



EMPLOYMENT TRIBUNALS

Claimant: Mr D Heaven

Respondents: Single Resource Limited (1)
Jobandtalent Limited (2)
Extra Personnel Limited (3)

Heard at: Nottingham

Heard on: 26 July 2023

Before: Employment Judge Victoria Butler (sitting alone)

Representation

Claimant: In person
Respondent: Mr I Pettifer, Solicitor

RESERVED JUDGMENT

The decision of the Employment Judge is:

1. The claim of unfair dismissal is dismissed because the Tribunal does not have jurisdiction to hear it.
2. The allegations of harassment are struck out because they have no reasonable prospect of success.
3. The allegations of direct race discrimination are struck out because they have no reasonable prospect of success.
4. The allegations of victimisation in the claim number 2602179/2022 are struck out because they have no reasonable prospect of success.
5. The allegation of victimisation in claim number 2603108/2022 is struck out because the Tribunal does not have jurisdiction to hear it.

REASONS

Background

The Claimant's first claim

1. The Claimant presented his first claim to the Tribunal on 14 September 2022 following a period of early conciliation period between 13 and 14 September 2022. He alleges direct race discrimination, harassment, and victimisation.
2. All three Respondents are part of the same group of companies and are employment agencies. The Claimant was assigned to work at a Sports Direct Warehouse ("the warehouse"), owned by the Frasers Group ("Frasers"). Frasers use four employment agencies overall to supply workers.
3. The Claimant was employed by the 1st Respondent from on or around 30 March 2021 until 14 September 2022 when he was dismissed for gross misconduct.
4. Within the particulars of claim, the Claimant refers to his dismissal but does not pursue an unfair dismissal claim, rather saying:

"The Claimant has been given the right to appeal his dismissal. In the event that his appeal is unsuccessful the Claimant may seek to amend this claim to add claims relating to his dismissal and the circumstances around it."

The Claimant's second claim

5. The Claimant issued his second claim against the 2nd Respondent only alleging unfair dismissal and race discrimination on 20 December 2022. The allegation of race discrimination is one of victimisation in that the 2nd Respondent placed a notification on its system that he should not be re-employed following his summary dismissal. The detriment suffered was the retraction of an offer of work at Aldi because of this notification.
6. A second period of early conciliation was not commenced in respect of the second claim, so the Claimant relies on the original certificate.

The preliminary hearing on 20 December 2022

7. The parties attended a preliminary hearing by telephone on 20 December 2022 before Employment Judge Adkinson at which the issues were identified as follows:
8. Direct race discrimination:
 - 8.1. In July 2022, did the Respondent reject the Claimant's application for promotion? (allegation 1)

8.2. In July 2022, did the Respondent assign him to the task of unloading deliveries (a task normally given to new starters, even though he was an experienced employee)? (allegation 2)

8.3. On 13 August 2022, did the Respondent dismiss him with effect from 14 September 2022? (allegation 3)

9. Harassment related to race

9.1. In April 2022, did a Polish colleague say to him “Go back to Africa”? (allegation 1)

9.2. In June 2022, when enquiring about his grievance, did a senior manager called Russell say to him “Why are you so upset? Is it because you're African-American?” (allegation 2)

9.3. At some point between June 2022 and 25 August 2022, did Ms Plonska make allegations of sexual harassment against him? (allegation 3)

Victimisation

10. Employment Judge Adkinson also recorded that there are two protected acts relied on. The first was made in February 2022 when he told his supervisor that he had been the subject of racism. After the supervisor did not react in the way the Claimant felt appropriate, he raised a grievance with Frasers. However, the claim form did not specify what detriments are alleged to have arisen and from which protected act.

The Orders

11. Employment Judge Adkinson made the following orders:

12. ***“Further information and strike out warning***

13. *For each allegation of direct discrimination because of race, the claimant must by 3 January 2023 write to the Tribunal and to the respondents setting out the names of any comparators and in relation to each comparator provide their name, their race and why he believes they are comparable to his situation.*

14. *The claimant must by 3 January 2023 write to the Tribunal and respondents and*

13.1 *set out which allegations in the claim as set out in its current form as presented to the Tribunal are detriments that he was subjected to because of his protected disclosures, and which protected disclosure was the reason for which detriment*

13.2 *explain why he believes his claim for victimisation should not be struck out on the grounds that it has no reasonable prospect of success. Unless he requests a hearing, the Tribunal will consider the replies and whether to strike out the claim of victimisation on the papers.”*

Events after the preliminary hearing on 20 December 2022

15. The Claimant did not comply with that order. On 2 February 2023, the Tribunal wrote to the Claimant in the following terms:

“The claimant has not sent the information to the tribunal as set out in the orders at paragraph 16 and 17 of Employment Judge Adkinson’s record of the preliminary hearing of the 20 December 2022 and no application has been received for an extension of time in which to comply.

The claimant must send to the tribunal and the respondent by 9 February 2023 the information as ordered otherwise his claims of direct race discrimination and victimisation may be struck out on the grounds that the claimant is not actively pursuing those claims pursuant to rule 37”

16. The Claimant still failed to reply to the order, and a judicial mediation scheduled for 8 March 2022 was cancelled because the Respondents did not know the case they were required to meet.

The preliminary hearing on 5 May 2023

17. The parties attended a further preliminary hearing by telephone on 5 May 2023. At that hearing, Employment Judge Hutchinson listed this hearing to determine the following:

18. *“In respect of the first claim whether to strike out the claims of;*

- *direct race discrimination*
- *harassment on the grounds of race*
- *Victimisation*
- *Whistleblowing detriment¹*

19. *On the grounds that:*

18.1 *the Claimant has failed to comply with case management orders and in particular the order made by Employment Judge Adkinson on 20 December 2022.*

18.2 *He is not actively pursuing the case.*

18.3 *The manner in which the proceedings have been conducted by the Claimant has been unreasonable.*

18.4 *The claims or any of them have no reasonable prospect of success.*

18.5 *Alternatively, the Employment Judge may consider making a Deposit Order in respect of any of the allegations or contentions made by the Claimant on the*

¹ The Claimant has confirmed that he does not bring a whistleblowing claim

grounds that they have little prospect of success

20. *In respect of the second claim*

19.1 *Whether the tribunal has jurisdiction to hear the claim of unfair dismissal on the grounds that it is presented out of time unless the Employment Judge is satisfied that it was not reasonably practicable to present the claim in time and it has been presented within such further period of time, as is reasonable.*

19.2 *Whether the claimant has sufficient service to proceed with the claim of unfair dismissal on the grounds that he has less than two years' service for the Respondent.*

19.3 *In respect of the claim of race discrimination whether that claim should be struck out on the grounds that it has no reasonable prospect of success.*

19.4 *Alternatively, the Employment Judge may consider making a Deposit Order in respect of any of the above claims if they consider that any of the allegations or contentions made by the claimant have little reasonable prospect of success."*

The Claimant's e-mails

21. On 24 May 2023, the Claimant sent a lengthy e-mail to the Tribunal explaining his experiences at the warehouse, but the contents of that e-mail failed to comply with the terms of Employment Judge Adkinson's order.

22. On 1 July 2023, the Claimant e-mailed the Tribunal further saying:

"As I can reflect on Judge Atkins's (sic) request to explain paragraphs 16 and 17. However, I find it to be extremely improper and arrogant for him to even suggest that. How could he even ask a victim such a motion after all the evidence had already been laid out to understand this matter? Could he also have asked the same question to the victim of rape to explain how the ordeal occurred requesting the details of the act? Having said that and I mean no disrespect, I feel like I start to have the impression that the tribunal is pushing me to a corner where I wouldn't have any prospect of succeeding in this case fairly and impartially before you. Therefore, I would request the tribunal to assign a Black judge who can identify with my trials and tribulations in Britain. Above all, this shouldn't come to you as a surprise after all the discrimination, racism, injustice, stigmatisation, and marginalization I had experienced at the hands of the defendants (Single resource, Extra personnel, and JobandTalent). Therefore I would appreciate it if the court can appoint a Black judge".

23. It is clear from this e-mail that the Claimant acknowledges that he had not complied with the order, nor did he intend to.

24. For completeness, the Tribunal confirmed that the Claimant was not at liberty to choose the ethnicity of the Judge hearing the case.

The hearing before me

25. The Respondent produced a short bundle for use and submitted further documents on the morning, which included the messages the Claimant had sent to Ms Plonska leading to his summary dismissal.
26. The Claimant maintained that he had already e-mailed the Tribunal with the names of his comparators but was unable to locate the e-mail he was referring to. Accordingly, I gave him opportunity to furnish me with it after the hearing.
27. He duly e-mailed the Tribunal on 29 July 2023 attaching what he says are further documents explaining details of direct race discrimination and racism he has endured. However, those e-mails (and attachments) do not address the information ordered to be provided.
28. The Claimant also appears to be suggesting that the version of his e-mail dated 24 May 2023 in the bundle for this hearing was different to his original. I have cross-referred the copy in the bundle to that on the Tribunal file and they correspond so there is no inconsistency.

Background information

29. We established the following information relevant to the issues. More generally, the Claimant's case is that the warehouse was staffed by predominantly Polish nationals and there was a culture or racism against black workers. Only Polish staff got promoted.
30. The Claimant says that he was blocked from promotion because '*they*' did not want a black man to become a supervisor – they just wanted someone Polish. He says that when it became known he wanted to apply for promotion, Ms Plonska made the allegations of harassment.
31. Further, it is Frasers who make decisions about who gets promoted, albeit the Claimant now says that the 1st Respondent chooses who gets put forward for selection.

The Law

Striking out a claim or part of it – Rule 37 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

32. Rule 37 provides:

“At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:

(a) That it is scandalous or vexatious or has no reasonable prospect of success;

- (b) *That the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
- (c) *For non-compliance with any of these Rules or with an order of the Tribunal;*
- (d) *That it has not been actively pursued;*
- (e) *That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."*

Rule 37(1)(a) – that the claim or a complaint is scandalous or vexatious or has no reasonable prospect of success

33. In dealing with an application to strike out all or part of a claim, I must be satisfied that there is “*no reasonable prospect*” of success in respect of that claim or complaint – it is a high test. It is not sufficient to determine that the chances of success are fanciful or remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and if it to be exercised, the claim or the part of it that is struck out must be bound to fail.

34. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

“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 prospects of success. I stress the words “no” because it shows the test is not whether the Claimant’s claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects...”

35. Where there are material issues of fact which can only be determined by a Tribunal it will rarely, if ever, be appropriate to be strike out a claim or complaint on the basis of it having no reasonable prospect of success before the evidence has been heard and tested.

Rule 37(1)(b) – the manner in which the proceedings have been conducted by or on behalf of the Claimant or Respondent has been scandalous, unreasonable or vexatious

36. A claim (or response) can also be struck out if it has been conducted in an unreasonable manner. A Tribunal must be satisfied that either the conduct involved was a deliberate and persistent disregard of the required procedural steps or has made a fair trial impossible. Striking out must be a proportionate response - ***Blockbuster Entertainment Limited v James 2006 IRLR 630, CA.***

37. Even if a Tribunal concludes that there has been scandalous, unreasonable or

vexatious conduct, it must consider whether a fair trial is still possible. If a fair trial is still possible, the claim (or response) should not be struck out.

Rule 37(1) (c) - a party has not complied with any of the ET rules or with an order of the tribunal

38. In **Weir Valves & Control (UK) Ltd v Armitage [2004] ICR 371** the EAT said:

“But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been caused and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience.”

39. The Tribunal must always guard against allowing its indignation to lead to a miscarriage of justice.

Rule 37(1)(e) - it is no longer possible to have a fair hearing

40. The critical question is whether a fair trial remains possible. If it is, the case should be permitted to proceed.

Rule 37(1) (e) – the claim is no longer actively pursued

41. A Tribunal can strike out a claim where: there has been delay that is intentional or disrespectful or abusive to the court, or there has been inordinate and inexcusable delay, which gives rise to a substantial risk that a fair hearing is impossible, or which is likely to cause serious prejudice to the Respondent.

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

42. Rule 39 provides:

“(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.”

(3) The Tribunal reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented as set out in Rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides a specific allegation or argument against the paying party for substantially the same reasons given in the deposit order: - (a) The paying party shall be treated as having acted unreasonably pursuing that specific allegation or argument for the purpose of Rule 76 unless the contrary is shown and; (b) The deposit shall be paid to the other party or if there is more than one to each other party (or the parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.”

Conclusions

Harassment

Allegation 1

43. The Claimant does not know the name of the individual who said: “Go back to Africa”. Accordingly, it could be an employee or worker of any of the four agencies used by Frasers or someone employed directly by Frasers.
44. The Claimant criticises the parties involved for not identifying the alleged perpetrator. However, as part of the investigation into the matter, the Claimant was asked to return to the night shift to help identify him, but he refused to do so.
45. Accordingly, we are left in a position where no-one knows who made the comment or who employed him. This creates an evidential hurdle which cannot be overcome. Further, it will be impossible to establish who is liable for the discrimination if proven and if any reasonable steps defence is made out. I am satisfied, therefore, that there is no reasonable prospect of the allegation succeeding and it is, therefore, struck out.

Allegations 2 and 3

46. The manager called ‘Russell’ was employed by Frasers, not any of the Respondents. Ms Plonska was also employed by Frasers. Accordingly, none of the named Respondents can be liable for those individuals’ actions and there is no claim issued against Frasers.

47. Furthermore, the Claimant does not argue that the Respondent/s failed to protect him from harassment, rather he appears to blame Frasers (p.146) against which there is no claim. It follows, therefore, that both allegations have no reasonable prospect of success and are struck out.

Direct discrimination

Allegation 1

48. The Claimant alleges that only Polish nationals were promoted, and Ms Plonska made her allegations simply to prevent his promotion because he is black.

49. I have had sight of the messages that the Claimant sent to Ms Polonska (which he does not deny sending) and the allegations of harassment appear properly made. The Claimant said in one message "*When are you going to give me a hug? I want to take you out to a nice bar. Just the two of us. No work related*". Thereafter, he sent pictures of himself and repeatedly asked her to send pictures in return including "*can you send me some pics of you in your sexy swimsuit please?.....*"

50. Ms Plonska did not reply to these particular messages. I am satisfied that, given their sexual nature, the Claimant's allegation that she made the allegation of harassment simply to block his promotion because of his race is bound to fail.

51. Accordingly, I am satisfied that this allegation has no reasonable prospect of success and is therefore struck out.

Allegation 2

52. The Claimant says that on 4 July 2022, he requested overtime and was told that to be in the overtime team he would have to unload trailers which is a task normally assigned to new starters, whereas other Polish workers who worked overtime did not.

53. The Respondent says that there is no duty that cannot be assigned to a newer or more experienced worker and that the Claimant was assigned tasks on a fair and reasonable basis according to what tasks were required from day-to-day.

54. I observe that in the claim form, which was submitted by Derbyshire Law Centre, it explicitly states that it was a Ms Polanska who assigned him the task. However, the Claimant subsequently said in his e-mail dated 24 May 2023, and before me, that it was a Mr Patryk.

55. Clearly, the Claimant has provided inconsistent factual explanations about this allegation. He has also failed to name a comparator in persistent breach of the Tribunal's Order despite saying he knows their names (I deal with this more below). Given the Claimant's inconsistency and failure to disclose the names of his comparators, I am satisfied that the allegation is baseless and bound to fail. It is, therefore, struck out because it has no reasonable prospect of success.

56. Even if I give the Claimant the benefit of doubt and assume that it was an error in the

claim form, the Claimant has refused to identify a comparator in breach of the Tribunal's order. The magnitude of the default is significant given that a claim of direct discrimination requires him to point to a comparator. The magnitude is amplified because he has failed to provide the names to date. It is a simple task given he says he knows them. He does not rely on a hypothetical comparator.

57. I do not consider that a lesser penalty would remedy the situation. The order was explained to the Claimant at the preliminary hearing on 20 December 2022 and the Tribunal gave him further opportunity to comply on 2 February 2023. It was repeated at the preliminary hearing on 5 May 2023, and I also gave him another opportunity after the hearing before me. The Claimant is aware of the consequences of his failure yet despite that knowledge still declines to cooperate with the Tribunal. As such, I have no confidence that he ever will.
58. I am satisfied that a fair hearing is not possible. The Respondent/s must know the claim they are required to meet. They are on unequal footing and cannot be expected to defend and adduce evidence about an allegation when they do not know the basis for it. As such, if I had not struck the allegation out on the basis that it has no reasonable prospect of success, I would have struck it out because of the Claimant's breach of the Tribunal's order.

Allegation 3

59. The Respondent says that the Claimant was dismissed because of i) serious acts of harassment ii) inappropriate behaviour and language iii) breach of its social media and anti-harassment policy and iv) because he admitted to sending the messages to Ms Plonska which the Respondent believed to be inappropriate and of a harassing nature.
60. In light of the sexual nature of the messages, I am satisfied that the Claimant's allegation that he was dismissed because of his race rather than because of the messages he sent to Ms Plonska is bound to fail. As such, the allegation is struck out because it has no reasonable prospect of success.

Victimisation – 1st claim

61. The Claimant has confirmed what the protected acts are. However, he has failed to comply with the Tribunal's order to set out the detriments suffered, and which disclosure was the reason for them despite having repeated opportunity to do so. In the absence of a fully pleaded claim, it is bound to fail. As such, it is struck out because it has no reasonable prospect of success.
62. If I had not struck the victimisation claim under Rule 37(1)(a), I would have struck it out under Rule 37(1)(C) for the same reasons as for his failure to comply with the order relating to direct discrimination.

The second claim

Unfair dismissal

63. The Claimant agrees that he does not have the requisite two years' service to pursue a claim of unfair dismissal under the Employment Rights Act 1996 and he does not complain of automatically unfair dismissal. Accordingly, the claim is struck out because the Tribunal does not have jurisdiction to hear it.
64. For completeness, the Claimant presented the claim out of time. The limitation period expired on 14 December 2022 and the claim was presented on 20 December 2022. I asked the Claimant three times why he had delayed given that he had been dismissed when he submitted the first claim. His explanations were vague, and at one point he said that '*Frasers had promised me my job back*'. However, there is simply nothing in the factual background to the claim that supports this as a reason.
65. Given that i) the Claimant had already been dismissed at the time of submitting his first claim; ii) he referred to his dismissal in the first claim but did not raise an unfair dismissal complaint; and iii) he has not provided a coherent reason for the delay in presenting the second claim, I am satisfied that it was reasonably practicable for it to have been presented in time.
66. Accordingly, even if the Claimant had the requisite length of service, the claim would be dismissed because it was presented out of time and the Tribunal does not have jurisdiction to hear it.

Victimisation

67. I was unable to ascertain from the Claimant precisely when he learned that the Respondent/s refused to re-employ him. However, on my questioning he said it was in late August 2022 which would tally with the fact that he attended a disciplinary hearing on 25 August 2022.
68. Accordingly, even taking the latest date of 31 August 2022, that allegation is also out of time given the limitation period expired on 30 November 2022. The Claimant presented no coherent explanation for the delay, so I decline to exercise my discretion to extend time because it is just and equitable to do so. As such, the victimisation claim is dismissed because the Tribunal does not have jurisdiction to deal with it.
69. Even if the claim was in time, I would have struck it out on the basis that it has no reasonable prospect of success. The Respondent accepts that it decided not to re-hire him after his summary dismissal to enforce its policies on equal opportunities and the prevention of sexual harassment. This is entirely credible whereas the Claimant's allegation that it was because of his race is not, particularly given his acceptance that he sent Ms Plonska the messages. Accordingly, I am satisfied that the claim is bound to fail.

Employment Judge Victoria Butler

Date: 13 September 2023

JUDGMENT SENT TO THE PARTIES ON
23rd October 2023

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FOR THE TRIBUNAL OFFICE

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