EMPLOYMENT TRIBUNALS

Claimant: Mr A Boateng

Respondent: Moss Bros Group Limited

Heard at: London South Employment Tribunal (by CVP)
On: 11 September 2023

Before: Employment Judge Abbott

Representation
Claimant: in person
Respondent: Mr Paul Smith, counsel

JUDGMENT having been sent to the parties on 25 September 2023 (reasons having been delivered orally on 11 September 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 and procedural history

1. The Claimant, Mr Boateng, brought the following complaints against his former employer, Moss Bros Group Limited (hereafter referred to as the Respondent) in his ET1 claim form:

    a. unfair dismissal (s.94(1) Employment Rights Act 1996 ('ERA 1996'));
    b. direct discrimination on grounds of race (s.13 Equality Act 2010 ('EqA 2010'));
    c. direct discrimination on grounds of religion or belief (s.13 EqA 2010);
    d. harassment related to race (s.26 EqA 2010);
    e. harassment related to religion (s.26 EqA 2010);
    f. victimisation (s.27 EqA 2010);
    g. unpaid notice pay;
    h. unpaid holiday pay;
    i. arrears of pay;
    j. other payments; and
    k. "equal pay".

2. The claim form was presented on 6 February 2020, the Claimant having been dismissed on 28 October 2019. Some of the allegations contained within the claim date back to early 2017.

3. The response was presented on 10 March 2020.

4. As a consequence of the COVID pandemic, understandably little progress was made with the claim in its initial months.

5. On 15 December 2020, the Respondent entered into a Company Voluntary Arrangement (CVA). Under the terms of the CVA, the Respondent had the benefit of a moratorium with its creditors. As a consequence, the claim was effectively stayed. A preliminary hearing that had been listed for 8 March 2021 was vacated, as was a final hearing listed for 4-8 October 2021.

6. The Claimant was notified of the approval of the CVA and invited to file details of the claim, which he duly did. He presented a Schedule of Loss in the total sum of £61,790.54 covering all of his heads of claim. The Supervisors of the CVA agreed the claim in that sum. On 6 August 2021, the Claimant was sent a cheque in the sum of £10,249.02 representing a first and final dividend of 16.59% of the adjudicated allowable claim, in accordance with the terms of the CVA (in fact this was slightly more than the approximate figure of 14.9% referred to in the CVA itself). The Claimant subsequently confirmed he has received this sum.

7. The CVA was completed on 31 March 2022. On 12 July 2022 the Tribunal wrote to the parties requesting an update. The Claimant responded on 19 July 2022 indicating that he has not received the full amount of his claim, the inference being that he intended his claim to continue. After some further correspondence between the Tribunal and the Claimant in which the Claimant continued to express his desire to proceed with the claim, a private preliminary hearing was listed to be heard on 23 June 2023.

8. Shortly before the hearing, on 13 June 2023, the Respondent applied to strike out the claim and either to vacate the preliminary hearing (on the basis that its application could be considered on paper) or to convert the hearing to a public one (as a claim cannot be struck out in a private hearing). In the event, it was directed that the private preliminary hearing proceed as listed. At that hearing, Employment Judge Sudra identified the issues, gave substantive directions for the case, listed the final hearing for 5 days (6-9 February 2024) and directed a 3 hour public preliminary hearing take place on 11 September 2023 to consider the following:

    a. Whether or not the Tribunal has jurisdiction to hear the Claimant'sclaims, owing to the CVA;
    b. whether or not the Claimant's claims have no reasonable prospectsof success, under rule 37(1)(a), on the basis that his claims have been compromised under the terms of the CVA, and therefore, the Tribunal should strike out the claim;

c. whether or not, under rule 37(1)(e), that due to the passage of timesince the allegations contained within the Claimant's claim, it is no longer possible to have a fair hearing in respect of the claim; and

d. Were the discrimination and victimisation complaints made within thetime limit in s.123 of the Equality Act 2010?

9. My judgment of 11 September 2023 concerns the first three of these, but primarily the third. The fourth did not arise for determination in view of my conclusion on the third.

<u>The CVA issues</u>

10. At the hearing, Mr Smith (who appeared for the Respondent) put his strikeout application in relation to the CVA issues more narrowly than it had appeared on paper. He conceded that the Equality Act claims were not covered by the CVA and nor were the unfair dismissal and holiday pay claims. He did, however, argue that any claims that are founded on breach of contract are covered by the CVA and should therefore be struck-out for lack of jurisdiction.

11. Having heard from Mr Smith, the Claimant indicated that he accepted whatwas being said in relation to his claims for notice pay, arrears of pay and other payments (unlawful deductions) and that he was content to withdraw those complaints. I was satisfied that this was a full-informed decision, and my judgment records that I dismissed these complaints upon withdrawal.

12. The Claimant also clarified during the hearing that his "equal pay" claim wasan aspect of his Equality Act claims rather than a standalone claim – which is consistent with how the issues were summarised by EJ Sudra.

<u>Rule 37(1)(e) application</u>

13. The main focus of the hearing then became the Respondent's application tostrike-out the claim under Rule 37(1)(e). I heard evidence from Miss Louise Passey, the Respondent's "Head of People" since July 2022, and submissions from both Mr Smith and the Claimant.

14. In summary, Mr Smith submitted that although applications under Rule37(1)(e) are rare, this is an appropriate case. Miss Passey's evidence provides a full picture of the extent of enquiries made by the Respondent into the allegations made by the Claimant. The claim covers a very substantial period of time (some allegations going back to the early part of 2017 when the Claimant's employment began) with a great deal of factual material and very substantial discrimination allegations against a wide list of people. However, in circumstances where considerable time has passed and the Respondent has faced significant business turmoil culminating in an insolvency process, the Respondent simply cannot defend itself. Very few of the individuals identified in the Claimant's narrative have, following enquiries by the Respondent, expressed any willingness to be involved in the case. Some are entirely uncontactable as the Respondent has no details, and others have been contacted but are not willing to be involved. Even those that

are available cannot comment on the vast majority of the allegations, and those they can comment on occurred many years ago (the last detriment being more than 4 years ago). Mr Smith accepted that none of this was the fault of the Claimant, but the reality of the situation, which is entirely understandable given the business turmoil faced by the Respondent, is that

it can no longer fairly defend itself against the allegations. A fair trial is not possible.

15. Mr Smith's submissions focused on the Equality Act claims. As regardsholiday pay, he argued that the Respondent's best witnesses are likely to come from the HR function, where there have also been changes of personnel since the Claimant's period of employment. As regards the unfair dismissal claim, he explained that the dismissal officer remains employed by the Respondent but has stated he has no memory of the Claimant's dismissal.

16. The Claimant's position was that he should not be punished for things thatare not his fault. He had been pushing for the case to be heard. He felt that there was sufficient material that a judge could make a decision "based on my evidence". He argued that allowing the Respondent's application would send a signal that respondents in Tribunal proceedings could always drag out the process and then argue a fair trial is not possible because of a lack of witnesses. Moreover, the Respondent does have some important witnesses who, on Miss Passey's evidence, are available – including the investigation officer for his dismissal – plus emails.

<u>*Relevant law*</u>

17. Rule 37(1) provides, insofar as relevant, as follows:

> 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— […] (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).

18. Mr Smith acknowledged that applications under Rule 37(1)(e) are rare anddid not draw my attention to any decisions that concern analogous situations. Nevertheless, consideration of whether a fair hearing is still possible often arises under other grounds for strike-out as a factor to consider.

19. One must always consider the balance of prejudice but, as the EmploymentAppeal Tribunal recognised in *Elliott v Joseph Whitworth Centre Ltd* EAT 0030/13, it is axiomatic in the exercise of discretion on a strike out that there will be an equal and opposite balance of prejudice as a matter of routine. What the Tribunal is looking for is something more to do with the case itself, such as memories fading, documents and witnesses going missing, the business going insolvent, a change of representation etc (*Elliott,* paragraph 16).

20. Rule 37(2) provides that a claim or response may not be struck out unlessthe party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing. I am satisfied that the Claimant had a reasonable opportunity to make representations at the hearing.

Factual findings

21. The undisputed procedural history of the claim is set out at paragraphs 1 to8 above.

22. I made the following relevant findings based on Miss Passey's, essentiallyunchallenged, evidence:

    a. The majority of people identified in the Claimant's claim no longerwork for the Respondent due to the passage of time since the acts complained of and the insolvency process (the CVA) to which the Respondent was subject. More specifically, a list of 22 individuals had been identified as being concerned with the Claimant's claim but no longer employed by the Respondent. This list includes all bar one of the individuals said to have perpetrated acts of discrimination / harassment / victimisation, based on the extensive List of Issues prepared by EJ Sudra which list approximately 30 individual acts.

    b. Of the 22 former employees identified, 17 are either uncontactable(because the Respondent has no contact details for them) or have been contacted by the Respondent and are not willing to cooperate. Best efforts have been exhausted. There is no realistic prospect of any of these individuals being able to provide evidence for the purposes of this case.

    c. The other 5 are:

        i. an HR Business Partner who is said to been involved with "various incidents during [the Claimant's] tenure";
        ii. a Store Manager alleged to have perpetrated a single act of discrimination / harassment / victimisation in April 2018, who also conducted the misconduct investigation into the Claimant that ultimately led to his dismissal;
        iii. a Store Manager alleged to have perpetrated (or beeninvolved in) two acts of discrimination / harassment / victimisation in April 2019;
        iv. a Senior Sales Advisor alleged to have perpetrated two actsof discrimination / harassment / victimisation in April and July 2019 and who was a part of the incident that led to the Claimant's misconduct dismissal; and
        v. a Team Leader not specifically alleged to have perpetratedany acts of discrimination / harassment / victimisation but who was a witness to the incident that led to the Claimant's misconduct dismissal.

Discussion

23. As Mr Smith conceded, it is rare for applications to be brought under this rule.Nevertheless, it is appropriate for me to consider all of the circumstances and make a determination as to whether a fair trial is possible.

24. It is important to note at the outset that this is a claim that was presented in February 2020 and will come to a final hearing only in February 2024. The core reason for the delay is that, for the period from 15 December 2020 to 31 March 2022, the claim could not proceed due to the CVA process that was ongoing. The COVID pandemic has also contributed to the delay. Plainly none of this is not the fault of the Claimant, but it is very relevant to why the Respondent is in the situation it now is in and why this case is out of the norm. It is also important to record that some of the allegations in the claim go back as far as early 2017, so would be coming to trial around 7 years later.

25. Miss Passey gave evidence, which was essentially unchallenged and whichI accepted (see above), that 22 individuals identified in the particulars of claim are no longer employed by the Respondent, of whom 17 are either uncontactable (because the Respondent has no contact details for them) or have been contacted and are not willing to cooperate. This list of 22 individuals covers almost all of those who could give evidence relevant to the Equality Act claims. Again, it is somewhat understandable that witnesses have been 'lost' to the case in this sense as a result of the corporate turmoil that the Respondent was faced with.

26. Mr Smith took me through the allegations made in the Equality Act claims andit is fair to say in summary that, for the vast majority of the allegations, the Respondent has no witness available to defend itself. Mr Smith therefore says that a fair trial of these claims is not possible. There is no real alternative available – it is impractical and unrealistic to allow some allegations to proceed but not others given the overall picture. For his part, the Claimant says it is unfair on him to have his claims dismissed through no fault of his own. These are serious allegations that, he says, need to be determined.

27. As regards the unfair dismissal claim, the individual who conducted themisconduct investigation is available. I am told that the dismissing officer is also available but has no recollection of the matter (although I have no evidence as to the extent to which efforts have been made to jog his memory with documents from the Respondent's HR files).

28. As regards the holiday pay claim, Mr Smith suggests that input from HRemployees is likely to be required, and the only HR employee who is listed in green was involved only in some incidents during the Claimant's tenure.

29. In reaching my conclusions, I must balance the prejudice that will be causedto the Respondent if the claims are allowed to proceed and to the Claimant if the claims are not allowed to proceed.

30. It is not straightforward, but in my judgement, a fair trial is no longer possibleof the Equality Act claims because of the inability of the Respondent to call

witnesses to defend its interests, as a consequence of the business turmoil suffered by the Respondent and the ensuing insolvency process which substantially (but necessarily) delayed progress of the case and resulted in many potential witnesses being 'lost' to the case. The prejudice to the Respondent of having to defend itself in these unusual circumstances outweighs the prejudice to the Claimant of not being able to pursue his claims. I accept the submission that there is no real alternative, it being impractical and unrealistic to artificially carve up the claim based on witness availability.

31. In reaching that conclusion, I note that the Claimant has already receivedsome compensation in respect of his claims through the CVA process (since his Schedule of Loss accepted by the Supervisors covered all claims, not just those that are founded on breach of contract), so he is not left with nothing – although, of course, it is not the full amount he seeks.

32. I consider the position is different for the unfair dismissal and holiday payclaims. The investigation and dismissing officer are available to give evidence. I accept that their recollections may not be perfect, which is inevitable given the passage of time, but I am not persuaded that a fair trial is impossible with them giving evidence. Further, I consider there to be a likelihood of there being documents relating to the dismissal process that can assist in prompting memories, and which will be available for the Tribunal to consider in any event. As regards the holiday pay claims, it seems to me that these are more likely to be capable of a fair determination based primarily on documentary evidence.

33. My decision therefore was that the Equality Act claims (*i.e.* direct race and religion discrimination; harassment related to race and religion; and victimisation) should be struck out under rule 37(1)(e). The unfair dismissal and holiday pay claims will proceed to a final hearing.

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Employment Judge Abbott

Date: 27 September 2023

REASONS SENT TO THE PARTIES ON

9 November 2023

FOR THE TRIBUNAL OFFICE

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