



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Ahmed

Respondent: Mitie FM Limited

Heard at: London South ET (by video) **On:** 30th May 2023

Before: Employment Judge J Bromige

Representation

Claimant: In Person

Respondent: Mr. Bidnell-Edwards (Counsel)

JUDGMENT

1. The complaint that the decision to remove the Claimant from her position working at the Uxbridge JobCentre Plus at the behest of a manager there is struck out on the grounds that it has no reasonable prospects of success.

REASONS

Background and Introduction

2. The Claimant presented her ET1 on 6th September 2022, in which she brought allegations of unfair dismissal, race discrimination and unauthorised deduction of wages against the Respondent. The main focus of the Claimant's claim is she was dismissed following a request by a third-party client for her to be removed from their site. The actions of the third-party client, and in turn, her line manager were acts, the Claimant says, of race discrimination.
3. Following a period of delay (no fault of either party), an ET3 was filed on 13th June 2022. This was followed by an application for further and better particulars on 28th June and an application for strike out on the 29th June 2022. EJ Clarke ordered the Claimant to provide a response to the further and better particulars by 14th September 2022, and the Claimant provided two statements on 9th September 2022.
4. A preliminary hearing was held before EJ Tsamados on 28th November 2022, where the issues in the case were clarified by the parties, and the unfair dismissal and unauthorized deduction of wages claims were struck

out as being out of time (the race discrimination claims were permitted to proceed with an extension of time).

5. A further application to strike out the claim was made by the Respondent on 16th January 2023. In the alternative, the Respondent sought a deposit order in the sum of £750.00. The notice of hearing for today's hearing (which is to determine the application) was sent to the parties on 6th February 2023.
6. EJ Tsamados recorded that the Claimant required an interpreter for the final hearing in their case management order. Unfortunately, this was not spotted for today's hearing, and the case was delayed until 15:12hrs (it was meant to start at 14:00hrs) whilst the Tribunal secured an interpreter for the Claimant. In addition, the Respondent had only served their bundle for the hearing the previous evening. The bundle ran to 167 pages, of which 81 pages were evidence that the Respondent relied upon for aspects of their application.
7. The previous case management hearing had further noted that the Claimant had the benefit of a friend who could provide informal translation into Somali for her. Clearly given the late service of the bundle, this had not happened, and I was concerned that the Claimant would be facing an application based upon documents that she either had not seen or would not understand. In discussion with Mr. Bidnell-Edwards, he confirmed that he limited his application to focusing on the "*no reasonable prospects of success*" test under rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 and would be based upon the Claimant's pleaded case (as clarified) rather than asking me to take into account any further evidence. This seemed to me to be a proper concession and ensured that a fair hearing could still take place.

The Application

8. The Respondents application to strike out what brought on two limbs – firstly that allegations 2.2.1 and 2.2.2 (with reference to the list of issues) are time barred, and secondly that all of the matters at paragraph 2.2 cannot amount to direct race discrimination, as they all flow from the request/stance of a third party. Even if the Third Party held a discriminatory motive, that motivation cannot be imported onto the Respondent and the Claimant would need to establish the Respondent held its own discriminatory motive, for which there is no evidence.
9. The Claimant confirmed that she agreed with the list of issues and allegations as summarised in the case management order as accurately reflecting her case. We went through each of the allegations in turn. She told me that for the first allegation (§2.2.1) where she had been removed from her position working at the Uxbridge JobCentre Plus at the behest of a manager working there, she accepted that it was Mr. Heath (who was not employed by the Respondent) who had removed her, and that her line manager (MR Rai) was not discriminating against her and was only following the "*orders*" of Mr. Heath.
10. As for §2.2.2, the decision to suspend the Claimant, she said that whilst Mr. Heath had ordered the Claimant to be suspended, she stated that Mr. Rai's

decision to suspend her was motivated by discrimination because he “*didn’t treat me as other employees*”. She referred to a potential comparator, a colleague named Maria, although accepted that Maria was not a comparator because there were no complaints received about her in the same way as Mr. Heath had complained about the Claimant.

11. Turning to the third allegation (§2.2.3), the decision to take disciplinary action, and the fourth allegation, the decision to dismiss her (§2.2.4), the Claimant said that whilst Mr. Rai was following the orders of Mr. Heath, there was evidence of his own discriminatory motivation because he had not given the Claimant any notice of the disciplinary action, had not shown her the Respondent’s policies despite her requesting them and had not taken disciplinary actions against other employees (although she did not name any particular comparators).
12. Recognising that the Claimant was representing herself, and communicating via an interpreter, I understood her submissions as being that with the exception of §2.2.1, she could point to evidence which showed that Mr. Rai was discriminating against her and therefore it could not be said that there were no reasonable prospects of success.

The Law

13. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 (as amended) states that “*at any stage of the proceedings... a Tribunal may strike out any claim or response on any of the following grounds that it is scandalous or vexatious or has no reasonable prospect of success*”.
14. The Appellate Courts have frequently cautioned against striking out discrimination claims, owing to their fact sensitive nature and that their proper determination, through hearing live evidence is vital – *Anyanwu v South Bank Student Union* [2001] ICR 391 at para [24]. In *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126, the Court of Appeal stated that it would “*only be in an exceptional case that an application to the employment tribunal will be struck out as having no reasonable prospects of success when the central facts are in dispute*”.
15. In *CLFIS (UK) Limited v Reynolds* [2015] EWCA Civ 439, Underhill LJ confirmed that the Tribunal must analyse the mindset of the alleged perpetrator of the discrimination, and it would not be possible to conclude that discrimination occurs when the decision maker acts without negative motive, although they may have been influenced by someone with such discriminatory motivation.

Discussion and Conclusions

16. Starting with allegation §2.2.1, the Claimant’s acceptance that Mr. Rai (the decision maker) was not acting with discriminatory motivation means that there are no reasonable prospects of success for this part of the claim. *CLFIS v Reynolds* prevents the Claimant from being able to rely upon the actions of Mr. Heath to support this part of the claim, and since he is not an employee of the Respondent, she is unable to bring a claim about his own alleged discriminatory conduct. This part of the claim is therefore struck out.

17. I do not accept the Respondent's submissions that there are no reasonable prospects of success for allegations 2.2.2 – 2.2.4. The Claimant distinguishes between the effective rubber stamping of Mr. Heath's request in 2.2.1 with the consequential treatment by Mr. Rai, in particular around allegations §2.2.3 and §2.2.4. I recognize that it would be exceptional in the context of discrimination allegations to strike out the Claimant's claims, and also that, owing to the late service of the Respondent's bundle, I do not take into account any documentary evidence before me, even when it could be said that it is evidence that is (or should not be) in dispute.

Employment Judge **J Bromige**

Date **19th July 2023**