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# EMPLOYMENT TRIBUNALS

**Claimant:** Ramaunus Marcinkevicius  
**Respondent:** ATE UK Ltd  
**Heard at:** East London Hearing Centre  
**On:** 21 September 2023  
**Before:** Employment Judge Housego  
**Members:** Professor J Ukemenam  
Ms G Forrest

## Representation

**Claimant:** In person  
**Respondent:** Alice Beech, of Counsel, instructed by Mills & Reeve LLP

# JUDGMENT

The claim is dismissed.

# REASONS

## Basis of claim and defence

1. The Claimant is Lithuanian. The Respondent makes trailers for vehicles. The Claimant was a production operative. He worked as an agency worker then was taken on as an employee. He worked as an employee from 01 September 2021 until summarily dismissed on 11 November 2022. He has less than two years' service so cannot claim unfair dismissal. He claims that he suffered sustained bullying and harassment at work and gave some examples of issues he says support this, and says that his dismissal was race discrimination. The Respondent says that there was an incident at work where a colleague teased him, whereupon he punched the colleague, who responded by kicking the Claimant. The Claimant was dismissed and the colleague given a warning. The Respondent says that the difference was because the Claimant instigated the violence, did not attend the disciplinary hearing, or for work the day before so showed no insight or remorse, and had a previous warning. The colleague had eight years' unblemished service, was remorseful and was not the instigator of the violence, and those

were the reasons he was not dismissed and the Claimant was dismissed. They deny the other allegations and say that most of them are out of time.

## **Summary**

2. The claim has not been conducted by the Claimant in a way that meets Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 to the extent that it is struck out.
3. There is nothing to support the Claimant's assertion that he was subject to sustained bullying and harassment. His claim form contains only a bare assertion, and he gave no oral evidence, though he explained more about it in a Case Management Hearing. The Respondents' documentary and video evidence about the matters the Claimant had complained about was more than adequate explanation of them. There were time issues with the harassment claim.
4. The cctv showed that the incident for which the Claimant was dismissed was exactly as the Respondent said, and it was used for the disciplinary process for the two people involved. The reasons given by the employer for this case are the same as set out in the letters dismissing and warning the Claimant and his colleague. They provide good reasons for the dismissal and the difference in treatment.
5. The Claimant has provided no evidence that could lead a Tribunal to find that there was any element of race discrimination in the way the Claimant was treated at work and in his dismissal, so that in any event the claim had no reasonable prospect of success.

## **Law**

6. Race is a characteristic protected by the Equality Act 2010<sup>1</sup>. The Claimant asserted that the treatment he received was direct race discrimination<sup>2</sup>.
7. The test for a claim that the Claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever was there less favourable treatment (compared to someone else) which was tainted by race discrimination. It is for the Claimant to show reason why there might be discrimination, and if he does so then it is for the Respondent to show there was none. The Tribunal has applied the relevant case law<sup>3</sup>, and has fully borne in mind, and applied, S136 of the Equality Act 2010. Discrimination may be conscious or unconscious, the latter being hard to establish and by definition unintentional. It is the result of stereotypical assumptions or prejudice.

## **Evidence**

8. The Tribunal heard no oral evidence from the Claimant, who had not provided a witness statement, despite being ordered to do so in a Case

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<sup>1</sup> S11 Equality Act 2010

<sup>2</sup> S13 Direct discrimination: (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

<sup>3</sup> The law is comprehensively set out in Royal Mail Group Ltd v Efofi [2021] UKSC 33 (23 July 2021)

Management Hearing for which he had a Lithuanian interpreter and part of the Order was translated into Lithuanian telling him how to get it all translated.

9. The Respondent was prepared to tender for oral evidence witnesses who had provided witness statements. They were all in attendance at the hearing. They were:
  - 9.1. Richard Herbert, Production Manager, who heard the Claimant's colleague cry out when the Claimant hit him;
  - 9.2. Nigel Egner, Manufacturing Operations Manager, who dismissed the Claimant;
  - 9.3. Dorian Horski, the colleague hit by the Claimant; and
  - 9.4. Mikolaj Sobala, a Production Operative, who gave evidence about the four incidents said by the Claimant to be race discrimination.
10. The Tribunal was provided with a full bundle of documents setting out the history of the Claimant's employment, his disciplinary record and the actions of the Respondent in response to the incident.
11. The Tribunal was also supplied with video evidence from two different cameras from different angles of the Claimant being teased by a colleague about a piece of paper, then punching his colleague, who then kicked him, the colleague then doubling up, the Claimant going over to him, bending down to shout at him close to his face. The video has clear sound. The Tribunal had viewed it before the start of the hearing.

### **Issues**

12. For the claim for race discrimination the issues were:
  - 12.1. whether the Claimant was bullied or harassed at work at least in part by reason of his race or nationality; and
  - 12.2. whether the dismissal was tainted by race discrimination.

### **The hearing**

13. I made a full typed record of proceedings. There was a Lithuanian interpreter. The Claimant was in Lithuania. It is not possible to give evidence in an Employment Tribunal case from Lithuania. Accordingly Ms Beech applied to strike out the claim and then the Claimant asked for an adjournment.

### **Preliminary application**

14. Ms Beech applied to strike out the claim:
  - 14.1. The Claimant was told exactly what was needed in a Tribunal Case Management Order on 14 July 2023 held by Judge Shore, the first

page of which is translated into Lithuanian, and tells the Claimant how to have the rest translated. There was a Lithuanian interpreter at that hearing, so the Claimant knew exactly what was decided and what he had to do.

- 14.2. That Order told him that he could not give evidence from Lithuania, and records that he said he intended to travel to the UK for the hearing.
- 14.3. A whole section of the Order dealt with witness statements and made it clear that the Claimant must provide one, but he had not done so.
- 14.4. The Order set out the issues. Nowhere was there any evidence and an allegation was not evidence. Even a witness statement had a statement of truth at its foot.
- 14.5. The Respondent's solicitor had been as helpful to the Claimant as it was possible to be, latterly setting matters out in full in an email to the Claimant on 22 August 2023, which the Claimant had fully understood as his reply said so.
- 14.6. The Respondent's documentary evidence was compelling.
- 14.7. It would be unfair for the Claimant to be allowed to cross examine the Respondent's witnesses without giving evidence himself on which he could be cross examined. A fair hearing was not possible.
- 14.8. The Claimant had clearly stated that he would not come to the UK or go to Latvia so that an adjournment was not going to make any difference and would be wasted cost and Tribunal time.
- 14.9. All three limbs of Rule 37 were relied on – breach of Tribunal Orders, unreasonable conduct and no reasonable prospect of success.
15. The Claimant said that he could not afford to come to the UK and that while he accepted that he had been told that he could travel to Latvia (which permits parties to give evidence from within its borders) that was 500km away. He said that he had not appreciated the problems that were now raised. He had no witness to give evidence and had not thought that he had to prepare a statement himself. He would most certainly do so now.
16. At the conclusion of the submissions the Claimant asked for an adjournment so that he could prepare a witness statement and attend a hearing in the UK.

### **Approach to strike out application**

17. The Tribunal considered and applied the law set out in Ahir v British Airways Plc [2017] EWCA Civ 1392, Anyanwu v South Bank Student Union [2001] UKHL 14, Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 and Mechkarov v Citibank NA [2019] UKEAT 0006\_19\_3107. In an application to strike out a discrimination case the claim must be taken at its highest.

18. Rule 37 provides:

**“Striking out**

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.”

**Conclusions**

19. It would not be fair to carry on with the hearing and allow the Claimant to cross examine the Respondent’s witnesses without him giving evidence.

20. The burden of proof lies on the Claimant, and he has provided no evidence. It is his own responsibility that he cannot give oral evidence for it was made clear to him by EJ Shore and by the Respondents’ solicitors that he could not give evidence from Lithuania, and he understood that. On 19 September 2023 he emailed the Respondent’s solicitor thanking them for explaining everything to him.

21. There is no merit in the application to adjourn. In his email of 23 August 2023 the Claimant said *“The court should happen without me if I can’t participate over the phone.”* There is no reason to think that the Claimant would attend a hearing if it was adjourned. While he said that he would, that was immediately after he had said it was not possible for him to come to the UK or go to Latvia.

22. Accordingly, the Claimant cannot meet the first limb of the burden of proof test (to show facts from which the Tribunal could find that there was race discrimination) and so the burden of proof does not pass to the Respondent: and so the claim must in any event be dismissed. This is because he has provided no evidence, and it is not fair to adjourn the hearing to allow him to do so.

23. Ms Beech’s application is sound. All three limbs of Rule 37 are engaged,

and each is a reason to strike out the claim.

24. Breach of Tribunal Orders: the Claimant has failed to provide a witness statement. It was explained to him that he needed to do so in a Case Management hearing, in Lithuanian. He set out his allegations in that hearing so it is plain that he understood what was going on. He has seen the Respondent's witness statements. He expected to be able to cross examination the Respondent's witnesses without giving evidence himself.
25. The Claimant said at that Case Management Hearing that he would attend in the UK to give evidence, but in a later email said he would not do so (23 August 2023). He said in that email that he would participate by telephone. It was made abundantly clear to him that he could not give evidence from Lithuania. It is unreasonable of him to expect to be able to present his case without giving evidence. It is unreasonable of him to ask for an adjournment at the hearing when he had indicated that it should go ahead even if he could not participate.
26. The Respondent's solicitors have gone out of their way to explain to the Claimant what was required of him, but his response was not constructive, referring, for example, to lie detectors rather than address the issue of how he could (and could not) give evidence. This is not a case where an unsuspecting litigant in person has been allowed to blunder. It has been made crystal clear to the Claimant by EJ Shore and by the Respondent's solicitors exactly what he was required to do, when, and how.
27. It is for the Claimant to show that there is evidence from which a Tribunal might find that the decision was tainted by race discrimination, and there is no such evidence here.
28. This is not a strong case taken at its highest, and an application under Rule 37 based solely on no reasonable prospect of success on its own would succeed. Given the failure to comply with Orders and the unreasonable way the case has been conducted this a discrimination case that is properly to be struck out.

**Employment Judge Housego**

**21 September 2023**