**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Number: 8000437/2023**

**Hearing held remotely by CVP at Glasgow on 6 November 2023**

**Deliberation and decision 9 November 2023**

**Employment Judge D Hoey**

| | |
|---|---|
| **Mr R Rohatgi** | **Claimant**<br>**In person** |
| **Capita Customer Management Ltd** | **Respondent**<br>**Represented by:**<br>**Mr Jackson – Counsel**<br>**Instructed by respondent** |

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claim in respect of automatic unfair dismissal is dismissed following upon the claimant's withdrawal of the claim at the hearing.

2. The respondent's agent's application for strike out of the race discrimination claim is refused and the claim is not struck out.

3. The claim of direct race discrimination pursuant to section 13 of the Equality Act 2010, in respect of the claimant's dismissal, shall proceed to a Hearing on dates to be fixed.

4. The respondent's application for a Deposit Order and case management matters are dealt with separately.

## REASONS

## Background

5. The claimant lodged a claim on 1 September 2023 for unfair dismissal and race discrimination. The respondent argued that both claims had no reasonable prospects of success and should be struck out, which failing a deposit order should be issued, there being little reasonable prospect of success.

6. A preliminary hearing was fixed to determine the respondent's applications. Both the claimant and counsel for the respondent attended. The parties had worked together to focus the issues, the respondent having set out the position at length in an application to the Tribunal dated 24 October 2023, with a further detailed skeleton argument setting out the principal arguments with authorities (on 3 November 2023). The claimant had responded with a 9 page detailed submission explaining why the claim was disputed and should be allowed to proceed.

7. The parties had agreed productions amounting to 216 pages and case law had also been produced.

8. During the course of the hearing the claimant stated that he was not arguing *the* reason for his dismissal (or the principal reason for this dismissal) was his alleged disclosure. He confirmed that he was not offering to prove that the sole or principal reason for his dismissal was the disclosure relied upon. Having considered matters and having set out the legislation, the claimant confirmed that the dismissal claim was being withdrawn and it would be dismissed. The claimant had less than 2 year's service to claim "normal" unfair dismissal. Given the terms of section 103A, the claimant's decision not to proceed with his unfair dismissal claim was a sound one.

## The race discrimination claim

9. The remaining claim was his race discrimination claim. The claimant is Indian and Asian and relies upon his ethnicity as the protected characteristic. He argued he was dismissed because of his race.

10. The claimant initially explained that he was relying on an actual comparator, Mr Sinclar, as he said Mr Sinclar had complained about the claimant and his complaint was upheld and yet the claimant's complaint about Mr Sinclar was not upheld. As Mr Sinclar was white and the claimant was not, the claimant said a *prima facie* case had been established.

11. I explained to the claimant that a comparator requires to be someone whose circumstances are not materially different to his. It appeared that there was no actual comparator since the complaint and the circumstances pertaining to Mr Sinclair were entirely different to those of the claimant (and there was no actual person whose circumstances were not materially different to the claimant's circumstances).

12. Mr Sinclair was an individual whom the claimant believed had acted inappropriately to a colleague (about whom the claimant had complained to the police). The colleague in question (and Mr Sinclair) had both denied the claimant's assertions were correct. No evidence had been obtained by the respondent, aside from what the claimant said he believed had happened, to support the position. Accordingly no action was taken in respect of the claimant's complaint.

13. The claimant's case is taken at its highest in consideration of this matter and the points below are for the purposes of this hearing only. It will be for the final hearing to make findings of fact from the evidence presented. The current application was made on the basis of what the claimant said, the contemporaneous documents and taking the claimant's pleaded case at its highest.

**The facts and the claimant's case (for the purposes of this hearing only)**

14. The claimant had raised a complaint about a colleague arguing that the colleague had acted inappropriately towards another individual at work. The claimant said he had seen acts of an inappropriate nature. Rather than raise matters at work he decided to email his boss and contact the police. He had not raised the issue with the colleague at the time or raised matters internally

at the time. Rather the claimant contacted the police and sent an email to the respondent.

15. The police investigated but found no evidence to support what the claimant had said. No action was taken (whether in relation to the claimant or any individual).

16. The respondent also investigated matters and found no evidence to support the claimant's position. A witness the claimant had said supported his position was unable to provide any positive evidence. The claimant had said there were a number of things he believed he had seen during his employment but there was no evidence to support what he had said and he had not raised matters.

17. There was no evidence, aside from what the claimant thinks he saw, to support the assertions made by the claimant, which are serious allegations.

18. The claimant had been instructed to keep the matters confidential given the investigation that was being undertaken and the seriousness of the issues. The individual about whom the claimant had complained had complained about the claimant's conduct and in particular that the claimant had been making assertions which had not been established. The claimant alleged that he had never used the individual's name and yet somehow his identity had been disclosed. The claimant considered that to be a relevant factor in support of his argument that his race was being used to oust him.

19. The respondent investigated the complaint about the claimant's conduct and discovered that the claimant had not kept matters confidential (contrary to the instruction he had received) and had instead raised matters with other members of staff while the investigation process was ongoing (contrary to an instruction not to do so). He had also been found to have used inappropriate language to describe colleagues which the respondent considered to amount to misconduct, if established. Despite the investigations having found no merit in what the claimant had alleged, he had continued to make complaints to other members of staff.

20. The claimant was suspended while matters were fully investigated and ultimately disciplinary proceedings were initiated against him.

21. The respondent spent a significant amount of time investigating what had been said and by whom and had interviewed a number of staff. Detailed notes were taken of each meeting and the summary position was set out in writing.

22. A lengthy disciplinary hearing took place (which appeared to span 3 days) and by letter dated 11 August 2023 the claimant was dismissed. In the letter of dismissal the full process that had been undertaken was set out, including that 6 individuals had been spoken to and the comments the claimant made were set out together with his response. The respondent concluded that the claimant had been guilty of gross misconduct because of what he had said and he was accordingly dismissed.

23. A detailed letter of appeal was submitted and an appeal hearing was convened. By letter dated 30 August 2023 the claimant's appeal was dismissed. One of the grounds in support of his appeal was that he believed he had been dismissed because of his race. No evidence was found by the respondent to support that belief and the sanction was considered to be suitable (and not too harsh as the claimant alleged).

**Law on discrimination**

24. Direct discrimination is where there is less favourable treatment because of a protected characteristic (section 13, Equality Act 2010). As persons rarely readily admit to discrimination section 136 sets out a two-stage burden of proof provision which assists claimants since if a claimant has led evidence giving rise to facts from which a court could conclude that discrimination has occurred, the burden switches to the respondent to show that the protected characteristic was in no sense whatsoever a reason for the treatment.

25. One of the challenges in discrimination law is the absence of proof of the reason why the employer acted. That is usually because the reasons for a decision may not immediately be obvious (and can sometimes differ from reasons given at the time, in writing or otherwise).

26. It is also important to note that the public determination of a discrimination claim is important and serves a reminder more generally of the importance of the eradication of discrimination.

27. It can be extremely difficult for claimants, especially those not legally represented, to understand what the evidence is to progress a claim.

28. That can lead to difficulties since it has been established that a mere assertion of discrimination is not enough to satisfy the burden of proof on a claimant at the first stage. If the only evidence is that the claimant was treated differently, with no reference to the characteristic (or evidence that the characteristic was in any way a relevant factor), that is unlikely to result in the claimant showing, in evidence, that there was less favourable treatment (a difference in treatment). 'Something more' is needed as was set out by Mummery LJ in *Madarassy v Nomura International Ltd* [2007] EWCA Civ 33 at paragraph 56: "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination 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."

29. The key question in a direct discrimination claim is why the claimant was treated as he 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.

30. The "something more" that may lead a Tribunal to move beyond the difference in status and treatment need not be substantial – it may be derived from the factual context including inconsistent or dishonest (see *Base Childrenswear Ltd v Otshudi* 2019 EWCA Civ 1648; *Veolia Environmental Services UK v Gumbs* EAT 0487/12).

31. The presence of discrimination is almost always a matter of inference rather than direct proof – even after the change in the burden of proof, it is still for a

claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.

32. In drawing inferences, an uncritical belief in credibility is insufficient' as Sedley LJ pointed out in *Anya v University of Oxford* 2001 IRLR 377 CA (paragraph 25) it may be very difficult to say whether a witness is telling the truth or not. Where there is a conflict of evidence, reference to the objective facts and documents, to the likely motives of a witness and the overall probabilities can give a court very great assistance in ascertaining the truth.

33. In *Talbot v Costain Oil, Gas and Process Ltd* 2017 ICR D11, EAT, His Honour Judge Shanks — having looked at the relevant authorities — summarised the following principles for employment tribunals to consider when deciding what inferences of discrimination may be drawn:

    a. it is very unusual to find direct evidence of discrimination

    b. normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question

    c. it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances

    d. the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference

    e. assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities

f. where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations

g. the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment

h. if it is necessary to resort to the burden of proof in this context, section 136 provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

34. Unreasonable conduct or poor management does not of itself point to discrimination. There must be indications from the evidence that point to the unreasonable conduct relating to the prohibited ground (*Laing v Manchester City Council* 2006 ICR 1519).

35. In *Glasgow City Council v Zafar* 1998 ICR 120, Lord Browne-Wilkinson considered that 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' His Lordship also approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.

36. Equally, it cannot be simply inferred that the fact that an employer has acted unreasonably towards one employee means it would have acted the same way towards others. A failure to explain unreasonable conduct by the employer can support an inference of discrimination. If an employer acts in a wholly

unreasonable way, it may be inferred that the explanation offered is not the true or full explanation (*Rice v McEvoy* 2011 NICA 9). In all cases, the drawing of inferences involves careful consideration of the surrounding facts:. "Facts will frequently explain, at least in part, why someone has acted as they have" (Elias P in *Laing* (above).

37. It is important therefore for claimants to ensure consideration is given as to how less favourable treatment is going to be established in evidence (and why the difference was in some way due to the characteristic).

38. In *Community Law Clinic Solicitors Ltd v Methuen* UKEAT/0024/11/LA, Bean J struck out a race and sex discrimination claim that consisted of the assertion that the claimant had been dismissed and replaced by someone of a different ethnicity. Bean J stated at paragraph 14: "It cannot be the law that where an employee is dismissed for whatever reason, whether health, capability or conduct, and is replaced by someone whose protected characteristics are not exactly the same the claimant can get a discrimination case to trial simply by asserting that the replacement employee is different."

39. It is rare for claims to be struck out without having been determined at a hearing where evidence is led and considered, particularly where discrimination claims are involved and assessments require to be made as to the reason why the employer acted (with appropriate inferences being drawn and evidence tested).

**Law on Strike Out**

40. Rule 37 provides as follows:

> *"(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 prospects of success..."*

41. To strike out because the Tribunal considers there to be no reasonable prospect of success' requires a tribunal to form a view on the merits of a case,

and only where it is satisfied that the claim or response has no reasonable prospect of succeeding can it exercise its power to strike out.

42. The Employment Appeal Tribunal gave guidance in *Cox v Adecco* [2021] ICR 1307, where the Employment Appeal Tribunal stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are.

43. In general, the Employment Appeal Tribunal has held that the striking out process requires a two-stage test in *HM Prison Service v Dolby* [2003] IRLR 694, and in *Hassan v Tesco Stores Ltd* UKEAT/0098/16. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In *Hassan* Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit.

44. Striking out is not automatic and care is needed given the draconian nature. In *Hasan* the Employment Appeal Tribunal held that relevant factors in the exercise of that discretion that might have weighed heavily included the early stage of the proceedings, the ability to direct that further and better particulars of each claim be specified, and the absence of any application on the part of the respondent for striking out.

45. Ultimately a Tribunal should exercise caution before striking out a claim, particularly where facts are in dispute and it is possible to hear evidence to determine the issues.

46. However, Underhill LJ in *Ahir v British Airways* [2017] EWCA Civ 1392 at paragraph 16 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 to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances

where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment."

**Decision on strike out**

47. The Tribunal considered the respondent's application carefully in light of the authorities and took some time to consider the issues in this case.

48. There were 2 arguments relied upon by the respondent in support of their application to have the claim struck out.

49. The **first argument** was that in order to be entitled to a hearing on the merits, the claimant requires to bring forth sufficient facts to support a *prima facie* case of discrimination. Mere assertion of discrimination is not enough.

50. In this case the respondent's agent noted that there was no basis to say race was in any sense a reason for the claimant's dismissal. There were clearly marked differences between the claimant's complaint about Mr Sinclar and Mr Sinclair's complaint about him. The substance was entirely different.

51. It was said that the claimant could not point to anything to show race was a factor. It was asserted and believed by the claimant but there was nothing more and as such the claim should be struck out, having no reasonable prospects of success.

52. The claimant said this was akin to cases where it was one word against another. There was no way to prove what he said was incorrect. Just because others said they had not seen the conduct the claimant said happened did not mean the conduct did not happen. Further the claimant said the respondent by had, accepting the evidence of his white colleague in preference to him had shown discriminatory conduct (related to race) which was a relevant factor in determining whether his dismissal was because of race.

53. The claimant also said that he believed the respondent would not have dismissed a white person for the comments he made. He said he would bring

evidence to show the respondent would not have dismissed a white person for saying the things he said.

54. Finally, the claimant argued that there were key facts in dispute, which he said he had set out in writing, and as a result strike out should not be ordered.

55. This is a very finely balanced case and the submissions on behalf of the respondent have considerable force. I have carefully considered what the claimant has said and taken it at its highest. I have also considered the respondent's submission and the legal tests. I have carefully considered the contemporaneous documents. It is also important that I bear in mind the draconian consequences of striking out a claim, particularly where a litigant is not legally represented since the claimant would be deprived of the right to have a hearing (and bring evidence to support his claim).

56. I have decided, with some hesitation, that it cannot be said that there are no reasonable prospects of success of the claimant showing unlawful direct discrimination from the material before me. While the claimant was unable to set out clearly what the "something more" was, he argues that the words he used, for which he was dismissed, were words that someone who was not of his race would not have been dismissed and that he will bring evidence to the final Hearing to support this assertion. He relies, as background, upon the fact that complaints made against him (by someone of a different race) were upheld and yet his complaint was not taken forward.

57. It appeared to me that there were significant challenges with the argument relied upon by the claimant. The claimant's complaint was fundamentally different to that of Mr Sinclair. The claimant was arguing that there had been inappropriate behaviour, That appeared to have been fully investigated and a decision taken. In contrast the complaint against the claimant was in relation to the words that he used having been told not to use such words (in respect of which there was little dispute).

58. The claimant also seemed to be arguing that it was race discrimination not to uphold his complaint and yet it was not unlawful discrimination (in respect of

Mr Sinclair) to have upheld Mr Sinclair's complaint. Logically that is not consistent.

59. Nevertheless, this case can be distinguished from *Methuen* since it is important, in a discrimination case, to consider the full context and factual matrix against which a decision would be made. In this case the claimant says the background position (which appears to involve some disputed facts) shows that he was treated differently because of his race. He says the fact others (who were white) were treated more leniently than he was supports the assertion that race was in some sense a relevant operating factor. He says the respondent would not have dismissed a white person for using the same words he did. While there appears to be little factual foundation for such arguments, it is not possible, fairly, to decide this matter without hearing evidence. In other words it cannot be said at this stage that there are no reasonable prospects of success entitling the claim to be struck out.

60. It is important to emphasise that a decision on strike out is made from the information that has been presented, taking the claimant's case at its highest. No inference should be drawn from the decision made in this regard given no evidence has been heard.

61. It is also important to recognise that in determining the reason why the claimant was dismissed, the Tribunal will require to make an assessment of the evidence. While the written documents appear clear and the process that was undertaken appears to have been carefully considered, deciding whether or not race was a relevant factor requires inferences to be drawn from the evidence and a careful examination of the reason for dismissal.

62. Given the background factors and the claimant's argument that others of a different race were treated differently (on facts which may be disputed) I consider that it would be contrary to the overriding objective to strike out the claim at this stage. Strike out requires a Judge to find there to be no prospects of success. It is not possible to make this assessment given the need to assess the reason why the claimant was dismissed from all the surrounding facts (from which appropriate inferences can be made).

63. I also considered the **second argument** in support of the respondent's application which was based upon *Ahir* above. It was submitted that even if there are disputed facts, the claim should still be struck out if there are still no reasonable prospect of the facts necessary to liability being established, provided consideration is given to the danger and consequences of so doing.

64. Counsel for the respondent said that was the position in this case. There were no real disputed facts but even if there were there was no reasonable case to go to a hearing and the claim should be struck out.

65. The claimant's written submission stated that the facts in dispute related to what Mr Sinclair is said to have said and how his name was identified (since the claimant said he had not mention him by name). The claimant also believes the alleged victim had sent incorrect emails and alleges malice. The claimant also argued a manager had accepted that what the claimant said he saw would not have been appropriate, which the claimant said was a disputed fact.

66. The claimant said others are not being truthful about what happened and that there may be collusion to result in the claimant's dismissal, all of which the claimant says supports the assertion that he was dismissed because of his race.

67. The claimant said his conduct did not justify misconduct far less gross misconduct and his dismissal was in fact motivated by his race. Had he been of any other race he would not have been dismissed.

68. It seemed to me that there was some dispute on certain of the facts. The claimant was disputing that what staff had said had not been fully considered or had been taken out of context. It was not entirely clear what the disputes were but the claimant argued there were key factual disputes that required to be resolved. It could not be said that liability could not be established notwithstanding such disputes.

69. I did not consider the prospects of the claimant showing less favourable treatment was because of race to be good but I could not say there were no

reasonable prospects (the test in respect of strike out). The cases relied upon by the respondent can be distinguished on the basis of the facts of this case.

70. In reaching my decision I took into account that the power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances. It is draconian in nature. The test imposes a very high threshold: there must be no reasonable prospect of success (as understood). The Tribunal must consider whether on a careful consideration of all available material it can properly conclude that the claim has no reasonable prospect of success.

71. The test is not whether the claimant's claim is likely to fail or whether it is possible that the claim will fail. It is not a test which can be satisfied by considering what is put forward by the respondent in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test.

72. Tribunals should be cautious in exercising the power to strike out, particularly in cases such as discrimination claims where there is a public interest in them being heard and because they are likely to be fact sensitive. The claimant's case should be taken at its highest unless conclusively disproved by (or totally and inexplicably inconsistent with) undisputed contemporaneous documents.

73. I took a step back to consider whether it was just and fair to strike out the claimant's claim. I decided that again on balance it would not be fair and just to do so. The clamant was not legally represented. The claimant had not fully understood the precise legal tests (but fairly conceded he had no automatic unfair dismissal claim given he was not saying his dismissal was solely or principally because of his disclosure). The claimant was saying his dismissal was because of his race (and confirmed his only claim was that it was his dismissal which was unlawful discrimination). He argued the background supported the fact that his race was a relevant consideration in his dismissal, as others without his race were treated preferentially to him and that others (of a different race) would not have been dismissed for the same conduct.

74. While those arguments appear to me to be weak, I cannot say there are no prospects of them succeeding, particularly in light of the nature of discrimination law, the fact there are some facts in dispute, how findings are made (via inferences from facts) and of the importance of discrimination claims being heard.

75. It was not just or fair to strike out the claimant's claim without hearing evidence.

76. In this case given the claimant relies upon direct discrimination in respect of his dismissal, they key question will be whether race was a factor in the claimant's dismissal, which turns on direct evidence and the inferences that may be drawn from it. That is likely to be capable of being resolved within a relatively short hearing, focussing on the decision maker's evidence (and restricting the costs incurred to both parties in determining this case).

77. It cannot be said that there are no reasonable prospects of success given the facts of this case. The claim is accordingly not struck out.

**Employment Judge:** **D Hoey**
**Date of Judgment:** **10 November 2023**
**Entered in register:** **13 November 2023**
**and copied to parties**