



EMPLOYMENT TRIBUNALS

Claimant: Mr M Johnson

Respondent: Dunelm (Soft Furnishings) Ltd.

Heard at: Hull by Video **On:** 26 July 2023

Before: Employment Judge Miller

Appearances:

For the claimant: In person

For the respondent: Mr M Cummings – solicitor

JUDGMENT having been sent to the parties on 31 July 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. First, I apologise to the parties for the delay in sending these reasons. The request for written reasons was received by the Tribunal on 9 August 2023 but because of absence and other work commitments, this is the first opportunity I have had to prepare written reasons.
2. Secondly, on 26 July 2023 I made decisions about the claimant's application to amend his claim and the respondent's applications for the claimant's claims to be struck out or made the subject of a deposit order. I also produced a judgment dismissing the claimant's claims of direct age discrimination and direct race discrimination following a withdrawal of those claims by the claimant. It is unclear which of those decisions the claimant is requesting written reasons for so I have produced reasons for all the decisions I made that day.
3. The claimant is an accountant and applied for the role of Controls and Compliance Senior Manager with Respondent in June 2022. He had three interviews, the last of which was on 5 July 2022 and was left with the impression that his application had been successful. The claimant says

that he did not hear formally about his job despite emails and calls chasing that up in July. The claimant then started Acas early conciliation on 26 September 2022 which ended on 7 November 2022. He submitted his claims for Age Discrimination and Race Discrimination to the Tribunal on 6 December 2022.

4. The claim form was apparently blank but, in fact, the claimant had set out in part 8.2 the narrative I have just described. That only came to light on the date of this hearing, there having been some problem with the Tribunal's system.
5. As a result of the apparently blank claim form, the claimant was ordered on 31 January 2023 to provide detailed information about his claim by 7 February 2023. He did not do so until 6 March 2023. In that additional information, the claimant produced the same broad narrative as had been set out in his claim form, but he added that the fact that the formal interview process was conducted by an all-white panel suggested bias in the recruitment and selection process. The respondent had not, by that point, released any information about the race or age of the successful candidate. There were also substantial delays in the claimant being notified of the outcome.
6. In neither the claim form nor in the further information provided by the claimant, did the claimant make any reference to the content of the job description or suggest that it might be discriminatory in any way. The claim appeared to be based on an allegation that he was not selected for the job because of his age and/or his race.
7. There was a preliminary hearing in Private on 9 June 2023 before EJ Deeley. (The hearing had been previously postponed through no fault of the parties). It was at that point, in that hearing, that the prospect that the claimant was making a claim for indirect discrimination first arose. That was the first mention of the claimant's concerns about the job description for the role the claimant had applied for.
8. Specifically, the job description included a criteria that candidates had experience with one of the "Big 4" or "Top 10" accounting firms. The "Big 4" refers to four well-known firms of accountants and the "Top 10" refers to large and successful accountancy firms.
9. This was the first time that this issue was mentioned specifically. EJ Deeley recorded the issues in her case management order and the Provision, Criterion or Practice (PCP) that was said to be discriminatory for the purpose of the potential indirect discrimination claim was
 - a. requiring "recent experience" of private practice; and/or
 - b. requiring an individual to have worked for a 'Big Four accountancy firm'?
10. The claimant was then ordered, in that hearing, to confirm by 14 July 2023 which complaints he was pursuing – whether direct or indirect. On 14 July 2023 the claimant wrote to the tribunal and said

“My claim in the employment tribunal is based on indirect discrimination because of my age and race

The job description for the role of Controls and Compliance Senior Manager listed qualifications for the role, which included “Big 4 or Top 10 external or internal audit experience”. The ethnicity for most qualified accountants employed at the “Big 4 or Top 10” is “white British”.

The inclusion of “Big 4 or Top 10” within the job description places my application at a disadvantage as my ethnicity is Black British Caribbean.

Furthermore, the Respondents lack of feedback regarding my application would suggest indirect discrimination, as the successful candidate, who was 45 and described their ethnicity as “white British”, was informed of the outcome of their application for the role in a timely manner.

I cannot accept that there “was some confusion over communicating the outcome my application for the role”. I made repeated attempts to obtain feedback regarding my application.”

11. At this hearing, the claimant confirmed that he was only pursuing a claim of indirect discrimination and was withdrawing his claims of direct discrimination.
12. EJ Deeley directed that the purpose of this hearing was to consider the following matters:
 - a. Does the claimant’s statement of claim (emailed to the Tribunal on 6 March 2023) amount to an application to amend his claim form (submitted on 6 December 2023)? If so, is leave to amend his claim form granted?
 - b. Should all or any of the claimant’s complaints be struck out on the grounds that they have no reasonable prospects of success?
 - c. Should a deposit order be made in respect of all or any of the claimant’s complaints on the grounds that they have little reasonable prospects of success?
 - d. Any case management orders that may be appropriate, including arrangements for the final hearing of this claim (if applicable).

Amendment

13. I consider first the question whether the claimant’s claim should be amended. Although the orders of EJ Deeley referred to an amendment arising from the claimant’s further information of 9 March 2023, I considered also whether the claimant’s claim should be amended to include the complaint of indirect discrimination.
14. In my view, the claimant made his application to amend his claim to include the claims of indirect discrimination on 9 June 2023. It was only at that point, at that hearing, that the respondent disclosed, as far as relevant, the age and race of the successful candidate for job. It was also

only then that the claimant found out that the successful candidate was a white man aged 45. Even by that time, the claimant had still not had a formal outcome to his application. The respondent says that the claimant had been told on 8 September 2022 that he had been unsuccessful by telephone and feedback was discussed.

15. When considering whether to allow an amendment application, I must consider the balance of prejudice and hardship to that parties in either allowing or refusing the claimant's application. In *Selkent Bus Co Ltd v Moore* [1996] ICR 836 at 843B it was held that the following factors will be relevant to that question:
 - a. The nature of the amendment, ie whether the amendment sought is a minor matter such as the correction of clerical and typing errors, the addition of factual details to existing allegations or the addition or substitution of other labels for facts already pleaded to, or, on the other hand, whether it is a substantial alteration making entirely new factual allegations which change the basis of the existing claim.
 - b. The applicability of statutory time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions. For these purposes, the date to consider for time limits is the date that the application was made.
 - c. The timing and manner of the application. An application should not be refused solely because there has been a delay in making it, but it is relevant to consider why the application was not made earlier.
16. In *Vaughan v Modality Partnerships* UKEAT/0147/20/BA (V) HHJ Taylor said:

“Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions”.
17. On the face of it there is no good reason for not including the details about the job description criteria in the claim form or in the further information provided in March. However, I have to weigh that against the fact that the claimant has been continually left in the dark by the respondent in relation to the details of the successful candidate. It is also relevant that there was a substantial delay even telling the claimant the outcome of his interview which understandably caused the claimant concern and to be suspicious.
18. The claimant did describe some personal circumstances that he said impacted on him making his claim, but that is not significant enough to

justify missing out the small but important detail relating to the Job Description.

19. Referring to the criteria in *Selkent*, this is a substantial amendment which introduces a new head of claim. It is quite late – this claim was only introduced at the first preliminary hearing.
20. However, it is also relevant that the claimant did set out in his claim form a narrative. Had that been served, in my view it is likely that a different set of circumstances would have arisen. The respondent would have entered a response and the issues would have been clarified at the case management hearing. There would still have been an issue about amendment, but the context of the amendment has been made more complex and controversial through no person's fault but by reason of the blank claim form apparently being received and served when that wasn't the case.
21. In my view, this procedural fault combined with the failure of the respondent to communicate the outcome and the information about the successful candidate means that the claimant will have a reasonable prospect of time being extended to bring his claim for indirect discrimination in the event that the tribunal at the final hearing determines that it was not brought in time. There remains a question of fact as to when the claimant finally discovered that his application had been unsuccessful and, consequently, from what date time would start to run for the bringing of a claim.
22. Overall therefore and subject to my view on the merits, in my judgment the balance of prejudice is in favour of allowing the claimant to amend his claim to include his claim of indirect discrimination. It is an ostensibly plausible claim and subject to what I have to say below, the prejudice to the claimant in not being able to produce or attempt to produce the evidence to show that the respondent applies a discriminatory PCP outweighs the prejudice to the respondent in having to defend a claim they would not otherwise have to. In my view, it is also in the interests of justice for the tribunal to determine if a large respondent like this one applies a discriminatory PCP.
23. I consider now the merits of the claimant's claim for the purposes of the respondent's applications to strike out the claimant's claim or make it subject to a deposit order.

Strike out application

24. In respect of the application to strike out the claimant's claims, rule 37 of the Employment Tribunal Rules of Procedure 2013 says (as far as is relevant):

(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.
25. The test for striking out a claim is whether, taken at its highest, the claimant has NO reasonable prospects of success. This is a very high threshold and, as the respondent observed, the Employment Tribunal has been warned over and over again by the Employment Appeal Tribunal not to hastily strike out discrimination claims as they are so fact sensitive
26. In my view, both allegations of indirect race and age discrimination have more than no reasonable prospects of success. It is true that evidence of group disadvantage is required and that might be difficult to obtain, but the arguments are coherent and, subject to what I say below about assumptions, the possibility of black people or older people being less likely to have obtained experience at one of the mentioned firms is not a shocking or startling proposition to anyone who is reasonable informed about the barriers faced by various groups of people in society.
27. There is a potential difficulty with what might be described as the intersectional basis of claims. The claimant says that he is at a particularly stark disadvantage because he is both black and in his 50s. It was explained to the claimant at the previous preliminary hearing that section 14 of the Equality Act 2010 (combined discrimination) has still not been brought into force.
28. However, the way the claimant describes the two disadvantages, either is credible of itself, albeit that it might be difficult ultimately for the claimant to prove that.
29. For these reasons, I cannot say that the claimant's claims have NO reasonable prospects of success and the respondent's application to strike out the claimant's claim is refused.

Deposit order application

30. In respect of the respondent's application for a deposit order, rule 39 says:
- (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.

31. The test for whether to make a deposit order is at a lower threshold to the test for a strike out order. In considering whether the claimant has little reasonable prospects of success, I can consider also whether the claimant or respondent are likely to be able to establish, with evidence, the cases that they put forward. I can consider, therefore, even if the claimant's case is coherent and legally sound, what are the chances of the claimant actually proving that case.

32. The claimant has described today a clearly understandable and potentially credible basis for believing that reference to the "Big 4" is likely to disadvantage black people or older people (when the comparator is materially the same i.e. a younger black man). Specifically, the claimant bases his assertion on his personal work experience working with different people from different organisations. This is more, and carries at this stage more weight in supporting the claimant's case, in my view, than an assumption that might be made that large City firms historically have not been particularly diverse, or have been staffed predominantly by white, privately educated men. The claimant also fairly observed that the historical lack of diversity in these firms appeared to potentially be changing, hence the basis of the age discrimination claim.

33. I conclude therefore that the claimant's case is brought on more than just a suspicion of potential for a discriminatory PCP, but is also informed by his own personal experience.
34. The claimant may, however, have some evidential difficulty in proving the group disadvantage in his case because he will need to bring some evidence to the Employment Tribunal to show that in fact there is or has been a disproportionately small representation of black people amongst the comparator firms the respondent has referred to in their Job Description. That might be possible to overcome with third party disclosure orders under rule 31 (which provides that the Tribunal can order someone who is not a party to the claim to produce documents in their possession or information if relevant to the matters to be determined).
35. Whether or not the tribunal would make a third party disclosure order against the "Big 4", and whether or not they would have documents or information to produce to support the claimant's claims is a different matter, but at this stage it seems to me that it is more than just a theoretical possibility.
36. Mr Cummings' second argument was that even if the claimant can get over the first hurdle of demonstrating the application of a discriminatory PCP (and group disadvantage), in any event the respondent's justification defence (although not pleaded for understandable reasons) means that he would fail at the last stage. The respondent says that it is perfectly reasonable for the respondent to have candidates with diverse experience and this PCP is a very good way of demonstrating that. The respondent says this will obviously be a proportionate means of achieving a legitimate aim.
37. That might be the case, but it is not obvious to me. The legitimate aim seems eminently arguable. It also seems, however, that there are a number of ways of achieving that aim beyond reference to specific previous employers. In my view, that is an argument that has some prospects of success from the claimant's perspective. It is certainly not such an obviously proportionate means of achieving a legitimate aim that I could say the claimant would have little reasonable prospects of succeeding in his claim.
38. My decision in respect of the deposit order is finely balanced. It is likely that the claimant could have some difficulty obtaining the evidence to support his claim. I refer, however, to rule 39(5)(a) as set out above. The consequence of this rule is that if the claimant is unsuccessful in any claims that have been made subject to a deposit order, he would have a higher risk of being ordered to pay some or all of the respondent's legal costs.
39. I do not consider that it is proportionate or reasonable to subject the claimant to a higher risk of costs at this stage. His case is internally consistent and appears to have a degree of public interest in being determined. The difficulties that claimant might well have are practical difficulties.

40. Having said that, even though it is not proportionate to expose the claimant to an increased risk of paying the respondent's legal costs right now if, as the orders progress, the respondent takes the view that the evidence does not support the claimant's claims, I make it explicitly clear that the respondent is entitled to renew their application for a deposit order at that stage if they consider it is proportionate to do so.

41. For these reasons, the respondent's application for a deposit order against the claimant is unsuccessful and is refused.

42. Finally, and for the sake of completeness, Rule 52 says

Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—

(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or

(b) the Tribunal believes that to issue such a judgment would not be in the interests of justice.

43. I have dismissed the claimant's claims of direct age and race discrimination in accordance with this rule because the claimant withdrew those claims, he did not express a wish to reserve a right to bring those claims elsewhere and there is no basis on which to conclude that issuing a judgment would not be in the interests of justice.

Employment Judge Miller

Date: 14 September 2023