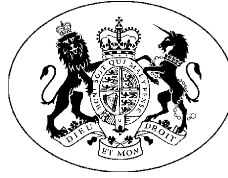
Case Numbers:6000069/2022
6000084/2022



EMPLOYMENT TRIBUNALS

Claimant: Mr. C O'Neil

Respondents: (1) Brook Street (UK) Limited
(2) Home Office

Heard: in public via CVP in the North East Region

On: 29 September 2023

Before: Employment Judge Ayre (sitting alone)

Appearances
For the claimant: In person
For the First Respondent: Ms S David, counsel
For the Second Respondent: Mr S Healy, counsel

PRELIMINARY HEARING IN PUBLIC JUDGMENT

1. The allegation that the First Respondent discriminated against the claimant because of race by dismissing him is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.

2. The applications to strike out the following allegations are refused, but the claimant is ordered to pay a deposit as a condition of being allowed to pursue them:

   2.1.1 The allegation that the First Respondent discriminated against the claimant by failing to make the following reasonable adjustments:

      2.1.1.1 Working from home;
      2.1.1.2 Sitting close to the bathroom; and

2.1.1.3 Transferring him to another department

2.1.2 The allegation that the Second Respondent discriminated against the claimant because of race by rejecting job applications that he made for positions as:

2.1.2.1 Executive Officer, in June, July and October 2022;
2.1.2.2 Customer Service advisor, in December 2022; and
2.1.2.3 Administrative Officer, in December 2022.

REASONS

Background

3. The case was listed for a Preliminary Hearing today to consider, amongst other things, whether the allegations above should be struck out on the basis that they have no reasonable prospect of success, and, in the alternative, whether the claimant should be ordered to pay a deposit (and the amount of that deposit) as a condition of continuing to pursue them on the basis that they have little reasonable prospects of success.

The hearing

4. The respondents had prepared a bundle of documents for today's hearing running to 422 pages.

5. The claimant had been ordered to send a witness statement for today's hearing to the respondents by 25 September 2023. The day before the hearing the claimant sent a 39 page witness statement to the Tribunal and the respondents. The witness statement appears to contain the claimant's evidence on the substantive merits of the claim, rather than on the issues that the Tribunal has to determine today. I have read the witness statement but it is largely not relevant to the issues I have had to determine today.

6. The claimant gave evidence to the hearing about his financial means.

7. I heard submissions from all parties.

Findings of fact

8. The claimant is not currently working or in receipt of any benefits. Since the First Respondent dismissed him, he has received Universal Credit, and worked for two and a half weeks in a temporary role in April and May 2023. He has not carried out any other paid employment.

9. The claimant last received Universal Credit in August 2023. His application is on hold because he was asked to submit certain documents and there has

been a problem with receipt of those documents. As a result his Universal Credit payments have stopped.

10. The claimant is not currently in receipt of any income. He has no savings and a very small amount of money in his bank account. He lives alone and is currently living off credit cards, although he has some support from his family. He lives in rented accommodation and does not own a car. He has no other assets.

11. The claimant was employed by the First Respondent on a contract of employment headed "Terms and Conditions of Employment for Temporary Employees" which he signed on 30 September 2021. That contract contained the following relevant provisions:

"*1.2 You will be assigned to carry out work for a Client from time to time…*

1.6 You agree that Brook Street or the Client may terminate an Assignment at any time, without prior notice or liability. Termination of an Assignment is not termination of your employment….

6.5 You are obliged to work when required by Brook Street. You acknowledge that Brook Street may terminate your employment if, in Brook Street's sole discretionary opinion, you unreasonably refuse to undertake an Assignment offered to you. In particular following the end of an Assignment, you will be provided with information on potential future Assignments. If you do not accept a new Assignment within 4 weeks of the end of your last Assignment, or if you fail to contact Brook Street within that period of time to confirm your availability for work, Brook Street may terminate your employment.

12. During the course of his employment with the First Respondent the claimant worked on assignment to the Second Respondent. His work was carried out either at the Second Respondent's premises or at his home.

13. In December 2021 there was an exchange of emails between the two respondents about the claimant working from home and the equipment needed by the claimant to enable him to do so. In or around February 2022 the claimant asked if he could change his working hours to work condensed hours over four days a week. Over the course of the next few weeks there was an exchange of emails between the respondents about the question of the claimant's working hours, and it was agreed that he could work condensed hours. Ultimately it was the Second Respondent's decision to allow this.

14. The claimant's assignment to the Second Respondent was terminated at the request of the Second Respondent on or around 8 June 2022 following an email sent to the First Respondent by Michael Joel of the Second Respondent. In that email, which is dated 8 June 2022, Mr Joel askes the First Respondent to end the claimant's assignment with immediate effect, and to supply a replacement. The reason for the termination of the assignment is the claimant's absence which made him unavailable for work.

15. After the termination of the claimant's assignment to the Second Respondent, the First Respondent took a number of steps to try and contact the claimant, and to find him an alternative assignment. The First Respondent tried to call the claimant on numerous occasions but was unable to reach him because his telephone number had changed. The First Respondent also sent emails to the claimant on 10 June 2022, 14 July, 26 August, 30 August, and 1 September asking him to get in touch.

16. The First Respondent identified another potential assignment for the claimant and tried to discuss it with him. The claimant did not respond to most of the attempts to contact him.

17. On 8 September 2022 the First Respondent wrote to the claimant terminating his employment with effect from 23 September 2022. The reason for dismissal is set out in the letter as being the fact that it is some time since the claimant's last assignment ended and "*during this period we have not heard from you regularly or you have not accepted any assignments….we are assuming that you no longer wish to work for us….If you would like us to look for work for you in the future, please do not hesitate to contact us….*"

The Law

<u>Strike out</u>

18. Section Rule 37 of the Rules provides that:

> *"(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 respondent (as the case may be) has been scandalous, unreasonable or vexatious; …*
> *(e) That the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response…"*

19. Strike out is a draconian sanction and not one that should be applied lightly. Tribunals should be particularly cautious about exercising their power to strike out badly pleaded claims brought by litigants in person who are not familiar with articulating complex arguments in written form on the ground that they have no reasonable prospect of success (***Mbuisa v Cygnet Healthcare Ltd EAT 0119/18).***

20. The Employment Appeal Tribunal, in ***Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108*** commented that whilst in some cases strike out may save time, expense and anxiety, in cases that are fact sensitive, including discrimination claims, the circumstances in which a claim is likely to be struck out are rare.

21. In ***Cox v Adecco and ors [2021] ICR 1307*** the Employment Appeal Tribunal gave guidance to Tribunals dealing with strike-out applications against litigants in person. It held that when considering strike out of claims brought against litigants in person, the claimant's case should be taken at its highest and the Tribunal must consider, in reasonable detail, what the claims and issues are. A Tribunal should not strike out a claim where it does not know what the claim is. There should, therefore, be a reasonable attempt at identifying the claim and the issues before considering strike out. The EAT also said that, if the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual tests that apply to amendments.

22. In ***Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391*** the House of Lords stressed the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and can only be determined after evidence has been heard.

23. This approach was adopted also in ***Kwele-Siakam v Co-Operative Group Ltd EAT 0039/17*** in which the EAT found that an Employment Judge was wrong to strike out claims for race discrimination and victimisation when the central issue in the case was the reason for the respondent's behaviour towards the claimant, which would require a Tribunal to make findings of fact after a full hearing.

24. In ***HHJ Kalyany Kaul KC v The Ministry of Justice and others EA-20221-000712-NLD*** (to which I was referred by Ms David in the course of her submissions) the EAT upheld the decision of an Employment Tribunal to strike out discrimination and victimisation complaints on the basis that they had no reasonable prospect of success. Mr Justice Swift, in giving judgment, referred to ***Ahir v British Airways [2017] EWCA Civ 1392*** in which Underhill LJ stated that:

   "*… Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary for liability being established, and also provided they are keenly aware of the danger of reaching such conclusion in circumstances where the full evidence has not been heard and explored…*"

25. The EAT held that as the discrimination claims rested on undisputed facts which, taken at face value, were not discriminatory, and the claim form provided little if any explanation as to why the events relied on ought not to be accepted at face value, the claims based on those events would inevitably fail if the events were taken at face value, and the Tribunal was entitled to strike them out.

Deposit Orders

26. The power to make Deposit Orders is contained in Rule 39 of the ET Rules:

"*(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…"

Conclusions

<u>Allegations against the First Respondent</u>

27. In reaching my conclusions on the question of strike out, I have taken the claimant's case at its highest. I have reminded myself that discrimination claims are fact specific and normally require the hearing of evidence before a decision can be made on their merits.

28. I do however accept Ms David's submission on behalf of the First Respondent that there is no bar on strike out in discrimination claims and that they can be struck out if there are critical factual issues on which there is no reasonable prospects of success.

29. I have considered firstly whether to strike out the allegation that the First Respondent failed to make reasonable adjustments.

30. Ms David submitted that the First Respondent's duty to make reasonable adjustments is more limited by virtue of section 41(4) and Schedule 8, Part 2, paragraph 5 of the Equality Act 2020.

31. She also submitted that the First Respondent had limited power to make reasonable adjustments given that the adjustments the claimant argues for are all within the Second Respondent's control. That said however, it is clear from the correspondence between the respondents that the claimant took me to in relation to condensed hours, that there was communication between the respondents about the claimant's health and at least some adjustments. I was also taken to emails between the respondents about the equipment needed by the claimant to work from home.

32. On the evidence before me it appears that the First Respondent did have some involvement in making reasonable adjustments, although ultimately the decision rested with the Second Respondent. It seems to me unlikely that the claimant will be able to establish at final hearing that the First~~Second~~ Respondent failed in its duty to make reasonable adjustments. Ultimately however that question will need to be determined by the hearing of evidence, and it cannot be said that the claim has no reasonable prospect of success.

33. For these reasons I find that the allegations that the First Respondent failed to make reasonable adjustments have little reasonable prospect of success, but that it cannot be said that they have no reasonable prospects of success. The claim that the First Respondent failed to make reasonable adjustments will therefore not be struck out, but the claimant is ordered to pay a Deposit as a condition of being allowed to pursue it.

34. I turn next to the allegation that the First Respondent dismissed the claimant because of race.

35. The evidence before me today suggests overwhelmingly that the First Respondent dismissed the claimant because the Second Respondent terminated his assignment, and because the claimant did not take up another assignment. This was in line with the provisions in the claimant's contract of employment. The claimant was also out of contact with the First Respondent for considerable periods of time and failed to respond to efforts to contact him, including efforts to contact him about an alternative assignment.

36. It does not of course follow that just because a dismissal is in line with a contractual procedure that it is not discriminatory, but taking the claimant's case at its highest, there is quite simply no evidence before me to suggest that in this case the First Respondent's decision to dismiss the claimant was because of race.

37. On the contrary there is evidence in the bundle of the First Respondent repeatedly trying to contact the claimant about other work and trying to discuss another assignment with him. There is also evidence that the claimant repeatedly did not respond to this contact, which cannot be explained just by the issue of the telephone number, as the First Respondent also sent several emails to the claimant.

38. The claimant has provided no evidence that the termination of his employment was because of his race. Even taking his case at its highest, it is a bare assertion, and not supported by any evidence. Given the attempts that the First Respondent made to contact the claimant and to offer him alternative work, there is no reasonable prospect in my view of the claimant proving that his dismissal was because of his race.

39. For these reasons I conclude that the allegation that the claimant was dismissed by the First Respondent because of race has no reasonable prospect of success and should be struck out.

<u>Allegations against the Second Respondent</u>

40. Mr Healy, quite sensibly, did not push for a strike out of the allegations against the Second Respondent in relation to the job applications made by the claimant. Rather, he submitted that the claimant should be ordered to pay a Deposit as a condition of being allowed to continue to pursue them.

41. In support of his application for a Deposit Order Mr Healy submitted that:

41.1 The Second Respondent had accepted the claimant on assignment between October 2021 and June 2022. It was very unlikely that the Second Respondent would engage the claimant knowing his race and then decide not to employ him because of his race.

41.2 The Tribunal can take judicial notice of the fact that the Home Office, and in particular the Visa Services and Immigration department in which the claimant worked, is very diverse because of the nature of the department and the work it carried out.

41.3 The documentary evidence all indicates that the reason why the claimant's job applications were unsuccessful was because the claimant's assignment was terminated in June 2022 because of the claimant's sickness absence record.

42. I accept Mr Healy's submissions, which are supported by the documentary evidence before me. The allegations of race discrimination in relation to the job applications made by the claimant have, in my view, little reasonable prospect of success and should be the subject of a Deposit Order. They appear to be mere assertions by the claimant, which are not supported by any of the evidence that is before me today.

Deposit order

43. I have taken the claimant's means into account both when deciding whether to make a Deposit Order and when determining the amount of the Order. I accept that the claimant is of limited means, although he does appear to have some funds to enable him to live, and to anticipate that he will receive Universal Credit again once the issue with the documents is resolved.

44. I make a Deposit Order of £10 in relation to each of the three reasonable adjustments the claimant alleges the First Respondent failed to make, a total of £30. I also make a Deposit order of £20 in relation to the allegation that the Second Respondent discriminated against the claimant because of race when turning down his job applications.

45. The total amount of the Deposit Order is therefore £50.

Employment Judge Ayre

1 November~~3 October~~ 2023

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