been raised as an issue, he says –

*"I fear there was a lack of communication **and that racist attitudes have become apparent in my situation**".*

5. The claimant's race discrimination claim is then particularised on pages 13 and 14. That particularisation, in full, says:-

"I do accept that my employment was subjected to a probation period however, my responses to the above incidents were not given due weight and I believe racism played a part in the way I have been treated and I am a victim of direct race discrimination which is a prohibited conduct to section 13 Equality Act 2010 from the management and victimisation from the work colleagues who gave negative feedback of me because I will not join their gossips and back biting, had I been someone of different colour and race the outcome of my meeting will have been different".

6. The claimant's schedule of loss (page 114 to 115) asks for the Tribunal to award him £906,800 before pension losses are included.
7. In the usual way, I asked for the claimant to explain his case to me. I also asked why he considered that his treatment was informed by his race. The claimant identified as black Ghanian. The claimant's representative then told me about his concerns about the respondent as an operator and an employer with respect to alleged failure to follow and weaknesses in respect of CQC guidance. I reminded both of them of the issues in the case, and particularly why the complaint of race discrimination should continue.
8. I asked the claimant to elaborate on his written comments that race or racist attitudes were at play during his time at the respondent. His only response was that he did not agree with the characterisation of his work by the respondent and its staff, and he considered the only reason why there might be a difference between those interpretations was because he was black Ghanian and the others at the respondent were not. He could not recall any particular incident from the time which left him feeling that he had been subjected to race discrimination. He said he thought that a communication barrier might have been at play because of his race. I asked for more information about the communication barrier and I was shown words on page 75 where a colleague recalls her account of one of the incidents relied upon by the claimant:-

"As Marie has worked with JW regularly she gave Moses some advice on how to encourage JW to stay in his room and hopefully sleep. Moses did not seem to be listening and was standing in the sensory area making no attempt to take this advice on board".

9. I do not understand, and it could not be explained, how the recording of this interaction relates to race in a situation where the claimant admits he did not perceive, at the time, that anything in this interaction was motivated by race.
10. The claimant contends that if he were not black Ghanian, then the respondent would have passed his probationary period despite him taking unauthorised leave and despite him not completing the workbook. I asked him for any information he could offer which would help him to establish this part of the claim, given that he accepts that his leave was not authorised and that the workbook was mandatory to be passed by the end of a probationary period. The only response the claimant had was that other colleagues were given more help with completing the workbook, although he acknowledged that he had had help. I asked him why, on his case, that was related

to his race. He then said that it is more to do with the fact that he works nights when the people who may help him were not around. He admitted that another colleague on night shifts had completed the workbook in the past.

The strike out application

11. The respondent denies the allegations and made this application for the claim to be struck out. The application was raised at a preliminary hearing on 19 December 2022 and this hearing was listed. The respondent made a written application on 27 January 2023 (pages 34 and 35). The application is grounded in some of the contemporaneous and undisputed documents which governed the claimant's probationary period which, the respondent contends, show that the claimant was supported and that he knew the respondent had firm footing to end the probationary period. The emphasis of the respondent's submissions at this hearing are drawn from the following parts of the written application:-

"The respondent further submits that the prospects of the claimant in establishing a connection between his dismissal and his race are utterly fanciful and completely without merit. In fact, the first time he alleges discrimination is during the final probation review meeting by which time he is aware that dismissal may follow..."

Accordingly, the respondent submits that the Tribunal should exercise its discretion to strike out the claim on the basis that this is an exceptional case where strike out is justified in light of the extremely weak evidential basis for the claim and the support contained within the contemporaneous documents for ostensibly innocent and justifiable treatment by the respondent (Garcia v British Airways Plc [2022] EAT 14)."

12. Mr Jones pointed me to that contemporaneous documentation. He also relied upon the admissions from the claimant that (1) he had not followed policy in relation to the annual leave taken, and (2) he knew it was a requirement to complete his induction and workbook to pass his probationary period, and he equally knew he had not done that work. Mr Jones then showed me the documents in the bundle which show supervisions between the claimant indicating that he was able to raise issues with completing his workbook and that he was, in his own words (and as he admits in his claim form), pleased with the support he received in order to try to complete this work.

13. Mr Jones submitted that, even if as I must take the claim at its highest, I must conclude that the claim has no reasonable prospects of success because the claimant accepts that he had done or not done things he should or should not have done and that he accepted they may lead to his employment ending at the end of his probationary period. Mr Jones reminded me that this is a case where the respondent was able to end the probationary period for any reason and that this is not a dismissal. Consequently, the only recourse the claimant has against the respondent is if he could establish discrimination. This is the reason, Mr Jones suggests, that the claim is framed around a discrimination element.

Relevant Law – strike out under Rule 37(1)(a)

14. The relevant part of Rule 37 Employment Tribunal Rules of Procedure say:-

“37(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;

...

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”

15. Caution must be exercised given the draconian nature of the strike out, and the ground relating to prospects should only be used in the most clear and obvious cases (QDOS Consulting Ltd & Others v Swanson [2012] UKEAT/495/11). It is rare for a claim of discrimination to be suitable for striking out because they are often very fact sensitive, meaning that the Tribunal will need to hear all of the evidence from both sides to be sufficiently certain of resolving the facts which will inform the outcome of the case (Mechkarov v Citibank NA [2016] UKEAT/41/16).

16. Plainly, it is not the case that discrimination complaints can never be struck out for lack of prospects where, for example, the claim as pleaded does not set out a cause of action in law or where a claim would not, even if all of the claimed facts are correct, constitute discrimination under the particular section being relied upon (Ahir v British Airways Plc [2017] EWCA Civ 1392). Documents from the time in question, so long as they are not disputed, may be determinative when considering what the claim could be when put ‘at its highest’ (Garcia v British Airways Plc [2022] EAT 14).

Discussion and conclusion

17. It is right that I take an extremely cautious approach to striking out a discrimination claim on its prospects, because prospects are very difficult to discern until full evidence is heard in respect of the discrimination alleged. However, there are exceptional cases where the discrimination complaint is presented in such a thin and non-specific manner that I can conclude that there are no reasonable prospects of success. That is the case here.

18. The claimant claims his probationary period was not passed due to events which are tarnished by race discrimination. He accepts, as he must, that he knew about the requirement to complete his workbook to pass his probation. He accepts it was only 70% complete after his extended probationary period came to an end. He also accepts that he took leave in a manner which was against respondent policy, and he accepts that that could be a reason for him to not pass his probationary period.

19. In terms of establishing facts from which a Tribunal may consider that race discrimination had occurred, I consider that he could offer me none. He could not

articulate any conversations or feelings from the time which had a racist element. Hr accepts he may have had less support with the workbook because he works nights, but he also offers a reason for that as being that others are not around on nights. In other words, he himself gives a good explanation for what he complains of which is nothing to do with his race at all. In terms of the allegation that he was labelled as a poor communicator because of racism, he could articulate nothing to demonstrate that other than one or two lines in a statement given by a colleague which, I consider, are more about what he was actually doing at the time rather than what the colleague thought about him.

20. I gave the claimant many opportunities to give me the 'something' that is required to link his protected characteristic and his treatment. He could not describe anything, and I am led to conclude that Mr Jones' characterisation of the claim is correct. Discrimination is being used as a means to complain about the dismissal because a complaint of unfair dismissal is not available. Unfortunately for the claimant, a bare assertion from his representative that "*I know where there is discrimination*" is not sufficient to bring a discrimination claim without further information or a description of what evidence might be presented.
21. It is not in accordance with the overriding objective to allow a claim with no reasonable prospects of success to continue. To do so would severely prejudice the respondent and use valuable Tribunal resources. The discrimination complaint, which is the whole of the claim, is therefore struck out.

Post-script

22. A matter arose in closing submissions which I consider necessary to comment upon here in case the issue is opened outside of these proceedings. During the course of the hearing, I asked the claimant more than once about whether he could offer any information about broader facts which might give rise to facts which could show that race played a part in the decision not to extend his probation, other than his reasoning that he was black Ghanaian and his probation was not extended. As part of that, I asked whether the claimant had detected any racist undertones or language used during the period of his employment. As outlined above, the claimant said there were none.
23. When talking about his leave in Ghana, the claimant said in relation to going to Ghana that "*my family are there and my Mum was not well when I went back*". In his closing submissions, counsel for the respondent said that instead of following respondent procedures, the claimant went on leave "*back to Ghana*".
24. Mr Boateng interrupted and objected strongly to this language, asserting that this is an example of "*racist undertones and language*" which I should take into account when considering what decision to make about the claimant's case. Mr Jones was clearly unhappy with the effect of his wording but strongly resisted the notion that he had said anything which was racist or had racist undertones. The hearing continued, but it was plain to me that the claimant and his representative were unhappy about the matter.

25. To be clear on my view, having been in the room at the time, there was nothing in respondent counsel's language or tone which was remotely derogatory about race or which implied that Ghana is where the claimant should belong – or somewhere to which he should go 'back' to. The language used was identical to the characterisation used by the claimant during the course of his own description of what happened. I consider that it is appropriate, and could be necessary, for a party to directly quote the other in the course of submissions.
26. If this matter is raised outside of these proceedings, I would encourage that my comments in this public document be shown as an official account of this exchange in this hearing.

Employment Judge Fredericks-Bowyer

23 June 2023