EMPLOYMENT TRIBUNALS

Claimant: Ms Sheena J B Worthington

Respondent: Norton Healthcare Ltd t/a Teva Runcorn

Heard at: Liverpool by CVP **On:** 24 July 2023

Before: Employment Judge Grundy

REPRESENTATION:

Claimant: Mr Karolia, Friend of the claimant
Respondent: Miss L Iqbal , Counsel

JUDGMENT AND ORDER STRIKING OUT CLAIMS

The judgment of the Tribunal is as follows :

1. On the application of the respondent for a strike out order and/or for a deposit order in relation to the claimant's claims, which are claims of direct discrimination by reason of age and /or by reason of race: the Tribunal strikes out the claimant's claims on the grounds they each have no reasonable prospect of success;

2. The Tribunal makes no order for the claimant to pay a deposit as the claims are struck out.

3. The unfair dismissal claim is dismissed on withdrawal by the claimant for lack of jurisdiction as the claimant does not have 2 years continuity of service to bring such a claim.

REASONS

1. The Tribunal gave reasons to the parties orally on the morning of the 3 hour hearing, reserving the right to set out those more specifically but not to alter the substance.

2. The claimant's claims as articulated in the CM Order of EJ Flanagan on 13 January 2023 at the bundle of documents for the Tribunal at page 32 set out the case summary and complaints and issues from pages 42 – 45 and are repeated below.

" 42 The claimant was employed by the respondent, a pharmaceutical company as a "sterile specialist", from 19th April 2022 until the 27th May 2022. Early conciliation started on 9th June 2022 and ended on 20th July 2022. The claim form was presented on 6 th August 2022.

43. The claim is about the claimant's dismissal from the company, which she states was discriminatory, based on her race and age. The respondent's defence is there was no discrimination, as the claimant was dismissed for gross misconduct, namely publicly sharing photographs taken inside the company's premises.

44. The claimant is making the following complaints:

44.1 Direct race discrimination about the following: The dismissal on the 27 th May 2022

44.2 Direct age discrimination about the following: The dismissal on the 27 th May 2022.

44.3 The Claimant agreed that there was no 'ordinary' unfair dismissal claim, as she had accrued insufficient service. The Claimant clarified that she was not bringing a harassment or victimisation claim. The Claimant also confirmed that there was no claim for unpaid holiday pay, breach of contract or any other payments.

45. The issues the Tribunal will decide are set out below.

Direct race discrimination (Equality Act 2010 section 13)

2.2 The Claimant is of Filipino and South Asian heritage.

1.2 Did the respondent do the following things: Dismiss her on the 27 th May 2022?

1.3 Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

1.4 The claimant says she was treated worse than Garfield [surname unknown] *(Hamilton*). She claims that Garfield was also a sterile specialist working for the Respondent, who took photographs of the inside of the Respondent's premises within days of her doing so and shared them on social media. Garfield does not share the Claimant's racial heritage. She claims that he was not subject to any form of disciplinary proceedings, whilst she was.

1.5 If so, was it because of race?

2. Direct age discrimination (Equality Act 2010 section 13)

2.1 The Claimant is around 36 years of age. She states she has the appearance of someone who is young.

2.2 Did the respondent do the following things: 2.2.1 Dismiss her on the 27 th May 2022?

2.3 Was that less favourable treatment?

2.4 The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

2.5 The claimant says she was treated worse than Garfield [surname unknown].(*Hamilton)* She claims that Garfield was also a sterile specialist working for the Respondent, who took photographs of the inside of the Respondent's premises within days of her doing so and shared them on social media. Garfield is an individual who is around 60 years of age and has the appearance of someone who is older. She claims that he was not subject to any form of disciplinary proceedings, whilst she was.

2.6 If so, was it because of age?

2.7 The respondent does not rely on the proportionate means of achieving a legitimate aim, as it denies that the Claimant was treated any differently because of her age. The Respondent states that the Claimant was dismissed for breaching its social media policy and policy on the use of phones in the workplace."

3 As explained above the claimant was employed for a 5/ 6 week period or so. She was dismissed on 27 May 2022. She claims by reason of her race or age. The respondent asserts the reason was conduct amounting to gross misconduct and denies any allegation of discrimination.

4 The claimant accepts she breached the company rules by a photograph of her in a sterile area being taken on her mobile phone and by posting "selfies" on more than one occasion which showed the respondent's confidential information in one guise or another.

5 At the hearing today the Tribunal has been assisted by each of the parties providing skeleton arguments, and an agreed bundle of relevant documents. The Tribunal had also considered the ECM file which included the 21 photographs the claimant agrees she posted on social media taken at the respondent's premises and some of which show confidential information, other employees and confidential premises and material visible in the photograph and submissions from the claimant.

6 The Tribunal has heard the oral submissions of both parties and considered the bundle and ECM file and considered the legal position as applied to the facts.

7 **The law to be applied** was set out by the respondent's Counsel in her skeleton argument and is adopted and repeated and highlighted in bold by the Tribunal as applicable here.

Strike out orders

1. **A claim can be struck out under rule 37 of the ET Rules for the following reasons:**

   (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).

2. A party should be given a reasonable opportunity to make representations, either in writing or at a hearing before a strike out: r. 37(2) ET Rules.
3. The striking-out process requires a two-stage test (*HM Prison Service v Dolby* [2003] IRLR 694, EAT, at para 15; approved and applied in *Hasan v Tesco Stores Ltd* UKEAT/0098/16 (22 June 2016,

unreported). The first stage is for the tribunal to consider whether any of the grounds at r. 37(a}-(e) ET Rules have been established. The second stage is whether the tribunal should exercise its discretion to strike out a claim.

4. "No reasonable prospect of success" was defined by Lady Smith in *Balls v Downham Market High School and College* [2011] IRLR 217, EAT (para 6) as follows:
"*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…"***

5. The fact that a claim as pleaded has no reasonable prospect of success gives an employment judge a discretion to exercise as to whether the claim should be struck out: *HM Prison Service v Dolby* [2003] IRLR 694; *Hasan v Tesco Stores Ltd* UKEAT/0098/16.
6. Under r. 37(1)(a) ET Rules **the threshold for strike out a claim on the basis of it having no reasonable prospects is a high threshold. It is a draconian power. The Court of Appeal has emphasised that where facts are in dispute this should only be done exceptionally**: *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330. **Particular caution should be exercised with litigants in person:** see for example *Mbuisa v Cygnet Healthcare Ltd* UKEAT/0119/18. The tribunal should then take the Claimant's facts at their highest before determining whether the claim has no reasonable prospects.
7. In *Chandhock v Tirkey* [2015] ICR 527 (CA) it was made clear as follows:-
"There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or 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 (per Mummery LJ in Madarassy v Nomura International plc [2007] ICR 867, paragraph 56); "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." The court went on to emphasise however that the exercise of a discretion

to strike out a claim should be "sparing and cautious"."

8. **The general principle is that a Tribunal will not strike out discrimination claims except in the most obvious and plain case: *Anyanwu v South Bank Student Union* [2001] 1 WLR 391.**
9. However, as *Anyanwu* and *Ezsias* themselves make clear, such cases *must* exist. **In *Ezsias* it was stated that an example of when it might be possible to strike out would be where the facts sought to be established by the Claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.** Further, Lord Hope set out in *Anyanwu*, at para 24: *"The time and resources of the employment tribunals ought not to [be] taken up by having to hear evidence in cases that are bound to fail."*

10. This was affirmed in the Court of Appeal's judgment in *Ahir v British Airways plc* [2017] EWCA Civ 1392 at paras 15-16:
"*Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established…*"
11. And, at para 24 of *Ahir*, per Underhill LJ:
*"… **where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so."***
12. Where an employment tribunal makes a decision on any disputed issue, including whether to strike-out a claim, it must give reasons for its decision per r.62(1) ET Rules.

(Deposit orders

13. The tribunal has the power to make a deposit order under s. 9 of the Employment Tribunals Act 1996. The tribunal may order a party to pay a deposit of up to £1,000 as a condition of continuing to participate in proceedings or pursuing a specified allegation or argument.
14. The test for making a deposit is where an allegation or argument has *'little reasonable prospect of success':* see r. 39 of the ET Rules. The jurisdiction to order a deposit was considered by the EAT (Elias P presiding) in *Jansen van Rensburg v Kingston upon Thames* UKEAT/0096/07/MAA. The EAT held that the test is plainly not as "rigorous" as for strike out, and tribunals have a greater discretion to take a view as to factual disputes when ordering a deposit.

15. The tribunal has the power to make a deposit order of up to £1,000 for each specific allegation or argument: *Wright v Ripponkoa Insurance (Europe) Ltd* UKEAT 0113/14. The tribunal should consider the party's ability to pay per r.39(2) ET Rules and the overall proportionality of the deposit order.

16. If a party fails to pay a deposit order by the date specified by the tribunal, the allegation the deposit relates to will be struck out: r. 39(4) ET Rules.
17. The purpose of a deposit 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 by creating a risk of costs, ultimately, if the claim fails*" per Simler J *in Hemdan v Ishmail and anor* [2017] ICR 486.")

Respondent's position at this hearing

8 The respondent in oral submissions set out the chronology and emphasized the claimant's short- lived period of employment and that the claimant had received the company employee hand- book and contract of employment before her dismissal and the gross misconduct complained of. The claimant therefore knew in her role as "sterile specialist" use of mobile phones were not permitted in some areas. It is accepted by the claimant that one photograph from her telephone, shows the claimant in a "clean room". Others show her and show confidential information of the respondent – machinery, employees and operating information. The claimant accepts she posted these on social media and was in a restricted area for one of the photographs.

9 The respondent forcefully says the claimant has no prospect of success in respect of the claims or in the alternative little prospect of success.

10 This is in the first place, because the primary facts as stated in paragraph 8 are not in issue. The claimant's actions amounted to gross misconduct on her own account and therefore it was likely dismissal would follow.

11 The respondent submits that the issue of suitable comparator was aired fully at the case management hearing on 13 January 2023 and the claimant was said by her legal representative at that hearing not to rely on a hypothetical comparator in respect of her claims. The note of the hearing deals with "Garfield".

12 Furthermore, the issue of Ms Virginia Lucaz as comparator was also aired although that was not alluded to in the Judge's case management note. From the note of the respondent's Instructing solicitor and previous counsel it was asserted that the Employment Judge did not consider her a suitable comparator as she was not an employee of the respondent (and as such could not be disciplined or sanctioned by the respondent.) Also as an agency cleaner she did not have the same status as the claimant as a "sterile specialist".

13 She was also Filipino so has the same racial heritage as the claimant. The respondent in addressing the prospects of success of the claim today asserted that the claimant had accepted at that hearing in January that she no longer relied on Ms Lucaz as a comparator and in any event the Tribunal could not consider she could be a suitable comparator. That the matter was aired and at that point the claimant did not rely on Ms Lucaz was accepted but that she subsequently sought to do so.

14 This leaves the claimant with Mr Garfield Hamilton as a comparator- the respondent having made further enquiries after the previous hearing. The respondent referred the tribunal to correspondence at page 47 of the bundle regarding Mr Hamilton. The respondent asserts he was a packaging technician who was a black

British man aged 51 with Caribbean heritage. At the time of these events he too was an agency worker. The respondent asserts that he was not in the same situation and the case will fail as he is not a proper comparator.

15 This is developed in the correspondence, quoted here in full - “For the purposes of the Equality Act 2010, in relation to a comparator "...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class." Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285.“As such, in order for Mr Hamilton to be an appropriate comparator, he would need to be “in the same position in all material respects as” the Claimant, other than her (i) age and (ii) race. For Mr Hamilton to be an appropriate comparator, the following circumstances would have to be present: Mr Hamilton had posted confidential information on a social media account, Mr Hamilton had used his phone to take photos in the Respondent’s clean rooms; The Respondent was aware of these breaches of the rules; and The Respondent treated Mr Hamilton more favourably than the Claimant (i.e. not terminating his employment).

Attached to this letter is a witness statement from Adam Platt, the decision maker in respect of the Claimant’s dismissal. Mr Platt’s witness statement confirms: He dismissed the Claimant because she acted in breach of the rules. Her age and race played no part in his decision. He has no knowledge of Mr Hamilton having breached any of the Respondent’s rules regarding confidentiality or the policy on social media. He does not know if Mr Hamilton has a social media account. He is not aware of Mr Hamilton taking photos in the clean room and he has never been involved in any disciplinary matters regarding Mr Hamilton.

16 The letter contends, “As such, the Claimant’s claims will not succeed as she will not be able to demonstrate that she was treated less favourably compared to Mr Hamilton because of her race or age when she was dismissed.

17 Miss Iqbal developed this point asserting that the claimant’s claim was based on “ bare assertion” not evidence in respect of less favourable treatment and no suitable comparator was present. She also contends the contemporaneous documents support the respondent’s narrative rather than any discrimination. The claimant’s claims are therefore bound to fail. She relied on rule 37(1) (a) and whilst conceding the test is a high one for strike out this case falls squarely within those parameters. She also addressed the deposit order question (not dealt with here as not applicable in the circumstances of the Tribunal’s order).

18 The claimant was represented by Mr Karolia today, he submitted that the claimant stands by her complaints of race and age discrimination. He submits she “ feels she was unfairly dismissed”. He repeats the contention that the case should go forward on the comparators previously discussed above Ms Lucaz and Mr Hamilton. He is accountant not a lawyer in seeking to assist the claimant. He pointed out the age difference between the claimant and the two individuals suggested as comparators. He alleges in Mr Hamilton’s case he had taken photographs in a sterile environment.

19 The claimant filed her ET1 as a litigant in person although she was represented by a lawyer on 13 January 2023 when certain concessions were made.

20 The tribunal also considered the claimant's submissions in writing, they were sent by email on 12 May 2023 and although not in the bundle formed part of the tribunals reading of the ECM file - in particular where the claimant drew attention to the following cases: the following is a direct quote from the same-

"(i) The Shamoon v. Chief Constable of the Royal Ulster Constabulary case, from 2003 UKHL 11 - In this decision, the House of Lords determined that a claimant may compare themselves to any other person who is in a relevantly similar circumstance, regardless of whether that person is employed by the same employer as the claimant.

(ii) West Yorkshire Police Chief Constable v. Khan (2001) A claimant must demonstrate that the comparator they have chosen is someone who is in the same or substantially comparable circumstances as they are, and that the variations between them are not material, according to the ruling in EWCA Civ 714.

(iii) Hewage v. Grampian Health Board (2012;) UKSC 37 - In this decision, the Supreme Court ruled that a claimant may switch their comparator at any time during the litigation as long as the change does not materially alter the comparison's fairness.

(iv)Brierley v. Asda Stores Ltd. The question of whether a claimant can compare themselves to a notional comparator rather than an actual person was addressed in the case EWCA Civ 160. The Court of Appeal ruled that, if required, a hypothetical comparator can be used, but stressed that care must be taken when drawing such comparisons.

As part of their responsibility to provide the Claimant with all relevant information and to make sure that the Claimant has a fair and equal opportunity to present their case, I would also like to make the argument that the Respondent should share information about Ms. Virginia Mercado Lucas. After further investigation, I have discovered that:

(i) R v. Hertfordshire County Council ex parte Green Environmental Industries Ltd. 1 All ER 171: In this instance, the court decided that a public entity was required by the Freedom of Information Act to provide all pertinent information to the petitioner. All information that the body holds is subject to this obligation, even if it poses a risk to the body or its personnel.

ii) Re Steadman [2004] EWCA Civ 197: In this instance, a request for information disclosure in a criminal case was made. The court decided that the defendant had a right to know any relevant information, including the complainant's past convictions and any accusations of wrongdoing.

(iii) R v. Goodyear [2005] 3. In EWCA Crim 888, the court decided that a criminal defendant has the right to disclosure of all material that would be pertinent to their case, including details of the prosecution's case and any evidence that might help the defendant's case."

The tribunal took into account the matters above pertaining to the employment cases cited but did not find assistance within the criminal cases cited.

CONCLUSION

21 The tribunal has reached the conclusion that the claimant's claims each have no prospect of success and that gives grounds for consideration of ordering the claims to be struck out.

22 The tribunal considered the law as stated and the evidential matrix referring to the issues previously identified to consider the first part of test in the **Tesco** case.

23 Here the reasons why the case has no prospects of success are as follows:-

(1) The facts as to the dismissal are not in dispute the claimant accepts actions on her part that amount to gross misconduct- she broke company rules relating to sterile areas and in posting selfies showing confidential information. This was briefly explored with the claimant at this hearing by the Employment Judge. She sought to make apologies and her representative today said she had been excited to obtain this employment as an explanation for the selfies. Nevertheless it is right that the facts of her gross misconduct are accepted by her. She expressed she felt shame at the thought of the consequences.

(2) The respondent has filed a witness statement from Mr Adam Platt which specifically refutes any discrimination. He does not have knowledge of Mr Garfield who is relied on as a comparator. As he was the dismissing officer it is difficult to see how his thought process to be motivated by a protected characteristic could be challenged if he has no knowledge of Mr Garfield.

(3) The tribunal accepts the submission of the respondent that the second " putative" comparator Miss Lucaz, and Mr Garfield are not in same circumstances as the claimant and at the case management hearing a hypothetical comparator was rejected as accepted by the claimant's legal representative. The submission in the letter on behalf of the respondent at page 47 is accepted.

(4) The tribunal accepts that the claimant's challenge is based on mere assertion and therefore fits into the **Ezsias** and **Ahir** cases for consideration. There is no evidence of less favourable treatment of a suitable comparator.

(5) Taking the claimant's case at the highest, the claimant must show facts upon which the tribunal could infer, in the absence of an explanation to the contrary, that she was subject to direct discrimination. The claimant has failed to show any prima facie case. There is no evidence identified by the claimant that shows discrimination. Also there is no evidence of a causal link between the complaint of discrimination and the decision to dismiss the claimant.

(6) The Tribunal considers that the claimant is really complaining of unfairness and not being given a second chance at work and is seeking to give the events the label of less favourable treatment due to a protected characteristic of age of race.

(7) The documents in as far as the contemporaneous investigation/ disciplinary action made available to the tribunal by inference support the contention of gross misconduct.

EXERCISE OF DISCRETION

23. The tribunal has to go on to consider whether to strike out the claims in the circumstances they have no reasonable prospect of success and how to exercise such discretion. The tribunal accepts strike out is a draconian order and is therefore a rare occurrence. The fact that the claimant had been legally represented on 13 January 2023 but not when filing the ET1 or today as she is represented by a friend has been part of the Tribunal's consideration. Should the tribunal pause and not strike out? This is a wholly unmeritorious case on the tribunal's analysis.

24. Discrimination claims are by their nature difficult and sensitive, however there are some cases where strike out is appropriate. 3 days have been set aside in May 2024 to hear this matter that would be freed for another case if these claims are struck out. It cannot be proportionate in an overburdened system to keep an unmeritorious case alive.

25 Although as explained to the claimant deposits ordered to be paid and paid, can be forfeit if a case is lost, taking all matters into consideration exceptionally this is one of those few cases that fits the criteria for the exercise of the Tribunal's strike out jurisdiction. It is in keeping with the overriding objective to save costs that the nettle is grasped and the claims struck out. **The 20-22 May 2024 hearing dates are vacated.**

Employment Judge Grundy

Date: 24th July 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON 2 AUGUST 2023

FOR THE TRIBUNAL OFFICE