EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000071/2022

Held on 6 June 2023 by CVP

Employment Judge N M Hosie

Mr A Fragoyannis	**Claimant** **In Person**
Grampian Health Board	**Respondent** **Represented by:** **Mr C Reeve, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is struck out as having no reasonable prospect of success, in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) 2013.

REASONS

Introduction

1. This case called before me by way of a Preliminary Hearing to consider 2 issues:-

   - Whether the claim should be struck out as having "no reasonable prospect of success", in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure")

   - Whether the claim has "little reasonable prospect of success" and, if so, whether the claimant should be required to pay a deposit as a condition of continuing with his claim, in terms of Rule 39

2. The claimant was not represented at the Hearing. The respondent was represented by a solicitor. It was not necessary for me to hear any evidence at the Hearing, as, for the purposes of addressing the issues with which I was concerned, I took the claimant's case at its highest value: I accepted that he would be able to prove the material facts he averred.

3. A joint bundle of documentary productions was also submitted ("P").

Parties' submissions

4. I heard submissions from the parties. The respondent's solicitor spoke to written submissions and the claimant spoke to his written responses to these submissions. These are referred to for their terms. I have summarised the respective submissions below. The claimant's pleadings and responses to the respondent's submissions were extensive and extremely detailed.

However, it is only necessary for me to summarise these for, as I recorded above, for the purposes of the Preliminary Hearing only, I took the claimant's averments in his claim form (P3-14) and in his Further and Better Particulars ("Response to ET3") (P33-40) at their highest value. The claimant responded (in red type) to each of the numbered paragraphs in the respondent's submissions and I do likewise, in so far as relevant and material to the issues with which I was concerned.

Background

5. Helpfully, the respondent's solicitor first set out in his submissions a brief history of the case, with which I take no issue.

6. The claimant submitted his ET1 claim form on 19 September 2020 (P3-14). He ticked the boxes at section 8.1 (P8) indicating that his claim comprised complaints of unfair dismissal and race discrimination. Subsequently, he withdrew his unfair dismissal complaint. On 9 March 2023, I issued a Judgment dismissing that complaint.

7. The respondent submitted the ET3 response form on 1 November 2022 (P15-27). The Grounds of Resistance averred, at paragraphs 6 to 9, that the claimant had, *"not specified a matter which in any way links the alleged actions of Ms Douglas to his race"* (P23). The Grounds of Resistance stated that it was the respondent's position that the claimant had failed to show a *prima facie* case of case of race discrimination, sufficient to shift the burden of proof.

8. The case progressed to a case management Preliminary Hearing on 15 November 2022 (P29-32). Paragraph 4 of the Hearing Note records that Judge Hendry explained to the claimant that in relation to race discrimination he would have to set out a *prima facie* case showing what facts he could prove (P30). He was reminded that unreasonable behaviour was not, without more, evidence *per se* of race discrimination. Paragraph 7 of the Note records that Judge Hendry explained to the claimant the requirement to

provide specification of the claim by way of Better and Further Particulars (P31).

9. The claimant provided these on 8 December 2022 (P33-40). However, I conducted a further case management Preliminary Hearing on 8 March 2023 and at para 3 of the Note which I issued following that Hearing (P42-48) I said this:- "*The respondent's solicitor advised that he was still of the view that the claim has no reasonable prospect of success. In particular, as he alleged in the Grounds of Resistance, in the response form, there is no "link" between the respondent's alleged actions and the claimant's race. I am persuaded that there may be merit in his contention and, having regard to the "overriding objective" in the Rules of Procedure, I decided that a Preliminary Hearing should be fixed to consider and determine the issue of the prospects of the race discrimination claim succeeding"* (P43).

10. The claimant made oral submissions at the Preliminary Hearing and in addition to his written responses to the respondent's submissions (in red type), he also referred me to the "Further Particulars" which he had attached to an email to the Tribunal, copied to the respondent's solicitor on 10 May 2023 at 18:19.

11. In these Further Particulars he said this, with reference to an article in the Herald newspaper:-

> "*The effect of the respondent's apparent decision and subsequent admission to permanently bar me from work at the 2C practices that they run needs to be viewed through the prism of what a "2C" GP practice is and the UK's Performers List Regulations as they pertain to General Practitioners*" (These were included in the bundle of productions (at P83 pages 1-14))
>
> *In summary, nearly 1 in 10 GP practices in Scotland is now being run by Health Boards with this figure rising to as high as 1 in 4 in some rural areas.*
>
> *Figures obtained under the Freedom of Information show that 76 GP surgeries out of a total of 910 in Scotland (8.4%) have either become*

2C practices or are heading in that direction after GP partners pulled out. This compares to 59 out of 943 (6.9%) in 2019.

The figure includes one of Scotland's largest practices, Inverurie Medical Practice in Grampian, which became the latest casualty of Scotland's GP shortage in March 2023 when its partners announced they would be handing back their contract to provide medical services from September this year after struggling to recruit new doctors.

The data also shows significant regional variation with 10% of GP surgeries in Grampian and 25% in the "North Highland" (Caithness and Sutherland) region Health Board-run.

The trend in declining GP numbers explains why more and more practices are collapsing, with Health Boards forced to step in to take over the running of such struggling practices who are having difficulties in recruiting doctors.

In Grampian, 13 practices have handed back their contracts in the past 5 years.

In NHS Grampian the practice statistics are as follows

> *Total number of practices: 69*
> *Number currently in 2C: 5*
> *Number currently pending for 2C: 2, 5?/Old Meldrum, and Inverurie Medical Practice*

This means that in effect, NHS Grampian has currently barred me from work at over 7% of all the practices within the jurisdiction of their geographic area (which as the map in the article shows below covers a large part of the whole of Scotland), with this percentage rising to over 10% later this year. This percentage, if current trends continue, is set to rise".

12. As I understand it, these Regulations govern the terms and conditions of employment between GPs and Medical Boards. The claimant asserts that he was *"suspended",* without due process, and that he is the only GP ever to have been *"suspended".*

13. The respondent's solicitor took issue with this. His position was that the claimant was not suspended, but rather the respondent decided they did not wish to accept the claimant as an agency worker

Relevant Law

14. In his written submissions, the respondent's solicitor referred first to the burden of proof provisions in s.136 of the Equality Act 2010 ("the 2010" Act). He also referred to the following cases :-

Igen Ltd and ors v Wong [2005] ICR 931
Laing v Manchester City Council and ano*r* [2006] ICR 159
Madarassy v Nomura International plc [2007] ICR 867
Hewage v Grampian Health Board [2012] ICR 1054
Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205
Hammonds LLP and ors v Mwitta EAT 0026/10
Bahl v The Law Society [2004] IRLR 799
Transport for London and anor v Aderemi EAT 0006/11
Efobi v Royal Mail Group Ltd [2021] ICR 1263
Glasgow City Council v Zafar [1998] ICR 120
Chief Constable of Kent Constabulary v Bowler EAT 0214/16
Dunn v Secretary of State for Justice and anor [2019] IRLR 298

"Law applied to the facts"

15. Under this heading in his written submissions, the respondent's solicitor detailed the following facts which I understand are not disputed. "*The claimant's racial background is 'Hellene' or 'Greek' (P33). He provided his services to the respondent as a Locum GP through an agency, "Locum Meds" from 25 October 2021 to 24 December 2021, and then from 17 January 2021 to 1 April 2022. On 17 May 2022, this arrangement was extended until the end of July 2022. The contract in fact ended on 18 July 2022*".

16. The claimant maintained that although *"several other GPs"* were allowed to work remotely and have flexible work patterns, his request for *"those privileges"* was denied.

17. The respondent's solicitor then went on in his submissions to address the points which the claimant had raised by way of "Further and Better

Particulars" in his "Response to ET3" which he had lodged on 8 December 2022 (P33-40). The following is a brief summary of his submissions and the claimant's responses (in red type).

18. In short, the main thrust of the respondent's submissions was that the claimant had not set out a *prima facie* case which would have the effect, in terms of s.136, of shifting the burden of proof to the respondent. By and large, the respondent's solicitor submitted that all that was alleged was a difference in status and a difference in treatment, or simply unreasonable treatment, which is insufficient in law to shift the burden.

19. In paragraph 1 of the claimant's "Response to ET3" (P33), it was submitted that all that the claimant had alleged was unreasonable conduct without any inference of discrimination. In any event, at (iv) on P36 the claimant gives details of the circumstances surrounding him terminating the contract early on 15 July 2022. It was submitted that, *"his own description of events undermines the claimant's argument at paragraph 1 that the respondent terminated his contract early*". It was also submitted that the claimant's earlier description of events in his ET1 claim form (P14), *"identifies clear non-discriminatory reasons for the action which took place, namely the issue caused by his notice of early termination of the contract not being properly communicated to the respondent and which led to his appointment book being full in the week in which his contract would have ended"*.

20. The claimant alleged unreasonable conduct on the part of the respondent over a period of several months which he claimed, "*may constitute (if the Tribunal sees it this way) the far more serious and unlawful charge of racial discrimination".* He claimed that the early termination of the contract between the respondent and Locum Meds, for the provision of his services and the respondent's failure to give notice, was, *"one such serious act of unreasonable conduct if not outright racist discrimination".* He disputed that there were "*clear non-discriminatory reasons"* for the early termination. He then went on to say this, "*During my time there I came across no other doctor or other health care professional whose employment was terminated, if at all,*

as mine was. The facts therefore prove that the respondent has treated me in a discriminatory way in relation to others. The burden of proof falls upon the respondent to try to show how this is not the case". He disputed that this was, "*alleged unreasonable treatment but no more than that"*.

21. At paragraph 4 (P34), the respondent's solicitor submitted that the claimant had alleged no more than unreasonable treatment which is insufficient to shift the burden of proof.

22. At paragraph 5 (P34/35), the claimant complains that 2 Managers namely, Morag Douglas and Tracy Fenton, failed to respond to 2 messages which he sent to them asking if he could work remotely. He averred that he had made the same request to his agency, Locum Meds and that they did respond to him to the effect that having asked the respondent twice the answer that they received was "no". It was submitted that the claimant had received a response communicated to him via his agency and that his allegation in this regard is insufficient to shift the burden of proof, there being, "*no inference of race playing any part in this*".

23. The claimant had gone on to say that, *"all other doctors working at Aden Health Centre were working remotely, at least partially, except him"*, but it was submitted that this is no more than an allegation of differential treatment and, in any event, he does not allege that *all GPs were treated differently to him.* Nor is there any assertion that those GPs were, "*white British"*, as per his comparator group, nor even that they were non-Hellenes/Greek. It was submitted, therefore, with reference to ***Hammonds LLP***, that there was an, "*insufficient basis from which to draw a prima facie inference of discrimination"*.

24. Further, so far as the claimant's averments at P35 (i) were concerned, the claimant refers to his alleged comparator, a white British male who was granted regular remote working, and that one of the factors in the decision to

allow him to do so, related to child care needs. It was submitted, "*he does not therefore draw a direct comparison between himself and his alleged comparator. In fact what he says is 'I was totally denied non-regular occasional remote work which would have enabled me to meet my family's needs at the time".* All that the claimant had identified was an alleged difference in treatment.

25. The claimant submitted that, "*The respondent discriminated against me because they granted remote working privileges to all of their doctors who asked for them except me and there was no other Greek doctor working at the Aden Health Centre apart from me".* He claimed that this discrimination was, "*further aggravated by the fact that the respondent chose not to reply to any of my messages, instead opting to inform the agency after my numerous messages to them. That act betrayed their rudeness and malice towards me. They could simply have politely spoken to me or sent a brief message to explain their decision, but they chose not to. They chose to ignore my messages".* He claimed that this conveyed, "*a feeling of unappreciation, unwantedness, of being undervalued and of being beneath others"*. He submitted that this constituted harassment, in terms of s.26 of the Equality Act 2010.

26. At (ii) (P36), it was submitted that the claimant had not averred that the 2 other GPs he compares himself with were white British. He states that "*at least one of these GPs still enjoys friendly relations with Morag Douglas*". However, it was submitted that, "*it cannot be reasonably argued that a manager simply maintaining friendly relations with a previous worker can itself draw an inference of discrimination"*.

27. The claimant submitted that the racial background of the comparators, who unlike him were allowed to work remotely, was irrelevant as, "*they were of a different ethnic background to mine and, as such, the fact is that the respondent treated me differently to all others within this group of doctors"*. He claimed that this was, "*overwhelming evidence of deliberate*

discriminatory behaviour perpetrated against me by the respondent". He claimed that his ethnic background was the one differentiating factor between him and the group of 9 doctors, 8 of whom were granted remote working privileges during the period from October 2021 to August 2022.

28. The respondent's solicitor accepted that the "ethnic background" of the comparators was indeed irrelevant, provided it was different from the claimant.

29. So far as the claimant's averments at (iii) (P36) were concerned, it was submitted that the claimant had not provided any documentary evidence within the bundle of having asked Tracy Fenton about the possibility of doing admin sessions; this was denied in any event by the respondent. In any event, it was submitted that what was averred *"cannot reasonably be said to infer discrimination".*

30. In the same paragraph, the claimant goes on to compare himself with the same alleged white British comparator who he alleges was granted some remote working sessions. However, it was submitted that he had, *"failed to draw an appropriate like for like comparator".*

31. The claimant submitted that Tracy Fenton had failed to respond to his "Teams message" about the possibility of doing admin sessions. He described this as, "*an example of passive/aggressive behaviour on the part of Tracy Fenton and another example of unlawful harassment in terms of s.26*".

32. The claimant denied that he had failed to "*draw an appropriate like for like comparator"* as the respondent's solicitor alleged. He claimed that his comparator was less experienced than he was and hence his request to have his administrative duties reinstated should at the very least have been considered. Further, the comparator was allowed to work remotely, whereas his request for remote working was, "*flatly and rudely rejected*".

33. The comparator referred to at (iv) (P36), Tom Callaghan, did not work for the respondent but used to be an employee of the Agency, Locum Meds. It was submitted that he is not an appropriate comparator and, in any event, the matters referred to do not form part of the originating claim form.

34. The claimant disputed that Mr Callaghan was not an appropriate comparator, even though he was not a GP, but rather an employee of the Agency, Locum Meds.

35. At the top of P37, the claimant referred to an issue with his notice not being communicated timeously to the respondent by his Agency. He avers that, *"the respondent failed to respect the fact that I had given adequate notice because they are discriminating against me*". However, it was submitted that, "*there is no basis put forward for the proposition that race played any part*" and that, "t*he facts that he himself relies upon do not raise an inference of discrimination. They indicate at the most that his agency failed to communicate his notice, and the respondent therefore did not accept such notice until it had been communicated, particularly as he says himself in his ET1 that his appointment book for patients was already full for that week".*

36. At (v) on P37, the claimant makes averments regarding the termination of his contract. It was submitted that this, *"appears to be conjecture regarding the termination of his contract"* and that there is "*no inference of race playing a part*". Further, and in any event, it was submitted that the claimant himself had averred facts which made it clear that there was a "*non-discriminatory rationale for what occurred".*

37. The claimant submitted that he had given *"adequate notice to leave"*, but this had not been acknowledged by the respondent. He submitted that, "*the fact is that the respondent's locum staffing agency had failed in their communication with them. My communication was beyond reproach"*.

38. The claimant disputed that the information he had provided was "*complete conjecture"*. He submitted that: "*The information is crystal clear on what happened. Tom Callaghan* (of Locum Meds) *basically threw me under the bus with his empty promises and the screen shots below prove this. The respondent didn't discriminate against Tom Callaghan in the slightest despite his failings yet singled me out for discrimination"*. He also claimed that he had been *"singled out*" for abuse by the respondent and that, "*race played a part because I am Greek. Tom Callaghan is not Greek, and neither are Morag Douglas, Tracy Fenton, Sandy Rough or Aileen Wilson"*, all of whom he alleged discriminated against him on account of his race.

39. It was submitted by the respondent's solicitor that at (vi) on P37, *"the claimant asserts that he has been barred from work at other NHS 2C practices run by the respondent. However, he has provided himself a description of the ending of his employment, which explains a non-discriminatory issue regarding notice being provided by the claimant, via his agency, of the early termination of his contract".* It was submitted that the claimant had not averred facts which raise an inference of discrimination. The claimant was an agency worker and, "*the fact that the respondent decided that it did not want any further services provided by the claimant cannot reasonably infer anything more than to evidence that the respondent was free to pick and choose how, and by whom, any future agency GP services are provided. It certainly contains no inference of race discrimination"*.

40. The claimant disputed that Locum Meds were his Agency. He submitted that they were the respondent's Agency. The respondent admitted that they had "*banned him"* from the 2C practices which he submitted was, "*the most damaging piece of evidence of racial discrimination"*, because he was the "*<u>only</u> GP that has ever suffered such a fate"*. He claimed that the fact that the respondent had "*refused to employ me at 3 successive jobs that came up within the space of a few weeks between the months of August and October 2022 in practices already struggling to recruit in late summer is highly unusual"*. He submitted that, "*the respondent's position is fatally*

compromised because even if the respondent provided evidence that they simply didn't recruit anyone for any of these roles, the fact remains that I applied for all 3 and was turned down for all 3. All 3 jobs were being actively advertised as per the messages I have with the recruiters. The respondent was therefore looking for people to fill those positions. If the respondent chose others instead of me, I contend that that was discriminatory. Similarly, if the respondent chose not to recruit anyone despite my applications I contend that was also discriminatory because they were actively advertising for all 3 positions".

41. At (vii) (P38), it was submitted that the claimant asserts that, "*it is discriminatory of the respondent to castigate me for seemingly leaving before the end of my notice period*". Although the claimant makes allegations about the respondent's conduct and concludes that, "*the single answer to all these questions is because they are discriminating against me on account of my race"*. It was submitted that no basis was put forward to explain why he alleges that race was the cause of the alleged actions. Further, and in any event, it was submitted that, "*on his own alleged facts there is a non-discriminatory reason for the respondent to have considered that matters had become unsatisfactory regarding the early termination of the claimant's contract".* It was submitted that all that was being alleged was that the respondent had been unreasonable and, "*a bland assertion of race being the cause"*. It was submitted that that was insufficient to shift the burden of proof.

42. The claimant submitted that, "*The respondent seems confused on this issue and is contradicting themselves. My paragraph explains in detail what happened and when, as well as the respondent's desperation".*

43. At paragraph 6, (P38), it was submitted that the claimant, *"himself refers to the possibility of his agency, rather than the respondent, having miscommunicated information to him".*

44. The claimant submitted again that "*Locum Meds" is not "my" Agency. I used their services for a 9-month period between October 2021 and July 2022. The respondent has had a close working relationship with Locum Meds for years and continues to do so. For this reason, Locum Meds is the respondent's "agency" and not mine*".

45. At paragraph 7, (P38), the claimant disputes that the respondent had identified performance issues on his part. However, it was submitted that this was insufficient to identify why this was because of his race.

46. The claimant submitted that: "*It is the respondent who once again is contradicting themselves as I have clearly laid out in paragraph 7. They cannot accuse someone of "performance issues" without any evidence (even though they have been asked to provide such evidence). 8 weeks before the termination of my contract they were telling the agency that they really wanted to hire me past June 2022 as the below message proves. The respondent's position is further compromised on this issue of so-called "performance issues" because the respondent's own contract with Locum Meds … clearly shows that the respondent extended my contract on 17/5/22 until the end of July 2022 and there was also a provision for an "extension to be confirmed for August"*.

47. At paragraph 8 (P39), it was submitted that, "*the claimant refers to a failure of the respondent to provide official job descriptions of the 3 individuals referred to at paragraph 25 of the Grounds of Resistance"* (P26). He asserts that he believes that those individuals acted outside their remit in banning him working at 2C Practices within the respondent and that he therefore believes that this was an act of race discrimination. However, it was submitted that he, *"failed to draw any connection between such alleged actions and his race. There is nothing in his claim which raises the inference of race playing any part in any of the alleged unreasonable actions of the respondent"*.

48. The claimant submitted that the respondent had now admitted that he was the only GP who was ever banned from 2C practices. He went on in his submissions to say this: "*I am Greek. There are no other Greek GPs who work in 2C practices, now or ever before as far as I know. No other GP of any race has ever been banned by the respondent from 2C practices. Only a Greek has been banned. That Greek is me. Banning someone is a highly unusual and punitive measure by any Health Board and was a decision that was taken by employees with no professional authority to do such a thing as their job descriptions clearly lay out (pages 56-79 joint bundle) and without recourse to the statutory provisions of The National Health Service (Primary Medical Services Performers List) (Scotland) Regulations 2004. As such my contention is that the respondent very obviously racially discriminated against me"*.

49. The respondent's solicitor then went on in his submissions to refer to email correspondence on 22 and 23 November 2022 when the claimant had requested copies of contracts of 4 employees which he had refused to provide (P51/50). It was submitted that the claimant made no reference in this correspondence to any assertion of race discrimination. It was submitted that, "*at best the claimant can only argue that he has been unable to evidence potential unreasonable treatment. Unreasonable treatment is not of itself sufficient to shift the burden of proof, as per* ***Madarassy***".

50. The claimant submitted that those who took the decision to, *"ban him … had absolutely zero professional authority"* to do so.

51. Finally, the respondent's solicitor made reference in his submissions to a request under the Freedom of Information Act on 24 November 2022, to which he had responded on 22 December 2022 (P54/53). He asserted that his responses "*are clear and unequivocal"* : "*The claimant alleges that he was discriminated against by reason of the fact that he was not granted remote working, nor that he was given the task of carrying out the admin session. At its highest position, the claimant's case is one of differential*

treatment. It is not known what the ethnicity of all the GPs working at Aden Health Centre in the relevant period was. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

52. The claimant submitted that: *"It is irrelevant what specific ethnicity the other GPs working at the Aden Health Centre were. The point is that they were of a different ethnicity to mine"*.

53. On the basis of these submissions, the respondent's solicitor requested that the claim be struck out in its entirety as having "no reasonable prospect of success" under Rule 37(1)(a) or, in the alternative, that the claimant be required to pay a deposit as a condition of continuing with his claim in terms of Rule 39.

54. This was disputed by the claimant, for the reasons given in his responses to the respondent's submissions.

Discussion and Decision

Burden of Proof

55. A complaint of race discrimination requires a claimant first to establish facts that amount to a *prima facie* case: the claimant has the initial burden of proving, on the balance of probabilities, facts from which the discrimination can be presumed. The statutory basis for this, so called "shifting the burden of proof rule" is to be found in s.136 of the 2010 Act which applies to all discrimination and victimisation claims. S.136(2) provides that if there are facts from which the Court or Tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the 2010 Act, the Court "*must*" hold that a contravention occurred; and s.136(3) provides

that s.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

56. In arriving at my decision, I was mindful of the guidance in ***Barton***, to which I was referred by the respondent's solicitor. These guidelines were explicitly endorsed by the Court of Appeal in ***Igen***, to which I was also referred, and other cases. Although these cases concerned the application of s.63A of the Sex Discrimination Act 1976 the guidelines are equally applicable to race discrimination complaints and the application of s.136 of the 2010 Act.

57. Further, and this was of particular significance in the present case in view of the claimant's allegations about the unreasonable way he had been treated by the respondent, in ***Bahl***, to which I was also referred, the Court of Appeal upheld the reasoning of the EAT and emphasised that unreasonable treatment of a claimant cannot in itself lead to an inference of discrimination, even if there is nothing else to explain it. Although that case proceeded under legislation prior to changes made to the burden of proof, the principle is still valid. In other words, unreasonable treatment is not sufficient, in itself, to raise a *prima facie* case requiring an answer. As the EAT said in ***Bahl*** at para 89: "*…. merely to identify detrimental conduct tells us nothing at all about whether it has resulted from discriminatory conduct"*.

58. The pleadings in this case were extensive and I spent a considerable period of time considering them and the parties' submissions. Having done so, I was driven to the view that that was the position in the present case. The claimant has set out (albeit in considerable detail) no more than allegations simply of unreasonable treatment at the hands of the respondent; or of unreasonable treatment and a difference in treatment. However, he does not explain why that treatment occurred *because of* his race.

59. I found favour, therefore, by and large, with the submissions by the respondent's solicitor.

60. All that was averred by the claimant was the fact that he is Greek and the fact that he had allegedly been subjected to unreasonable, unfavourable/less favourable treatment by the respondent. Further, as the respondent's solicitor submitted, the claimant himself identified a non-discriminatory reason for what occurred, namely the issue caused by his notice of early termination not being properly communicated to the respondent by Locum Meds which led to his appointment book being full in the week in which his contract would have ended. It seemed to me that he was aggrieved as much about the way Locum Meds had treated him as the respondent.

61. Nor could I understand the claimant's assertion that Locum Meds was the respondent's Agency. While, as I understand it, the respondent has an established working relationship with Locum Meds, the claimant provided his services to the respondent through Locum Meds. They were *his* Agency as can be seen, for example, from the email exchanges between Tom Callaghan of Locum Meds and Morag Douglas of the respondent on 16 May 2022 (P80). The respondent, therefore, was under no obligation to accept the claimant as an agency worker. They decided not to do so. The claimant was not "suspended", as he alleged.

62. There were no alleged facts which, if proved, could allow an inference to be drawn that the way he alleged he had been treated and his race were linked. The guidelines in ***Barton*** and other cases clearly require the claimant to establish more than simply the *possibility* of discrimination having occurred before the burden will shift to the employer.

63. The point was further emphasised by LJ Mummery, giving the Judgment of the Court of Appeal in ***Madarassy***, to which I was also referred:-

> "*For a prima facie case to be established it will not be enough for a claimant simply to prove facts from which the Tribunal could conclude that the respondent could have committed an act of discrimination. Such facts would only indicate a possibility of discrimination, nothing more. So, the bare facts of a difference in a status and a difference in treatment – for example, in a direct discrimination claim the evidence that a female claimant had been treated less favourably than a male comparator – would not be*

> *sufficient material from which a Tribunal could conclude that, on the balance of probabilities, discrimination had occurred. In order to get to that stage, the claimant would also have to adduce evidence of the reason for the treatment complained of"*.

64. That, in my view, was the extent of the claimant's case: he is Greek and he was treated less favourably than others who are not Greek. I took this to be a complaint of direct discrimination, in terms of s.13 of the 2010 Act. In his submissions he also alleged that he had been "harassed" which I took to be a s.26 complaint. However, not only did the conduct alleged not satisfy the definition of "unwanted conduct" in s.26, in neither complaint did he explain why he was treated that way because of the protected characteristic of race.

65. As I recorded above, for the purposes of the Preliminary Hearing, I took the claimant's averments in the claim form and in his response to the respondent's ET3 at their highest value. However, he is required to: "*set out with the utmost clarity the primary facts on which an inference of discrimination is drawn;"* and: *"It is the act complained of and no other that the Tribunal must consider and rule upon"* (***Bahl***).

66. In my view, the claimant has failed to set out such primary facts which would enable an inference of discrimination to be drawn; on the basis of the case, as now pled, even if he were able to prove all he alleges, he would still not be able to establish a *prima facie* case, and should he not discharge this onus, the burden will not shift to the respondent and his claim will fail.

67. I arrived at the view, therefore, that his claim of race discrimination has no reasonable prospect of success and that it should be struck out in terms of Rule 37(1)(a) in the Tribunal Rules of Procedure.

68. In arriving at this view, I should say that I remained mindful that allowances should be made for the fact that the claimant was unrepresented and had no experience of Employment Tribunals. However, he is an educated, articulate person and at the case management Preliminary Hearing on 15 November

2022, Judge Hendry explained what the burden of proof provisions required of him and he confirmed this in his written Note (P.30, para 4).

69. In ***Anyanwu v Southbank Students' Union and Ors*** [2001] UKHL 14 ICR 391, Lord Steyn said, that as discrimination cases tend to be *"fact sensitive"*, strike out should only be ordered: *"in the most obvious and clearest cases"*. In my view, the present case falls into that category.

70. I was also mindful in arriving at my decision that Lady Smith, in ***Balls v Downham Market High School and College*** [2011] IRL 217, stated that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success.

71. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent in the ET3 and deciding whether disputed matters are likely to be established as fact. It is a high test.

72. In ***Balls***, at paragraph 4, Lady Smith emphasised the need for caution in exercising the power, as follows:

> "*…. to state the obvious, if a claimant's claim is struck out, that is an end of it. He cannot take it any further forward. From an employee claimant's perspective his employer 'won' without there ever having been a hearing on the merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high. If his claim had proceeded to a hearing on the merits, it might have been shown to be well founded and he may feel, whatever the circumstances, that he has been deprived of a fair chance to achieve that. It is for such reasons that 'strike-out' is often referred to as a draconian power. It is. There are of course, cases where fairness between parties and the proper regulation of access to Employment Tribunals justify the use of the important weapon in an Employment Judge's available armoury but its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision is reached.*

73. Further, although not cited to me, by either party, I am aware of the EAT Judgment by the Honourable Justice Simler DBE, the President of the Employment Tribunals, in ***Morgan v Royal Mencap Society*** [2016] IRLR 428, in which, helpfully, she analyses the principles laid down in the case law, where at paragraph 14 she states that the power to strike out a case can be properly exercised without hearing evidence.

74. I also recognised that the second stage exercise of discretion under Rule 37(1) is important, as commented upon by the then EAT Judge, Lady Wise in ***Hassan v Tesco Stores Limited*** UKEAT/0098/16, an unreported Judgment of 22 June 2016, at paragraph 19, where the learned EAT Judge refers to "*a fundamental cross-check to avoid the bringing to an end of a claim that may yet have merit*".

75. In light of this guidance and the "draconian nature" of strike-out, I spent a great deal of time analysing the claimant's pleadings. They were extensive and I am bound to say I had considerable difficulty with some of the allegations identifying what was being alleged, other than that he felt aggrieved at the way he had been treated, he is Greek and others had been treated differently. It was clear that the claimant felt passionately and was incensed about the way he felt he had been treated, not just by the respondent, but also his Agency, Locum Meds, and with emotions running so high, it was perhaps understandable, that he should detail his allegations at such length. However, the danger with unduly prolix pleadings is that any good points may not be highlighted and may go unnoticed. The reasons why none found favour with me may be relatively brief, considering the extent of the pleadings, but the time devoted to ensuring that no point of substance was overlooked has been considerable. With the benefit of hindsight, it would perhaps have been preferable to have carried out further case management before proceeding to a Preliminary Hearing and to have directed the claimant to present his claim in a more succinct and focused way, by only providing details of his principal allegations, rather than all and every complaint about the way he felt he had been treated by the respondent.

76. His treatment may have been unfair, it may have been unreasonable, but, as pled, it could not be said, in law, that it was because of his race and therefore discriminatory.

77. Despite the guidance in the case law that caution required to be exercised when considering strike out, the *"fact-sensitive"* nature of discrimination claims and the *"high bar",* I decided that this was indeed one of the exceptional cases where strike out was appropriate. I should also add, that, in arriving at this view, I was satisfied that my decision was consistent with the "overriding objective" in the Rules of Procedure.

78. Accordingly, the claim is struck out as having no reasonable prospect of success.

Employment Judge: N M Hosie
Date of Judgement: 10 July 2023
Date sent to Parties: 10 July 2023