EMPLOYMENT TRIBUNALS

Claimant: Mr Mudassar Mubin

Respondent: Walkers Nonsuch Limited

Held At: Midlands West by CVP **On:** 12 July 2023

Before: Employment Judge Connolly (sitting alone)

Appearances
Claimant: In person
Respondent: Mr Andrew McPhail (Counsel)

JUDGMENT ON A PRELIMINARY HEARING

1. The claimant's complaint that the respondent directly discriminated against him because of race by communicating with a previous employer without his permission is dismissed on the ground that it has no reasonable prospect of success.

2. For the avoidance of doubt, the claimant's complaint that the respondent directly discriminated against him by rejecting his application(s) for the role of Food Auditor / Technical Manager can proceed to final hearing.

WRITTEN REASONS

INTRODUCTION

1. This preliminary hearing was listed by Employment Judge Coghlin KC on 13 January 2023 to determine the respondent's application that the claim or part of it should be struck out on the ground that it has no reasonable prospect of success or, alternatively, that a deposit order should be made in respect of all or any part of the claim on the ground it has little reasonable prospect of success.

2. I was provided with an agreed bundle of 184 pages. The bundle included 2 witness statements on behalf of the respondent and 1 from the claimant on his own behalf. I was invited to read the statements but it was agreed I should not hear oral

evidence on nor determine the factual issues in the case. I heard oral evidence from the claimant as to his means. I was also provided with a helpful written Skeleton Argument by Mr McPhail on behalf of the respondent.

3. The hearing was listed for and required 3 hours including delivery of an oral Judgment with reasons. The claimant requested written reasons.

RELEVANT FACTS, CLAIMS AND ISSUES

4. It is common ground at least for the purpose of this hearing that:
   4.1 the respondent manufactures confectionary
   4.2 in April 2022 the claimant applied for the role of Food Auditor / Technical Manager with the respondent through the recruitment website 'Indeed.com'.
   4.3 he submitted his CV on which he stated his name and that he previously worked as what he termed a 'professional interim'.
   4.4 the claimant's application was rejected.

5. It is the respondent's case that none of a total of 51 applications received through Indeed were progressed as they were not considered suitable. The applicants were therefore automatically informed by Indeed that they had been rejected.

6. After he was informed that his application had been rejected and on/about 26 April 2022, the claimant applied directly to the respondent. Again, his application was not progressed. The respondent contends that, at or about this time, they had arranged for a recruitment adviser to assist them in recruiting to the role. The respondent asserts that, on or about 5 May 2022, the recruitment adviser put forward five candidates for the role. The respondent interviewed two candidates and appointed a Ms Okolowicz to the role. The respondent says it appointed her on merit.

7. The claimant contacted Acas to commence early conciliation on 29 May 2022. Early conciliation ended on 16 June 2022. On / about 15 June 2022, having been made aware that the claimant had contacted Acas, the respondent accepts it contacted one of his previous employers.

8. The claimant's complaints are of direct race discrimination. He identifies his race as his Pakistani national origin. He asserts the respondent was or would have been aware of his race or that he was not 'Caucasian', as the claimant puts it, by reason of his name.

9. He contends that the respondent treated him less favourably than they treated Ms Okolowicz in 2 respects: (a) deciding not to progress or by rejecting his application on 2 occasions (the first complaint') and (b) contacting a previous employer of his without his permission (the second complaint').

10. He invites the Tribunal to infer that the reason why his application was rejected and the reason why his previous employer was contacted was his race. In respect of his first complaint the claimant asserts that his qualifications and experience were more than adequate for the role and that he was better qualified than Ms Okolowicz

whose qualifications and experience, he says, fell short of what was essential or desirable for the role holder. In those circumstances, he invites the Tribunal to infer that the reason why he was rejected and she was appointed was not on merit but because of race.

11. In relation to his second complaint, namely, that the respondent contacted his previous employer because of the claimant's race, he relies heavily on the fact this was different treatment when compared with the other 50 candidates or Ms Okolowicz, as far as he knew and asserted in his witness statement [125] that the reason why the respondent acted in this way was that they
'*sought a reference after his rejection which makes no reasonable sense other than creating a defence with hindsight*'.

12. At the preliminary hearing, the respondent emphasised two aspects of its defence to the first complaint: firstly, it asserted that Ms Okolowicz was not an appropriate comparator because she was not directly competing with the claimant in the same recruitment exercise. The respondent says the 50 other candidates that were rejected are the appropriate comparators and they are of mixed ethnicity or race as far as one can tell. Secondly, it asserted that the reason why the claimant was rejected was his employment history which revealed that, in the 6 years prior to April 2022, he held some 15 different roles and he lived a significant distance from the respondent's site.

13. In relation to the second complaint, the respondent denies that they contacted the claimant's previous employer because of race. They assert that they did so, having been contacted by Acas, in order to find out more information about him generally and the work he had carried out with that employer.

14. On this application the respondent contends that the claimant has no or little reasonable prospect of establishing that Ms Okolowicz is an appropriate comparator and/or no or little reasonable prospect of establishing that the reason for any difference in treatment was race. The respondent asserts that the claimant's case amounts to nothing more than a difference in treatment and a difference in race, and that there is no *prima facie* case that race was the reason for any difference in treatment.

RELEVANT LAW
Strike out / Deposit

15. **Rule 37 Tribunal Procedure Rules 2013** permits the Tribunal to strike out all or part of a claim where satisfied it has no reasonable prospect of success. **Rule 39 of the 2013 Rules** permits the Tribunal to make a deposit order as a precondition of pursuing any specific allegation or argument in a claim where satisfied it has little reasonable prospect of success.

16. Mr McPhail, on behalf of the respondent, acknowledged the body of caselaw emphasising the importance of not striking out discrimination claims save in the clearest of circumstances. I note the well-known observation in **Anyanwu v South Bank Students' Union [2001] IRLR 305**
"Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the

bias in favour of the claim being examined on the merits or de-merits of its particular facts is a matter of high public interest."

17. Key principles which emerge from the authorities on striking out claims are as follows:

    (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."

18. The bar for a deposit order lower than that for striking out a claim i.e. little rather than no reasonable prospect of success. Nonetheless, one must bear in mind that it, too, can operate as a significant deterrent to pursuing a claim. A mini-trial of the facts is to be avoided, just as it is to be avoided on a strikeout application, because it defeats the object of the exercise. If there is a core factual conflict, it should properly be resolved at a full hearing where evidence is heard and tested.

19. Even if satisfied that a complaint or allegation has little reasonable prospect success, I have a residual discretion to decide whether appropriate to make deposit order in all the circumstances of the case. Finally, if I were minded to make a deposit order in principle, I am required to make reasonable enquiries into the claimant's ability to pay the deposit and to have regard to such information when deciding the amount of any such order (**r.39(2) ET Rules 2013)**.

Relevant law - direct discrimination

20. The relevant statutory provisions in a claim of direct discrimination because of race are **sections 13, 39, 23 and 136 Equality Act 2010**.

21. The task for the claimant is to prove a *prima facie* case of race discrimination, that is, to establish facts, from which the tribunal could properly infer, in the absence of an explanation from the respondent, that the claimant was treated less favourably than his chosen comparator because of the protected characteristic of race.

22. The statutory comparator must be in the same or not materially different circumstances to the claimant.

23. As emphasised by Mr McPhail on behalf of the respondent, in **Madarassy v Nomura [2007] EWCA Civ [56]**,

The court in Igen Ltd v Wong [2005] ICR 931 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

24. Further, the less favourable treatment must amount to a contravention of or fit within the treatment defined in **s.39 Equality Act 2010**. In this case, not offering the claimant employment (**s.39(1)(c)**) in respect of the first complaint and/or in the arrangements an employer makes for deciding to whom to offer employment (**s.39(1)(a)**) in respect of the second complaint.

CONCLUSIONS

25. In relation to the first complaint: whether the rejection of the claimant for the role was less favourable than that accorded to his comparator and/or was because of his race, I concluded that these were disputed issues of mixed fact and law or issues of fact alone. As to the characteristics of the appropriate comparator, this was not, it seemed to me, a straightforward issue capable of assessment at a preliminary hearing. I certainly could not say there was little or no reasonable prospect that a tribunal would conclude Ms Okolowicz was an appropriate statutory or evidential comparator. There were many issues of fact as to whether the claimant or Ms Okolowicz were better qualified or experienced, whether Ms Okolowicz met the requirements of the role, whether those matters could be material, in addition to a difference of race, from which a tribunal could infer that the appointment was not based on merit but something else, specifically race. There were also issues as to whether and to what extent the decision maker took into account the claimant's employment history or location and whether this may render his circumstances materially different from Ms Okolowicz's.

26. I concluded that such factual issues, particularly in claim of discrimination, were unsuited to assessment at a preliminary hearing such as this. I could not find that the claimant had no or little reasonable prospect of success in relation to this part of his claim without straying into a mini trial of the facts which is inappropriate on such applications. For those reasons I declined to strike out the first complaint or to make a deposit order in relation to any part of it. I caution the claimant against misunderstanding this aspect of my judgment and concluding that he has a claim with reasonable prospects of success. I have simply formed the view that these factual issues must be decided at a full hearing.

27. The situation is, in my view, different in relation to the claimant's second complaint. The claimant's case is that he knows a call was made by the respondent to one of his previous employers but he does not know the date or the content thereof. He has no basis on which to challenge the respondent's witness evidence that the call was made after his applications for a job were rejected and once they had learned he was considering a claim. He has no basis on which to challenge their evidence that the purpose of the call was to find out more about him and his work history

with his previous employer. In fact, the claimant's own evidence, set out in his witness statement, is that he believes the reason for the call was to retrospectively bolster the respondent's argument that it had good reason to reject his application on its merits. If that is right, the reason for the call was not the claimant's race.

28. I find therefore that the claimant has no reasonable prospect of challenging the respondent's evidence on the facts in relation to the second complaint and that, on the claimant's own evidence, no reasonable prospect of establishing a prima facie case that his race was a significant or material reason for the respondent making the call. On that basis I determined that the second complaint should be struck out.

29. Alternatively, I find that the claimant has no reasonable prospect of establishing that the making of this call constituted relevant treatment within the meaning of **s.39(1) of the Equality Act 2010.** Given that the claimant is unable to challenge the date on which the call was made, after he had been rejected, and after he had contacted Acas, he has no reasonable prospect of establishing that it was part of any arrangement made by the respondent for deciding to whom to offer employment. Further, I am unable to see how the mere making of an enquiry is less favourable / detrimental treatment when compared to not making an enquiry.

Employment Judge Connolly
18 July 2023