



EMPLOYMENT TRIBUNALS

Claimant: Mr T Hayward

Respondent: Magnetic Shields Ltd

Heard at: London South via CVP **On:** 31 August 2023

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Mr Briley, Union Representative

For the respondent: Mr Ross Beaton, Counsel

JUDGMENT ON APPLICATIONS UNDER RULE 37

Decision

- The claimant's claim for Direct Age Discrimination has no reasonable prospect of success and is struck out.
- The respondent's application to strike out the claimant's claim for Indirect Age Discrimination as having no reasonable prospect of success is refused. The alternative application under Rule 39 (for a Deposit Order) is also refused.

Reasons

The issue (s), appearances and documents

1. This was a Public Preliminary Hearing to determine the respondent's application to strike out the claimant's claim for having no reasonable prospect of success, alternatively that it was vexatious, under Rule 37 of the Employment Tribunals Rules, Schedule 1, 2013, alternatively under R.39 for a Deposit Order as the claim had little reasonable prospect of success.
2. The Tribunal had a Bundle running to 70 pages. Mr Woolger, the Managing Director of the respondent, gave evidence and was questioned.

3. The claimant was assisted by Mr Briley, his union rep. The respondent was represented by Mr Beaton, Counsel.
4. Both parties provided oral submissions.
5. The Tribunal admitted in evidence Mr Woolger's witness statement (received 2 days before) and a wage information document (only served 1 day before) as they were actually or potentially relevant and necessary to the issue (s) before the Tribunal.
6. A reasonable enquiry of the claimant's means was also undertaken as a result of which the claimant had a surplus of between £500-£600 per month (income minus outgoings).

Relevant Findings of Fact for this Hearing

7. The Claimant is still employed by the respondent. He is a Furnace Loader.
8. In April 2022, he was awarded a pay rise to bring him up to the new NMW of £9.50.
9. Before then, he was on £9.25 from January 2021. From April 2020, NMW had been £8.74. He was thus being paid more than NMW.
10. In April 2021, NMW increased to £8.91. There was no impact on the claimant, he continued to be paid more than NMW.
11. Other employees in the Furnace department also were paid the same NMW from April 2022. This was in pursuance of an asserted same pay for the same job policy although it appeared broader than that (possibly by reference to a band or level) in accordance with the list before the Tribunal. The respondent did not lead direct evidence on the document for example to explain its breakdown, but simply referred to the information in its generality.
12. Prior to that date, some had been on £9.25, others had been on £8.91. With one exception, the employees who had previously been paid £8.91 had under 2 years service and were aged 33 or under. The employees who had previously been paid £9.25 had between 6 years and 22 years' service and were between the age of 60 and 73. This included the claimant.
13. There was a separate list of leavers provided too. The length of service was not populated, but with one exception, it showed employees who had previously been paid £8.91 who were then paid £9.50 from April 2022 were aged between 18 and 22.
14. In oral testimony, Mr Woolger accepted that following the increase in pay to £9.50 in April 2022, there was an advert in relation to the same job as the claimant advertising the role between £9.50 and £10.50 per hour, He could not however explain why. He said he didn't fully know why.

15. Mr Woolger also added that there was an old pay policy as a result of which the claimant did receive extra pay (over NMW) – he said this was going back years but he said the pay policy now was bringing people in line.
16. There was no pay policy before the Tribunal or any information provided to explain the change. This was a point made by the claimant's representative too.
17. At the outset of today's Hearing, the Tribunal had, following some initial reading, offered a provisional view that the pleaded claims were not clear to the Tribunal in particular whether the claim for Age Discrimination was Direct, Indirect or both. Mr Briley for the claimant said they were both.
18. Mr Beaton accepted that either type of claim could be inferred from the narrative, but he said even if both claims were advanced, his position on prospects was the same.
19. The respondent's application to strike out was premised on the assertion that the respondent's decision making did not take into account considerations relating to age. Further, that at a meeting on 17 July 2023, the claimant said more than once that he did not think he had an age discrimination claim but this was more about unfair treatment. These minutes were at page 51 to 57.

Applicable Law

20. Striking out – Rule 37 Employment Tribunals Rules of Procedure 2013, Schedule 1:

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) 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.
- (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

21. Deposit Orders – Rule 39 Employment Tribunals Rules of Procedure 2013, Schedule 1:

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.

(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal’s reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

Conclusions and analysis

22. Dealing first with Direct Age Discrimination, it is clear to the Tribunal, that on the case of both parties, the reason why the claimant’s pay changed to the amount it did in April 2022 was because of the new higher rate of NMW and/or the respondent’s prevailing pay policy to pay all employees undertaking the same

role, the same pay (although it appeared broader). The reason why was not and could not thus be the claimant's age. This was common ground. The Direct Age Discrimination claim has no reasonable prospect of success and is struck out.

23. The alternative Indirect Age Discrimination claim is less clear cut, not least because it is not well pleaded. However, the claimant's complaint appears to relate to the respondent's shift in pay policy which he says has disadvantaged him by removing any pay supplement which he had previously been in receipt of over and above NMW.
24. The alleged PCP has not been clearly articulated and group disadvantage has not been properly asserted (and by reference to comparative age groups), but the claimant has only just received the wage information with age and length of service information. Based on the foregoing analysis of wage information, there is at least an arguable case for indirect age discriminatory impact.
25. This view was supported by Mr Woolger's testimony about there being a change in pay policy.
26. Further, the respondent's reliance on the meeting minutes of 17 July 2023 did not wholly support its application. This was because at the same meeting, the claimant had said, more than once, that age is relevant. He said newcomers coming into the business were generally going to be younger, so his age was relevant, further that he had 22 years' service, thus age does come into the conversation.
27. In pursuance of the above, whilst further particulars are required, the draconian step of striking out the claim is not made out. The cases of *Anyanwu and another v South Bank Students' Union and another* 2001 ICR 391 and *Community Law Clinic Solicitors v Methuen* 2012 EWCA Civ 571 CA make it clear that the threshold to strike out is very high and discrimination claims should not be struck out except in the most obvious cases as they are fact sensitive and require a further or full examination of the facts. Neither is the Tribunal satisfied that the claim has little reasonable prospect of success such that a Deposit Order should be made.
28. That is not the same thing as saying the claim has reasonable prospects of success, neither does this decision impact or undermine the respondent's objective justification, if and when the Tribunal gets to that position.

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Employment Judge Khalil

12 September 2023