Case Number: 3312785/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G. Singh	**v**	Specsavers Optical Group Limited

PRELIMINARY HEARING

Heard at: Reading **On**: 10 May 2023
Before: Employment Judge George

Appearances
For the Claimant: in-person
For the Respondent: Mr H. Zopidavi, counsel

RESERVED JUDGMENT

1. The Employment Tribunal has jurisdiction to consider the claims of race discrimination because, subject to them being found to be well-founded, the individual allegations in the claim amount to an act extending over a period and the claim was presented within the time period specified in s.123 Equality Act 2010.

2. The claim of race discrimination is struck out under rule 37 Employment Tribunals Rules of Procedure 2013 because it has no reasonable prospects of success.

REASONS

1. Following a period of conciliation which lasted from 22 September 2022 to 18 October 2022, the claimant presented his claim form on 21 October 2022.

2. In his attached particulars he said at paragraph 4 that he began employment in August 2019, at Specsavers, Ashford, Kent as a 'locum' Hearing Aid Dispenser. It might therefore be assumed that he was, by the claim form, alleging that he had been in continuous employment thereafter. However, the claimant's complaint is rather that various steps were taken, by those employed or acting on behalf of the respondent which led to him being approved on the Specsavers Partnership Pathway.

3. He alleges that the National Professional Development Manager then made untrue statements about his competence and required that he complete a development plan which has been referred to at this hearing as a clinical improvement plan, in order to be approved as a potential Specsavers Joint Venture Partner. He alleges that these untrue statements were made on racial grounds to prevent what he describes as his “chance of promotion”. What the claimant is actually referring to is his chance of becoming Specsavers Pathway/Partner Approved.

4. The respondent entered a response on 29 November 2022 by which they denied discrimination. However, they also raised 2 matters which have been listed to be determined at the preliminary hearing.

5. In paragraphs 6 and 7 the respondent argued that the tribunal does not have judication to hear any claims of discrimination because they were presented more than 3 months after the date complained of. Additionally, in paragraphs 3 and 4, they denied that the claimant has ever been employed and aver that he worked as a self-employed locum at the Ashford Store from August 2019. They go to say that there was no relationship between the legal entity that is named as respondent, Specsavers Optical Group Ltd, and the claimant so the claim has no reasonable prospect of success.

6. On initial consideration under rule 26 of the Rules of Procedure 2013, the case was listed for a preliminary hearing to consider the issues set out in paragraph on page 36 of the bundle of todays hearing. Those are as follows:

   6.1 If the claim has any reasonable prospect of success against the respondent in the light of paragraphs 3 to 4 of the grounds of resistance given by the respondent.

   6.2 To identify the legal and factual issues the tribunal will be asked to describe.

   6.3 To determine the preliminary issues.

   6.4 Whether the claim is out of time in respect of any of the alleged discrimination has set out in paragraphs 6 to 7 of the grounds that has been given by the respondent.

7. Thereafter, the purposes of the hearing before me was to list the case for hearing and case manage it, should any part of it continue after it today. Employment Judge Talbot-Ponsonby also directed parties to co-operate on a draft list of issues. They were able to agree a list which appears at page 39 of the file for the preliminary hearing.

8. For the purposes of the preliminary hearing in public, I had the benefit of a file of documents, which contains the documents set out in the index to it and runs to 182 numbered pages. Within that (page 71) is found a witness statement prepared by the claimant for the preliminary hearing. He adopted that in evidence and was crossed examined upon it. Mr Steven Moore, who is employed by the respondent as a legal director for the U.K. & Republic of

Ireland, gave evidence on the respondent's behalf and adopted in evidence a witness statement upon which he was cross examined.

9. I discussed the issues for the preliminary hearing with the parties at the outset before hearing evidence because I was mindful of the case of E v X (UKEAT/0079/20 & UKEAT/0080/20) and because the claimant had recast the issues as set out in paragraph 1 on page 71 of bundle. This is how he recast them.

    9.1 The Equality Act 2010 does not apply to the claimant in regards to the case reference.
    9.2 The Employment Tribunal (ET) has no jurisdiction to hear the above entitled case
    9.3 no relationship existed exists between Specsavers Optical Group Ltd (SOG Ltd) and the claimant, therefore SOG Ltd are not responsible.
    9.4 The claimant's made by the claimant are out of time.

10. The claimant confirms that he is making a case for race discrimination against this respondent and no other corporate entity (paragraph 3 page 71).

11. In E v X Ellenbogen J reminded Tribunals of the distinction between a strike out application under rule 37 (for example on the basis of no reasonable prospects of success) on which, as a general rule, no evidence was called and determination of a preliminary issue. She emphasised the importance of identifying the issues with clarity. It seemed to be the case that the probable intention of the judge who directed the preliminary hearing was to consider whether the claims had no reasonable prospects of success on the basis that any relationship or anticipated relationship between the claimant and the respondent did not amount to a contract of employment within Part 5 EQA. That is the legal and factual issue covered by paragraphs 3 to 4 of the grounds of resistance and also points 1 to 3 of the claimant's recasting of the issues set out in para.9 above. The parties were content that that reframing of the first issue for the decision at the preliminary hearing in public was clear.

12. I also initiated a discussion with the parties about the meaning of the issue listed in relation to time. The guidance given by Ellenbogen J in E v X was that, caution should be exercised when considering a definitive decision at a preliminary stage about whether a discrimination claim was out of time having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case. For that reason it is more commonly the case that the question at the preliminary stage in relation to time was whether there are no reasonable prospects of the discrimination claim succeeding because it appears to have been brought outside the time limit set by s.123 EQA 2010. However, I accepted the issue directed to be decided today seemed to be to decide the time point substantively. That seems to be implicit in para.3 of the issues for the preliminary hearing and from the direction for evidence, if so advised.

13. The arguments on time points would require me both to decide whether the claim was in fact brought within 3 months of the date of the act complained of (or, if the conduct extended over a period at the end of that period) and, if it was brought more than 3 months after the date of the act complained of, whether it was brought within such further period was just & equitable. It was extremely helpful that the parties had agreed a list of issues (page 39). However, it became apparent when the claimant was cross-examined that the list of issues lacked some precision about the dates relied on by the claimant. Although the agreed list of issues at page 39 is the agreed position of both parties there are no dates on some key allegations and in particular on paragraphs 1.13 and 1.14.

14. For reasons I explain below, I've concluded that the claims should be struck out because there is no reasonable prospect of the claimant establishing that he was or aspired to be in a contract of employment with the respondent that falls within Part 5 EQA. The respondent argued that if I reached that conclusion, it would not be necessary for me to make a decision on whether the claim was presented in time. However, it is a jurisdictional point. Furthermore it seems to me that is in fact a point which can be dealt with relatively quickly once the issues are clarified.

<u>What are the issues in the case and was the claim presented in time?</u>

15. I heard submissions on which allegations were within the claim form on fair reading of the form as a whole. I also heard submissions on whether there was a continuing act or whether the allegations, if found to be as alleged, were so linked as to amount to an act extending over a period. If they were then they should be regarded as to be taking place at the end of that period. It is far from ideal that the question of whether or not there is a continuing act should be considered when no conclusions have been reached on whether any individual act is unlawful and therefore is apt to be considered as part of the alleged continuing whole. However, that is what has been directed to be considered and it has, in the circumstances of the present case, been possible to do so without making a determination of whether the individual allegations of discrimination are made out.

16. The claimant's allegation in para.37 of the particulars of claim (page 20) is that after he had submitted HCPC findings within a completed Clinical Improvement Plan (hereafter a CIP), by which he rejected the express concerns about his clinical practice, Ms Dixon continued to make statements that he was subject to outstanding concerns. The date of these statements was explored with the claimant in oral evidence.

17. The explanation given him was that, by an email dated 3 September 2022, (page 127) he submitted to Ms Dixon (among others) his completed CIP which he identified as being the document that starts at page 160. His allegation at para.37 of the particulars of claim is that, after that date, he was still told that he had an outstanding CIP. At para.40 of the particulars of claim, he alleged that Ms Dixon failed to acknowledge the completed CIP and informed a member of the recruitment team that job applications must not be forwarded until he was signed off by her (said to have happened on 8 September 2022 see para 38 of the particulars of claim).

18. At this preliminary stage I am not concerned with whether the claimant can substantiate his allegations or not. The evidence by Mr Moore that the submitted CIP did not provide that what was sought by Samantha Dixon is therefore not relevant at this preliminary stage. It seems to me that those paragraphs in the particulars of claim make clear is that the claimant alleges that, as late as early September 2022, Ms Dixon intervened either by failing to progress his completed CIP or by continuing to inform the recruitment department that applications for work should not be progressed. A comment made by the claimant in para.39 of the particular claim is 'the cycle just continues on but I am going to bring this to an end'.

19. By para.40 of the particulars of claim he makes clear that he wishes to argue that the actions from September 2021 were discriminatory. As that is clearly within his particulars of claim, the list of issues does not seem to be as extensive as the particulars of claim. Were the case to continue it seems to me that paragraph 1.14 needs to be amended by adding the words at the end "most recently within a reasonable time of 2 September 2022 when the claimant submitted a completed CIP/PDP or on 8 September 2022 in conversation with Sophie Ayland'. In essence, the claimant complains that the respondent failed, within a reasonable period of 2 September or in conversation on 8 September 2022, to reconsider the refusal to make him Specsavers Pathway Approved when new information had been provided to them.

20. Those were the dates of the latest allegations made that are within the scope of the claim form. They were less than 3 months before the date on which the claimant contacted ACAS. At this stage these are bare allegations. If the case proceeded, the claimant would have to show that there was a failure to act when his email of 3 September 2022 (page 127) does not positively ask the addressees to approve him for the Partnership Pathway. However, that also is a matter of underlying merits and not relevant to whether the alleged act is in time.

21. The time points therefore seem to me require me to consider whether there was a continuing act up to that point. I emphasise again that I am not making a finding on whether Ms Dixon's actions were or were not discriminatory. The allegations are defended on grounds which, if supported by cogent evidence, appear potentially substantial. However if the claimant makes out his case in relation to all of the allegations in the list of issues he alleges that in June 2020 Ms Dixon, on grounds of race, made various statements about the claimant's clinical competence, required him to carry a clinical improvement, and refused to retract the statements when the claimant challenged them. He then alleges that the respondent, in about May 2022, informed the director of the Maidenhead Specsavers store where the claimant worked that he was on a CIP and, likewise, the director of the Norwich store. It is also alleged that in, September 2020, claimant was told that he must inform prospective new places of work that he is on a CIP and that the respondent held off submitting the claimant's job applications to companies within the group. All of these matters were said to be linked to Ms Dixon's assessments about the claimant's clinical competency.

22. The claimant's explanation for what happened between those two periods of time is set out in his witness statement. It is that, having had a grievance rejected, he was willing to accept that the concerns were not raised from grounds of race and self-referred himself to the Health & Care Professions Council (hereafter the HCPC). This has been described to me as the regulatory body governing a number of Health & Care Professions including hearing aid dispensers, the job in which the claimant was engaged. They investigated and I accept that the investigation was finally concluded by a notice of decision dated 2 November 2022 (page 145).

23. There is documentary evidence in the bundle which supports the claimant's explanation that he was provided with information from the HCPC which gave him to believe he had been cleared in late August 2022. This is information he apparently included in the CIP that he forward to the respondent.

24. His explanation for the decision to bring race discrimination proceedings when he did was the failure to act upon that CIP and his conclusion that, if he had done everything he was asked to do and the respondent was still unwilling to approve him for Partnership Pathway then there was no other explanation other than race. I stress again that I have not making a decision about whether the allegations are true or meritorious. However, if the claimant makes out his case on what happened then the later acts from early September 2022 are apparently based on the original assessment by Ms Dixon. The claimant alleges that all these were discriminatory.

25. The passage of time between the events in 2020 and those in 2022 is certainly a relatively long period of time. The involvement of the same individual is not the only relevant matter that influence a conclusion on whether or not there was or was not a link between those events. However, in this case the involvement of one individual is an important factor. I've concluded that the events of September 2022 should be regarded as a continuing series of acts so that the conduct is continuing over a period that ends less than 3 months before the claimant contact ACAS. This is because of Ms Dixon's alleged involvement in some acts and direction of others from time to time and also because of her assessment of the claimant's capability. That is a linking feature. In the meantime the claimant was going through the process with the HCPC but found, he claims, that her position was essentially unchanged. I give the important caveat that, although I was satisfied that the allegations can be linked, and I have been directed to reach a final conclusion on that link, this does not any way mean that the claimant is or is not likely to succeed in showing the respondent's actions were discriminatory. I therefore word the judgment as, subject to whether or not the allegations are well-founded, then it seems to me that they are linked and for that reason I'm satisfied that the claimant has shown that the claim was presented in time.

<u>Are the reasonable prospects that the allegations fall within Part 5 EQA?</u>

26. The Employment Tribunals (Rules of Procedure) 2013 Sch.1 include the following:

> "**37.— Striking out**
> (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) 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 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."

27. The power to strike out a claim on the ground that it has no reasonable prospect of success comes from rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013. It is a power to be exercised sparingly, particularly where there are allegations of discrimination. In the case of Anyanwu v South Bank University [2001] IRLR 305 HL, the House of Lords emphasised that in discrimination claims the power should only be used in the plainest and most obvious of cases. It is generally not appropriate to strike out a claim where the central facts are in dispute because discrimination cases are so fact sensitive. Furthermore, there is a public interest in ensuring that allegations of discrimination are heard and determined after appropriate investigation of the circumstances because of the great scourge that discrimination, whether on grounds of race or other protected characteristic, represents to society. It is relevant to bear in mind that s.136 of the Equality Act 2010 provides for a shifting burden of proof and so at this stage the question is whether the claimant has no reasonable prospect of establishing facts from which a tribunal at a final hearing might, in the absence of an explanation, infer that the reason he was not offered employment services was discriminatory.

28. That said, where it is plain that a discrimination claim has no reasonable prospects of success (interpreting that high hurdle in a way that is generous to the claimant), then the tribunal does have and, in a plain and obvious case, may use the power to strike out the claim so that the respondent and the tribunal system are not required to spend any more resources on a claim which is bound to fail.

29. I heard evidence on the question of the identity of the legal entities which were parties to contracts relevant to the case and on the nature of the relationship which the claimant aspired to enter into. The respondent relies upon Patel v Specsavers Optical Group Ltd (UKEAT/0286/18) as persuasive on those factual issues. I do not by these reasons make findings of fact – as I would have to were I tasked with determining as a preliminary issue whether the claimant and the respondent were in a relationship which fell within Part 5 EQA. However, since the parties had covered the position in witness statements and since the claimant was self-representing, it was convenient to

permit cross-examination on these points in order better to understand where any areas of factual dispute lies.

30. The position accepted by the claimant was that the contract of engagement under which he provided services as an audiologist at Specsavers in Ashford (page 42) was between him (described as a locum) and Ashford Visionplus Limited. That entity is not a party to these proceedings. Although the claimant refers to the email at page 114 in which someone whom the claimant alleges to be employed by the respondent writes to Ashford Visionplus Ltd referring to the claimant as an employee, that is a reference to him being an employee of Ashford Visionplus Ltd. It is not relevant to the allegations brought within these proceedings whether or not the claimant was employed by Ashford Visionplus Ltd because they are not a party to the claim and it is not that relationship which is relied upon as giving rise to rights under the EQA. Furthermore, there may be a factual dispute about whether the author of that email wrote on behalf of the respondent or a different legal entity but that is not relevant for the question I need to decide at this hearing.

31. Neither is it material whether Ms Dixon's relationship with the respondent was one which causes them to be liable for her actions (see the arguments at para.40 and 41). In fact it appears that the respondent alleges that Ms Dixon was employed by Specsavers Optical Superstores Ltd (page 101). Engaging with that issue seems to me to risk embarking on a mini trial of a factual issue which is not the purpose of a strikeout application.

32. The claimant describes himself as an applicant for a job and states that the respondent are entitled to choose which candidates they want as 'Specsavers Pathway Approved'. As he alleges in his particulars of claim "once 'pathway approved' I could then buy shares in a Specsavers Hearcare business such as Specsavers Ashford, Kent." (para.5 page 14). In this he does not disagree with para 10 of the grounds of resistance (page 33) where the respondent says that becoming "pathway approved" would allow the claimant to "buy shares in a Specsavers Hearcare business and become a Joint Venture Partner in that business."

33. Apparently the joint venture partner in the Ashford store was willing for the claimant to become his "partner" in the sense that they would respectively provide vision and audiology services through separate corporate entities. The claimant was unwilling to accept in evidence that the Pathway Approval Process does not lead to employment at the end of it but was rather pre-qualification to becoming a partner within the store. This was a position he put to Mr Moore in cross-examination.

34. Mr Moore's statement (para.9 and following) states that audiology store businesses in UK operate as joint ventures between the individual joint venture partner (such as the claimant aspired to be) and Specsavers UK Holdings Limited. He states that in Ashford, for example, the other partner in the joint venture was a company the shares in which were owned equally by the two individual "partners" of the store. So Mr Moore's evidence will be that had the claimant been Pathway Approved the Specsavers model would see him form a company which would then go into partnership with Specsavers UK Holdings Limited. Therefore he was not aspiring to become a partner

(either directly or indirectly) with the respondent but with an entirely different corporate entity. He was not applying to become an employee of the respondent or of any corporate entity, Mr Moore will state.

35. This was an area that Mr Moore described as a "well-trodden path". He referred to the EAT decision in Patel. The findings of the first instance Tribunal in that case were that Mr Patel, an optician, had successfully applied to be a joint venture partner to run a Specsavers store and entered into a written contract of employment with the store trading company (Skelmersdale Visionplus Ltd - SVL) which was wholly owned by a holding company. This respondent (SOG), another joint-venture partner and Mr Patel were shareholders in the holding company. This respondent was the majority shareholder and, to simplify things slightly, seems to have carried out disciplinary and grievance functions on behalf of SVL, the employer. Mr Patel was dismissed and claimed unfair and wrongful dismissal as well as victimisation against this respondent. At a preliminary hearing an Employment Judge determined that Mr Patel had never been an employee of this respondent in the context of the ownership structure described above either under the Employment Rights Act 1996 or the EQA.

36. Among other things, the EAT upheld the judgement of the Employment Judge and specifically rejected an argument that Mr Patel had been jointly employed by SVL and this respondent.

37. As I say above, the EAT decision is persuasive rather than binding on the present parties – because it is about a factual matter between the parties to that case and not a legal matter. Furthermore, the ownership structure in Mr Patel's case seems to have been different to that which Mr Singh would have entered into, had he been successful. Mr Patel and this respondent seem to have been shareholders in the holding company which owned Mr Patel's employer and, as shareholders, their relationship was governed by a shareholders agreement. Mr Moore's evidence in his witness statement was that Mr Singh and this respondent would not have had a contractual relationship of any kind.

38. Nevertheless one of the claimant's allegation is that he was an applicant for employment with Specsavers Optical Group Limited. This is inexplicably inconsistent with his own position that the Partnership Pathway would have enabled him "to buy shares in a Specsavers Hearcare business" (see para.32 above). The contract for services provided by the claimant to Ashford Visionplus Limited (page 42 and 44) is inexplicably inconsistent with the assertion that an individual who has been approved on the Partnership Pathway will become an employee of this respondent and entirely consistent with Mr Moore's statement evidence and the claimant's evidence that it would result in a joint venture agreement.

39. It is as an applicant for a job that the claimant argues his situation falls within part five (work) of the EQA. However the factual allegation he raises is that Ms Dixon (whom he alleges the respondent to be responsible for) failed to approve him as a prospective joint-venture partner which would have been through a company vehicle. There is no reasonable prospect of the claimant establishing that he was or had applied to enter into a contract of employment

with the respondent's within the meaning of s.83(2) EQA where it is said to mean "a contract of employment, a contract of apprenticeship or a contract personally to do work". There is no reasonable prospect of the claimant establishing that he was engaged in or had applied to become engaged in contractual relations with this respondent.

40. For that reason I have concluded that the claimant's race discrimination has no reasonable prospects of success and dismiss it pursuant to rule 37(1)(a) Rules of Procedure 2013.

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Employment Judge George

Date: 11 September 2023……………..

Sent to the parties on: 12 September 2023

For the Tribunal Office