



EMPLOYMENT TRIBUNALS

Claimant: Ms E Zhang

Respondents: Heliocor Ltd (1)
Heliocor Consulting Ltd (2)
Mr V Tripathi (3)

PRELIMINARY HEARING JUDGMENT

Heard at: London Central (in public; by video) **On:** 4 July 2023

Before: Employment Judge Emery

Appearances

For the claimant: In person
For the 1st respondent: Ms L Skehan (solicitor)
For the 2nd respondent: No representation
For the 3rd respondent: In person

JUDGMENT

The 1st respondent's applications for a strike-out or a deposit order in respect of all allegations against it fail and are dismissed.

REASONS

The Application

1. The 1st respondent makes this application after disclosure and argues that the unusually large amount of relevant documentation shows there is no little or no reasonable prospect of the claimant being able to prove that conduct towards her was related to or because of her race.
2. Set out below are the 1st respondent's arguments, the comments C and of R3 (who supports and adopts R1's applications as his own) in respect of each allegation.

Allegation 1 – around March 2019 when C asked to visit her sick grandfather R3 shouted at C saying words such as: ‘you are an asshole, you are just a piece of tool to me. If you don’t come back with me your plane will crash, you will die on the journey’.

3. R1’s argument is that the documents show a more caring attitude: when in June 2019 C said she may need to go to China early, R3 sent two messages “Oh” “Sure”; on 22 June after C’s grandfather had died, “So sad to hear.” A subsequent message: “I am happy I persuaded you to go early.”
4. Ms Skehan argued that the allegations of harassment are “*out of sync*” with these documents, that there is “*no reasonable prospect*” of an Employment Tribunal finding otherwise.
5. Mr Tripathi argued C did not discuss her grandfather with him in March 2019; in any event “*I would never use such language*”. He referred to her positive message about her going to China early. He argued that he allowed C time off, including for elective surgery.
6. Ms Zhang argued that she needed to book leave with Mr Tripathi, and he refused it in March 2019; there is evidence that he was regularly abusive towards her and this is one example.

Allegation 2: On / around June 2019 R3 said to the claimant when she was late for a meeting , ‘Fuck You’ and ‘Shame on you’

7. Ms Skehan argued that C “*uses the same language*” referring to page 185 and 3 messages from C to R3: “I told you”; “Fuck him”; “taiwanese...”. And 186, in messages about C wanting a “chinese bf”, and R3 suggesting “Indian”, and “Irish” boyfriends, C sent clearly racist messages referring to Irish people: “I hate irish”; “potato eater”; “fuck irish”.
8. There is no way argued Ms Skehan that the claimant can say that comments towards her were race discrimination or harassment, there were derogatory and discriminatory comments by both C and R3. “*It’s a vexatious claim, there is no chance*” C can persuade a tribunal her claim has prospects of success. Bad language was used in the office – see also 198 – C’s own evidence is that it is common, but there is no evidence that the language is on grounds of or connected to C’s race.
9. Mr Tripathi argued that it was an atmosphere in which swear words including fuck were said a lot, but he did not say “fuck you”, that the word was never directed at the claimant; that Mr Cameron would agree with this. He said that the claimant was “*more racist than probably I was*”, referring to her racist language about the Irish.
10. Ms Zhang argued that the office had a “*toxic atmosphere*” and she “*picked up some bad habits*”. She said that the ‘hating Irish’ comment was in this context, and she referred to having an Irish boyfriend in the past “*not a good relationship.*” She said that R3 “*was a very powerful and difficult manager. I had no option but to go along with his style. He has the power over how*

conversations take place.” She argued that the texts are not a complete record, but “you can see office environment he is creating. He is a swears and argumentative and racist person –every colleague witnessed this.”

Allegation 3: In around June 2019, Mr Tripathi requested all employees come to work with no more than one minute late. One day he came late and the claimant talked to her colleague Mohit Kumar in a very low voice and said Vikas is late. He later forced her to go into the small room and forced her to tell him what she had been discussing with Mohit. She refused to tell him, he told her, I’m telling you to tell me, just tell me. Then she had to tell Mr Tripathi what she was discussing with Mohit. He then abused her with comments such as ‘none of your fucking business’, told him to follow his orders and say Yes Sir to him.

11. Ms Skehan argued that C *“has identified the reason for this behaviour – because C whispered. The reason for C’s treatment is in the allegation”*. There is no suggestion within the allegation that this was related to race or on grounds of race. Being told “none of your fucking business” is a profanity but not related to or on grounds of race. Swearwords were used often in this business.

12. Mr Tripathi denied disrespecting the claimant, but he accepted that on one occasion, 4 April 2019, he asked her if her had disrespected her, and she said no. He referred to texts in July when she is asking him to drop her home “because you like helping people” – why would she write this if she was so disrespected?

Allegation 4: The claimant’s grandfather passed away in June 2019, which occurred whilst she was on a business trip to Shenzhen. Mr Tripathi forced her to attend a business meeting instead of attending her grandfather’s funeral. Therefore, she had to miss her grandfather’s funeral. He recorded her business presentation on that day and he criticised that her on the bases that she didn’t perform and verbally threatened her and abused her again.

13. Ms Skehan argued that the tone of the evidence shows the relationship between R3 and C does not support this allegation. The messages at 190 do not reference the funeral and are supportive by R3. *“Had there been an issue it is inconceivable that they would not be referenced in messages”*.

14. Mr Tripathi said that C did not ask to attend the funeral, he was not aware that the funeral had not occurred by the date of the meeting, *“if she had asked me I would have allowed her”*. He said that today is the first day he knew the funeral was on 24 June. *“No-one asked me and I never said no”*. He says he was unaware there was a presentation on the same date as the funeral.

15. Ms Zhang argued that she asked to attend the funeral but was instead told she must attend the presentation *“he stopped me from going and I did not believe he would have done was I not Chinese”*. She said Mr Tripathi contradicts himself – his statement said she attended the funeral; he now says he has just heard the funeral was on 24 June.

Allegation 5: Mr Tripathi took the claimant's mobile phone (on 04 October 2019) and then her USB (around October 2019 and handed back around December 2019) without her permission and kept them with him. He took her mobile phone with him and forced her to beg him to return it. This happened in front of her previous colleagues Roisin Hunter, Mohit Kumar and Heliocor Ltd investor Roger Sherma. He also recorded a video about her pleading with him to give back the phone. He returned the phone to her later the same day on 04 October 2019.

16. Ms Skelton argued that there is no reference to race in this allegation, “so how is it discrimination?” 192-3 shows the text exchanges on 4 October 2019, arrangements to leave together to attend training, reference to emailing photos. “When look at the documents, there is no reasonable prospect of C being able to show the allegation occurred”. The documents show a “nice relationship, inconsistent with this allegation, which suggests the allegation is fabricated”.
17. The claimant argued that R3 took her phone over dinner and he gave it back to her 20 – 30 minutes later. “This was in front of the investor, and the investor said give her back her phone and R3 said no and started taking a video of me – and he said, ‘beg me to give you back the phone’ and he saved a video on his phone of me saying this”.
18. Mr Tripathi denied the event with the phone took place, he says he was interacting with her on text all day, referring to a page with messages between 12.37 and 16.40 (53).

Allegation 6: On 06 November 2019, the claimant applied for a business trip with Owen Hall and received permission to go to Malta. Since Mr Tripathi was not in the UK and she was mentally abused by him for a long time therefore she was not able to communicate with him. She didn't update Mr Tripathi of her schedule and later when he came back to London, he called her into the small room and abused her verbally for an hour and forced her to write an email and apologise to him.

19. Ms Skehan argued that even if it was true that this comment was made, and it is denied by R3, it does not show race was a factor in this decision. Again, the reason for the treatment is in the allegation – C did not update R3, and he shouted at her and was forced to apologise.
20. Ms Skehan accepted that discrimination is not often expressly stated, but she argued “it is unusual for an ET to have uncontested visibility into their relationship”. She argued that there is “strong evidence” that C is aware of issues of discrimination, and she comments repeatedly on race; but she never references allegations against him in any documents. A hypothetical comparator – a white UK born employee – in this context would be treated the same.
21. Mr Tripathi argued that by this date “we were not communicating, C is acting weird and doing things on her own terms...”. He said this included “personal stuff, and not company stuff”. She was not reporting into him by this date she was reporting to Owen Hall. “I do not decide who goes to Malta. And I did not abuse her”.

Allegation 7: Before the 2019 company Christmas party, to stop me from attending the party at Barcelona, Mr Tripathi lied on behalf of the claimant to company CEO Owen Hall. He said that because her colleague Mohit Kumar doesn't have a visa to go she therefore also didn't want to go. she never said this to him. The truth was discovered after Owen Hall mentioned it in the office and she also asked him in front of other colleagues, why did you say this? He texted her later and said, 'don't shout'. This was seen and witnessed by other colleagues.

22. Ms Skehan argued that the evidence shows Mr Tripathi encouraged the claimant to attend the party – page 55 “I want u to come to Spain”, and tells her to “get visa”. Again this evidence contradicts the allegation.

23. In response, Ms Zhang argued that these were emails earlier in the year, but by December she was told she could not attend, and that tickets were booked for 10 employees based in London, only two did not attend, her and an Indian national employee who had a visa difficulty.

Allegation 8: On or around March 2020 Mr Tripathi made overtly racist comments about people who are ethnically Chinese, and their characteristics and appearance using the words “Chinese are thieves, they steal everything. Indians will beat up the Chinese. Chinese have small eyes, China is going to kill all the COVID patients, what a stupid country it is’.

24. There are some references to China in documents sent by Mr Tripathi: Mr Tripathi forwards a website article to ‘London Sales’ including the claimant, the headline is: “China to seek courts approval to kill the [sic] over 20,000 coronavirus patients...” another was of a video of then USA President Trump talking about the ‘Chinese virus’.

25. Ms Skehan argued that these documents “do not come close” to the allegations. There is no proof that these comments were made, no evidence that Mr Tripathi made overtly racist comments as alleged. This damages the claimant’s credibility, at this time there was an “*open and friendly relationship*” between her and Mr Tripathi. It is unlikely that a tribunal could find that the claimant would continue to interact with Mr Tripathi if he was being so racist.

26. Ms Skehan argued that the statement and answers to lawyers’ questions provided by Mr Cameron on behalf of the claimant provides at its highest evidence that Mr Cameron believed Mr Tripathi was acting with “*subconscious*” racism in saying the claimant spoke “*Chinese*”, and not Mandarin. There is no third-party evidence of harassment. While Mr Cameron does record the claimant saying “you’re so racist” so often it “became a company catchphrase” (164) there is no evidence that the events alleged took place, and in fact there is direct evidence that these events did not occur.

27. The messages at 219 – 220 shows C and R3 discussing issues of race including about China and India; and then R3’s response: “Just being brown and Indian doesn’t make me unhygienic”; “I am disappointed and offended with your comments...”. The claimant responded, “Okay sorry about that.” This

does not evidence discrimination. The *“tone of this is the inconsistency of C’s allegations.”*

28. The claimant argued that the messages sent with reference to coronavirus were not relevant to our work, that she is the only Chinese person in the group and the messages are clearly fake and micro-aggressive - *“is China going to kill 20,000 coronavirus patients?”*; and she responded to the messages texting “impossible” and “fake news”. She said that many of the comments about Chinese people were made in the pub and in the office “you have small eyes”; “why are your eyes so small”. She argued that this was an *“accumulation”* of comments, for example one comment at a group lunch, one in the office. She said that these comments were heard by colleagues.
29. On the allegation from R3 that she had called Indians unhygienic and dirty *“this is not true”*. She said she handed R3 some food and he said ‘you have tied your shoelaces and not washed your hands and so I will not eat this. Are all Chinese like this?’. She said that she responded, ‘your desk is like a bin, are Indians like this?’ *“And he got angry and texted me”*.
30. Mr Tripathi argued that he had stopped communicating with the claimant in October 2019, so he cannot have made the comments alleged. During the covid pandemic he was in Essex, there were *“no communications”* at all with the claimant from 8 January 2020 onwards *“I never met her in person since.”*
31. In the messages about China, these were “forwarded to the group” when they were all sitting in a bar, They were discussing the covid outbreak and its impact in a bar and I said that Italy was impacted more. There was information sharing only, without comment. He said he would have forwarded the same article had it been about India.
32. Mr Tripathi referred to the following text exchange at page 59, *“when we were talking”* as indicative of the friendly exchanges they had, including about race. He forwarded a photo of a bus he was on in China saying, “so many Chinese people”. The claimant responded: “Lol”; “Don’t be racist”, Mr Tripathi responded “How’s that racist?”. The claimant responded: “I can feel you talk in a racist way.”; “I can smell your tone”. Mr Tripathi responded, “You can feel and smell whatever you what Miss Zhang.” The claimant responded, laughing.
33. The claimant argued that she had invested in the company and was an employee of the company. “I need to ensure my investment is safe, and he has power and I am alone in the UK.” She said that his use of language *“is a demonstration of power and I had no choice but to follow him and humour him and start mimicking his ways.”*

The Law

34. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

Striking out Rule 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;
- 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. ...

(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.

Deposit orders Rule 39

(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.

...

35. Case law

- a. *Balls v Downham Market High School and College* UKEAT/0343/10: The process to be adopted:

“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 assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects.”
- b. *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46: The power to strike out on the ground that it has no reasonable prospect of success must only be exercised in rare circumstances, and should not, as a general principle, be struck out on this ground when the central facts are in dispute
- c. *Ezias v North Glamorgan NHS Trust* [2007] EWCA Civ 330: where there is ‘a crucial core of disputed facts’ that was ‘not susceptible to determination otherwise than by hearing and evaluating the evidence’, the case should not

be struck out, because at a strike out hearing the tribunal is in no position to properly weigh competing evidence: it will be an exceptional case where it is justified to strike out as having no reasonable prospect of success.

- d. *Mechkarov v Citibank NA* UKEAT/0041/16: The EAT formulated the following test:
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.'
- e. *Romanowska v Aspirations Care Ltd* UKEAT/0015/14: *If there is a dispute about the 'reasons why' a decision maker acted as they did, and the parties have competing assertions on those reason, there is a crucial core of disputed fact in a case, and 'it will be very rare indeed that that dispute can be resolved without hearing from the parties who actually made the decision'*.
- f. *Hawkins v Atex Group Ltd* [2012] IRLR 807: discrimination claims can be struck out – "*Judges should not be shy of making robust decisions in a case where there is realistically only one possible outcome even if the issue is formally one of fact*".
- g. *Ahir v British Airways plc* [2017] EWCA Civ 1392: If a case is so inherently implausible, it is legitimate for the tribunal to conclude that it had no reasonable prospect of success.
"...where there is on the face of it a straightforward and well documented 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. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced."
- h. *HM Prison Service v Dolby* (2003) IRLR 694, EAT - Even if one or more of the five grounds in r 37(1) is made out, the tribunal must also consider whether to exercise their discretion or make an alternative order. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim or response (or part thereof), order the claim or response (or relevant part) to be amended, or order a deposit to be paid.
- i. *Hemdan v Ishmail* [2017] EAT IRLR 228 – 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.'

- j. Sami v Avellan; Sami v Nanoavionics UK Ltd [2022] EAT 72: There is a need for care when making a deposit order, particularly where core facts are in dispute.
- k. Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0095/07, [2007] - When determining whether to make a deposit order, a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. There must be a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.
- l. Sharma v New College Nottingham UKEAT/0287/11 – a tribunal must consider Anyanwu v South Bank Student Union [2001] UKHL 14, [2001] 'discrimination issues...should, as a general rule, be decided only after hearing the evidence.' Only in the clearest of cases will it be apt to order a deposit or strike out order. If there is a core factual dispute, it should properly be resolved at a hearing.

Conclusions on the evidence at the law

36. The 1st and 3rd respondents case is that the evidence is “totally and inexplicably inconsistent” with the pleaded claim. The claimant argues that there is contested evidence, that the culture within the organisation was toxic and racist, that she was forced to go along with ‘banter’ because of her position of vulnerability. The claimant did not explicitly mention race in her complaint in November/December 2019, but she says that she is the only Chinese member of staff, that colleagues never experienced this treatment. The claimant says she can rely on witness evidence of poor treatment.

37. I concluded that the documentary evidence does not overwhelmingly show there is an inconsistency between the claimant’s case and the evidence. The evidence shows that Mr Tripathi readily engaged in issues of race, specifically about China and Chinese people – note the coronavirus texts, the reference to Chinese people on a bus. Answers provided by Mr Cameron – if accurate – suggest that the claimant was concerned about issues of race constantly being raised, but he considered that Mr Tripathi and Mr Hall “just wouldn’t take it seriously”.

38. There is therefore sufficient inconsistency between what the claimant alleges and what the respondents say occurred, which will need to be tested in evidence. Taking each issue in turn:

Allegation 1:

39. I note Mr Cameron's reference to Mr Tripathi's "violent temper" and "repeated inappropriate use of language" including "mimicking [C's] accent" and criticising her. If this is accurate, it is not beyond the bounds of possibility that Mr Tripathi did lose his temper and deny the claimant leave when she asked to go to China.

Allegation 2

40. The allegation is one of toxic language, that the claimant was targeted. Mr Tripathi accepted there was a lot of swearing in the office but denied ever directing it at the claimant. But his direct answer in his submission was that the claimant was more racist "than I was". This suggests that Mr Tripathi accepts that on occasion he may have engaged in some racist conduct.

41. Also, considering Mr Cameron's evidence, there is on the face of it (and talking the evidence at its highest) Mr Tripathi's violent temper and targeting of the claimant. It is not fanciful to say the claimant may be able to show that she was talked to in this matter, that this conduct did occur.

Allegation 3

42. Mr Tripathi's comments on this incident were confusing: on the one hand he denies criticising her, on the other he recalls asking her on another occasion whether he has disrespected her. This is no overwhelming evidence that this incident did not occur, there will be contested witness evidence on this issue. Again, considering Mr Cameron's view of Mr Tripathi's temper, it is not possible to say that it has no reasonable or little reasonable prospects of success.

Allegation 4

43. On whether the claimant asked to attend her grandfather's funeral and if she did why she was not able to attend is a question of fact. Mr Tripathi denies knowing of the date of the funeral or of the date of the presentation, again these will be issues of fact which need to be tested at a hearing.

Allegation 5

44. C says that there was a video of her begging for her phone back; also a named client was present. And C's case is he would not do so but for the power imbalance, being of Chinese origin and a Chinese national. R3 denies this incident occurred. Again, this is a contested issue of fact and I cannot conclude that this allegation claim has no or little reasonable prospects of success.

Allegation 6

45. The Malta trip: I note emails in the supplemental bundle in which Mr Tripathi is asking if C "take line manager approval" before a training event, C responds saying she is upset and can he call her. This is not indicative of Mr Tripathi's view that they are not communicating at this time, that this was not for him to

authorise. It also suggests that he had an issue with this training and the tone of his response "... please answer what I asked!" suggests frustration on his part. Given Mr Cameron's comments about Mr Tripathi's temper, I cannot discount the claimant's version of events as fanciful: this is a contested issue which must be determined by the evidence.

Allegation 7

46. The Christmas party – C clearly wanted to attend, the question is why did she not? She says it's because of Mr Tripathi's attitude towards her, based on her race, he refused to allow her to go. Mr Tripathi's evidence will be that her non-attendance had nothing to do with him.

47. Again, this will be an issue of contested evidence and I cannot say that this claim has no reasonable or little reasonable prospects of success.

Allegation 8

48. Mr Tripathi denies using racist language, saying instead it was the claimant who did so. He also denies interacting with the claimant after January 2020, considering her weird, but accepts he included her in group messages in March 2020 when they were sitting in a bar; both were derogatory about China and Chinese people. Why did Mr Tripathi feel the need to send these messages?

49. In addition, Mr Cameron's view that the claimant did raise issues of racism in the workplace which were brushed off; the way he says she was criticised and her accept mimicked.

50. These are all questions which need to be explored in evidence. Again, it can't be said that this claim has, on the face of it, no or little reasonable prospects of success.

E J - Emery

22 August 2023

Sent to the parties on:

22/08/2023

For the Tribunal Office: