EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000362/2023

Preliminary Hearing held in Edinburgh remotely on 10 January 2024

Employment Judge A Kemp

Mr G Macik	**Claimant** **Represented by:** **Mr L Shand,** **Solicitor**
Edinburgh Napier University	**Respondent** **Represented by:** **Mr B Nichol,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal strikes out the Claim under Rule 37(1) (a) of the Tribunal Rules of Procedure in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that it has no reasonable prospects of success.

REASONS

Introduction

1. This was a Preliminary Hearing held to consider an application for amendment, which was determined in favour of the claimant and addressed by separate Note. The respondent had also sought strike out

which failing a deposit order. Both agents were prepared to deal with that issue at this Hearing, were content that it was addressed at this Hearing, and I considered that it was in accordance with the overriding objective to do so. The hearing was held remotely. The claimant was initially a party litigant but is now represented by Mr Shand, and the respondent was represented by Mr Nichol.

2. There are two claims being pursued both of which are of direct discrimination, firstly on grounds of age and secondly of disability, under section 13 of the Equality Act 2010. The respondent, which denies the claims, argues that they have no reasonable prospects of success, which failing little reasonable prospects of success. Disability status and knowledge actual or imputed is not admitted, but is taken as established for the purposes of the present application.

3. A Preliminary Hearing had taken place on 1 November 2023. The Note issued set out the requirements for further specification as to the claims made, which included the detail of the comparator. After that hearing the claimant produced a document which was an amended Claim on 20 November 2023 (and had provided another version earlier as the Note refers to). The respondent replied, and has applied for strike out again having intimated that earlier. It also provided a skeleton argument.

4. The basic facts were not disputed. The claimant had been in a small room with his manager. The claimant had taken out a Stanley knife, which has a sharp blade of about one inch in length. He brandished it, making stabbing motions towards himself at a time when there was a discussion over complaints the claimant had over how he was being treated. After an investigation and disciplinary process in relation to that, the respondent dismissed the claimant for gross misconduct, and rejected his appeal against that dismissal.

5. The claimant claims however that the respondent wished to dismiss him because of his age and disability, and that the dismissal was unlawful. Mr Shand stated that the claimant had felt frustrated during the meeting at how he had been treated by the respondent who, through HR, questioned his qualifications for the role, that his manager had said something to the

effect that he was too old for training, and that he had not received the same equipment as another member of staff. He took out the knife and made motions towards his heart to show how he felt as if the respondent had stabbed him in the heart. He had done so as his command of English was not good.

Submissions

6. The following contains a very basic summary of the helpful submissions that were made by both of the agents.

Respondent

7. Mr Nichol argued in brief summary that the claims had no reasonable prospects of success. It was contended that the claimant had not pled any proper comparator, and that from the admitted facts of the claimant taking out a Stanley knife in a meeting held in a small room with his manager, brandishing it and making what were described as stabbing motions, he had acted in a manner that would have led anyone to be dismissed. It was a clear case. He accepted that there was a high threshold and that in general discrimination claims were not struck out, but the claimant had not pled facts from which discrimination could be inferred. He relied in particular on the case of ***Romanowska*** referred to below. In the alternative if the claim was not dismissed, there should be a deposit order.

Claimant

8. Mr Shand accepted that the claims were not the strongest. He accepted that a comparator had not been pled (although that was referred to in the Note of the Preliminary Hearing), initially suggested that there was an actual comparator, a Marcel Lopez, but was not clear as to the age of that person (the claimant is 67 years of age currently) and withdrew that. It was not clear whether there was an actual or hypothetical comparator. He accepted that no detriment had been pled specifically and that the claim of less favourable treatment was in relation to dismissal, with earlier matters being he argued evidence of an intention to dismiss on grounds

of age or disability. He argued that if the claimant was able to establish that he had been treated less favourably with regard to training and equipment, and the questioning of his qualifications for the role, related to age or disability or both, and that the respondent had wanted to get rid of him because of his age or disability, he would be successful.

9. When asked what facts he had averred from which the Tribunal could find that there had been unlawful discrimination because of a protected characteristic he referred to the claimant acting as he did to demonstrate how he had felt stabbed in the heart by what had been done to him by the respondent as he was not able to articulate that in English. He had been frustrated at the pattern of behaviour towards him.

The law

10. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

> "2 **Overriding objective**
>
> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

(i) Strike out

11. Rule 37 provides as follows:

> "**37 Striking out**
>
> (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 the 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 (or the part to be struck out)."

12. The EAT 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' (paragraph 19).

13. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 24:

> "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is

always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

14. Lord Hope of Craighead stated at paragraph 37:

" … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

15. In ***Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly [2012] IRLR 755***, the following summary was given at paragraph 30:

"Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian ***(Balls v Downham Market High School and College [2011] IRLR 217***, para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (***ED & F Man Liquid Products Ltd v Patel [2003] CP Rep 51*****,** Potter LJ, at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (***ED & F Man … ; Ezsias …)***. But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (***Ezsias*** … Maurice Kay LJ, at para 29)."

16. In ***Ukegheson v Haringey London Borough Council [2015] ICR 1285***, it was clarified that there are no formal categories where striking out is not permitted at all. It is therefore competent to strike out a case such as the present, although in that case the Tribunal's striking out of discrimination claims was reversed on appeal.

17. That it is competent to strike out a discrimination claim was made clear also in ***Ahir v British Airways plc [2017] EWCA Civ 1392***, in which Lord Justice Elias 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."

18. If it is not possible for the claim to succeed on the legal basis put forward it may be struck out – ***Romanowska v Aspiration Care Ltd UKEAT/0015/14.***

19. In ***Mechkarov v Citi Bank NA [2016] ICR 1121*** the EAT summarised the law as follows:

> "(a) only in the clearest case should a discrimination claim be struck out;
> (b) where there were core issues of fact that turned on oral evidence, they should not be decided without hearing oral evidence;
> (c) the claimant's case must ordinarily be taken at its highest;
> (d) if the claimant's case was "conclusively disproved by" or was "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it could be struck out;
> (e) a tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts."

20. A further summary of the law as to strike out was provided by the EAT in ***Cox v Adecco and others [2021] ILEAT/0339/19.*** It referred to the level of care needed before a claim was struck out.

Discussion

21. I did not make an immediate decision on the competing arguments as I wished to take time to reflect on the position and the arguments made. I have also considered the authorities above, and the amended pleadings in the case for the claimant.

22. The test for strike out of a claim of discrimination is a high one, as was recognised by Mr Nichol. The claimant's own motivation for acting as he did in the incident is not really the point. It is the conscious or subconscious thought process of the manager who dismissed him that is where the focus lies.

23. It is not sufficient that the claimant establish less favourable treatment, in this case a dismissal, and that he has a protected characteristic (see for example ***Glasgow City Council v Zafar [1998] IRLR 36)***. It is not, however, necessary that the discrimination complained of is said to be the sole reason for dismissal, or the principal reason. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that if part of the reasoning for the decision was the protected characteristic and that part was more than trivial that could suffice in this context.

24. There must in my judgment be some form of link pled between the protected characteristic and the decision that is said to be discriminatory such that the decision can be said to be "because" of it. What are needed are primary facts from which the inference of discrimination can be drawn. All that has been pled is a general view that the claimant had that the respondent wished to get rid of him because of age or disability, and what

he says are earlier examples where he was treated less favourably in relation to training, equipment and a question over his qualifications. Even if all those earlier matters are established in evidence, and I take that to be the case for these purposes, it is not pled how they bear on the decision taken by the dismissing officer, who was someone independent of the claimant's manager. There could be the possibility of an argument of the kind of manipulation seen in ***Royal Mail Group v Jhuti [2019] UKSC 55,*** but that is not pled in any way.

25. Mr Shand accepted that the allegation that the claimant's manager had said that he was too old for training was not raised by the claimant during the disciplinary or grievance processes. Assuming that the other aspects were within the knowledge of the dismissing manager, however, I do not consider that they are a basis to contend that there had been direct discrimination as alleged where the context is the admitted conduct referred to.

26. I asked Mr Shand if he wished further time to take instructions but he did not wish to do so. He said that there was very little else that he could say beyond what he had pled and provided in submission.

27. It appears to me that there is no reasonable prospect of the claims succeeding. The matters pled do not appear to me to be able to raise the possibility of a *prima facie* case of discrimination. Simply having a view that the respondent wished to be rid of the claimant because of age or disability is not I consider sufficient in this context. I am conscious of the fact that no evidence has been heard, that great care is required at this stage because of that, and that discrimination cases should only exceptionally be struck out. But as the authorities referred to above make clear they can be where that is warranted.

28. The Note of the Preliminary Hearing sought specification which has not, at least in part, been provided. The part that is not provided is I consider crucial in a direct discrimination claim. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, a House of Lords authority, Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating

primarily on why the complainant was treated as she (as the claimant in that case was) was treated, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? Whilst it is possible therefore for a comparator not to be used, there must in my judgment be some pleading to allow the taking such a more direct course. I do not consider that it is found in this case. The claimant does not wish to expand further on what has been pled, or referred to orally.

29. I revert to the issue of a comparator in that context. The claimant has not pled the details required of any comparator, being someone who does not share the relevant protected characteristic, who is otherwise in materially the same circumstances, and who would not have been dismissed (section 23 of the 2010 Act). That is so despite the terms of the Note issued after the first Preliminary Hearing, and the orders contained in that. Mr Shand could not be specific about that issue at the hearing before me, although he did give the name of one individual. But even if he had pled an actual comparator, the person given is used as such, or if he had stated that an hypothetical comparator was to be relied on, it seems to me that what would also be needed were facts averred which, if proved, could be a basis to hold that a *prima facie* case of direct discrimination had been made out, such that a Tribunal might be able to apply the terms of section 136 of the Act. I do not consider that such facts have been pled. What has been pled are earlier incidents said to be discriminatory, but even if true (which I take them to be for these purposes) it does not follow from them that the decision to dismiss for the admitted later actions of the claimant, by a different person from the line manager or HR officer involved in those incidents, was also discriminatory.

30. The fundamental difficulty for the claimant, in my opinion, is that taking out a Stanley knife, which has a blade on it, even when a tool used for work purposes, doing so during a discussion with a manager about what may generally be described as grievances, and doing so in a small area, all of which is admitted by him, is the kind of conduct that does lead to dismissal. The explanation that he acted out of frustration given his limited command of English to show why he felt that he had been stabbed in the heart, as it

was put, does not assist him, I consider. On the face of it it is not unreasonable for an employer in the undisputed circumstances of this case to dismiss. This is only a claim of direct discrimination, and the reason why the respondent acted is what that claim revolves around. In the absence of anything pled to suggest why a comparator who acted in that manner but did not share the same characteristic would not have been dismissed, or a more direct basis to found the claim under section 13, it appears to me that the claim is bound to fail.

31. Whilst I have sympathy with the claimant. who is being treated for cancer, and recognising that he had frustrations about his earlier treatment by the respondent and had a limited command of English, on the basis of what was before me in my opinion it is in accordance with the overriding objective to strike out the Claim which I consider has no reasonable prospects of success.

Conclusion

32. The application for strike out is granted.

Employment Judge A Kemp

Employment Judge
16 January 2024

Date of judgment

Date sent to parties 18/01/2024