



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Eva Goddard

**Respondent:** Home Group Ltd

**Heard at:** Watford Employment Tribunal

**On:** 4 July 2024

**Before:** Employment Judge Young

## **Representation**

**Claimant:** Litigant in person

**Respondent:** Ms Camille Ibbotson (Counsel)

# JUDGMENT

1. The Claimant's complaint for redundancy pay is struck out.
2. The Claimant's direct race discrimination complaint that Mr Hancock sarcastically asked the Claimant for the pronunciation of her name is struck out.
3. The Claimant's racial harassment complaint that Mr Hancock sarcastically asked the Claimant for the pronunciation of her name is struck out.
4. The Claimant's remaining complaints remain.

# REASONS

## **Introduction**

1. The Claimant was employed by the Respondent, a registered social landlord providing social housing and supported housing nationally as a support coordinator, from 16 May 2017 until 27 August 2023. Early conciliation started on 17 June 2023 and ended on 29 July 2023. The claim form was presented on 28 August 2023.

## **Hearing**

2. I was provided with a bundle of 66 pages. The short history of the case is that it came before EJ Graham on 4 April 2024 at a case management preliminary hearing in private. Further to the Respondent's application to strike out the Claimant's claim, EJ listed the hearing on 4 July to hear the Respondent's application for some of the complaints to be struck out, or

subject to deposit order on the basis that the Claimant has little or no reasonable prospects of success of showing at the final hearing that those claims were brought in time, or that it would be just and equitable to extend time. The Respondent had also applied for a strike out in a deposit order on the basis that the complaints (including those in time) in any event have little or no reasonable prospects of success. I asked the Respondent to clarify whether the Respondent was asking the Employment Tribunal to determine whether any of the claims were in time. The Respondent clarified that the application was not to determine any time issues but whether having regard to time the Claimant's claims had no prospects of success.

3. The Claimant withdrew her arrears of pay claim and holiday pay claims at that hearing and EJ Graham dismissed the claims by judgment dated 7 May 2024.
4. I asked the Claimant to clarify her claims. The Claimant referred to claims that she had not made yet. I offered the Claimant an opportunity to make an amendment either orally or in writing either by taking time in the hearing to write the amendment by hand or send it by email. The Claimant said that she did not want to do this as she wanted to take advice before she wrote her amendment. She said that she would make the amendment when she got home. I asked the Claimant to explain her claims so that I was clear about what claims were potentially discrimination. The Claimant did not mention that she considered it discrimination that on 13 October 2022, Ms Blake asked the Claimant to train Mr Pallister when I asked her what her discrimination claims were. The Claimant clarified later after the decision was made that this specific complaint was not discrimination or harassment. The Claimant did say that the reason she resigned was the Respondent was not dealing with her grievance and they did not pay her in August.
5. The Claimant said that the claims were (1) on 13 October 2022, the Claimant was told she had been unsuccessful in her application to be promoted to senior customer services manager and Mr Pallister was promoted instead which amounts to direct age & race discrimination, (2) On 13 October 2022, Mr Hancock sarcastically asked the Claimant how to pronounce her name, which amounts to direct race discrimination or harassment related to race (3) On 27 August 2023, the Claimant was dismissed which is both direct age & race discrimination and harassment related to age, (4) On 8 February 2023, an agency worker attended the Claimant's sleep-in shift unexpectedly which amounted harassment related to age (5) on 13 October 2022 Ms Blake told the Claimant in a telephone call that the reason Mr Pallister got the promotion was because of the 'grow your own' program which amounts to direct age discrimination or harassment related to age.
6. The Claimant clarified that she was also claiming discriminatory constructive unfair dismissal. It seemed to me that the Claimant was also claiming harassment constructive unfair dismissal on the grounds of race and age as the Claimant said that all the matters she complained of that she said amounted to either direct race discrimination or racial harassment and direct age discrimination or age related harassment were also the reason why she resigned.

7. Once the Claimant had clarified her claims, I moved on to deal with the Respondent's strike out application which was to strike out all the Claimant's claims. In the alternative the Respondent requested deposit orders.

#### Submissions

8. Both parties made oral submissions and were given 30 minutes each. In summary the Respondent's application dealt with the discrimination/harassment claims first. Ms Ibbotson referred to the legal principles applicable to strike outs. Referring to the EAT in Ahir v BA plc who said that strike out should be used sparingly and the Employment Tribunal should not back off if a discrimination claim falls within ambit of strike out.
9. Ms Ibbotson also referred to the decision of Sanak v Community Lives consortium [2014] UKEAT/ 0585/12 at paragraphs 10-11 where Peter Calrk J sitting alone in the EAT says Employment Tribunals are not prevented from striking out in plain and obvious cases. It would be wrong to assume every complaint of discrimination is prima facie valid.
10. Ms Ibbotson referred me to HHJ Tayler's remarks in Cox v Adecco and ors EAT 0339/19, that one of the principles that can be understood from the case law is that no one gains by allowing a truly hopeless cases to be pursued to a hearing.
11. Ms Ibbotson argued that even if the Claimant can establish conduct at its highest the Claimant has no reasonable prospects of success as there is nothing on the face of the alleged treatment that is because of or related to age or race. To date either in her detailed grounds of complaint in long discussions she had with the Employment Tribunal, she had failed to identify any facts of documentary evidence that the reason for the treatment is race or age.
12. Ms Ibbotson argued that in respect of the promotion allegation the Claimant did not refer to anything that happened during or after of the interview that was because of her age. Whilst the Claimant has referred to sarcastic pronunciation of her name as ss 13 & 26 complaints, she also says her name is the English spelling. There is nothing about that question asked about pronunciation that suggests the reason it was asked for was the Claimant's nationality. In respect of the grow your own comment as age discrimination, the programme applied to both the Claimant and the successful candidate Mr Pallister. Furthermore, the attendance of the agency worker on 8 February 2023 cannot amount to age harassment. The Claimant was unable to articulate why this is not an error by the Respondent. When probed on this it was said that it was due to sexual lives of older people. There is not even a hint of age discrimination in this. The claims are hopeless claims. All the same points apply for the deposit order.
13. Dealing with the constructive unfair dismissal claims including discrimination and harassment, the Claimant has no reasonable prospects of showing that the allegations amount to discrimination or harassment so

there is no breach of the implied term of trust and confidence. The Claimant cannot show she resigned because of the conduct alleged as there is a long delay. The alleged discriminatory acts on 13.10.22 or 08.02.23 are not mentioned in her resignation email. The Claimant said in her resignation email that she resigned because of no response to her grievance and not being paid for August. The Claimant has no reasonable prospects of showing that she didn't affirm the contract, the last act relied upon by the Claimant was on 8 February 2023 and she carried on working between the date of resignation and being paid.

14. Ms Ibbotson's submissions on the time limits can be summarised as relying on LSE v Lindsay, which she said say if a claim is brought out the time it is for the Claimant to show it is just and equitable. Adedeji v university Birmingham NHS Foundation Trust [2021] EWCA civ 23 establishes that in considering the just and equitable test the Employment Tribunal should have regard to length of delay and reasons for delay. All the discrimination claims are significantly out of time. The Claimant's reason for the delay is wanting to resolve her issues with her employer before submitting a claim to the Employment Tribunal. But the Claimant lodged her grievance on 3 June 2023- then contacted ACAS on 17 June 2023. This demonstrates she was thinking about bringing an Employment Tribunal claim. ACAS conciliation ended on 27 July 2023, but the Claimant delayed a month until 28 August 2023 even though the Claimant still didn't have a grievance outcome. Although in paragraph 4.2 of her claim form, the Claimant refers to an informal grievance and the Respondent accepts that there may have been a period when she tried to resolve her grievance informally, the Claimant then goes formal and so it doesn't add up that she doesn't wait for an outcome. We do not have a valid or full reason for why there was a delay.
15. The Respondent is prejudiced by the delay. Delay will affect the cogency of witness evidence. There are no documents to confirm memories in respect of matters said verbally, although the Claimant did refer to emails about the agency worker incident. A key witness Mr Pallister who was also involved in the decision making requesting the attendance of the agency worker is no longer employed by the Respondent and not willing to attend.
16. Ms Ibbotson refers to Kumari v Greater Manchester Mental Health Foundation Trust [2022] EAT 132 at paragraph 96 says the merits of a claim can be relevant even if the Employment Tribunal is not in a position to say that it doesn't have prospects of success. The threshold is lower in deciding whether there are prospects of extending time.
17. The Claimant's redundancy pay should be struck out as having no reasonable prospects.
18. The Claimant's submissions in summary were that the reason for delay was wanting to resolve the grievance but it was also because the Claimant did not think she had the evidence to be able to prove her case until a former colleague had obtained references for the Respondent and so was willing to come to the Employment Tribunal to give evidence. The Claimant prior to bringing her claim sought legal advice which she paid for and that is when she knew she had grounds for a claim in around April 2023, but she was also having counselling and was not in a position to

bring a claim because of her emotional state. She said some discrimination was done in hiding. She doesn't believe that her claims should be struck out.

## **The Law**

### **Law on discrimination/ harassment time limits**

19. Section 123 of the Equality Act 2010 provides:

*“123 Time limits*

*[Subject to [[section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—*

*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

*(2) Proceedings may not be brought in reliance on section 121(1) after the end of—*

*(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*

*(b) such other period as the employment tribunal thinks just and equitable.*

*(3) For the purposes of this section—*

*(a) conduct extending over a period is to be treated as done at the end of the period;*

*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

*(a) when P does an act inconsistent with doing it, or*

*(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”*

### **Strike Out**

20. Rule 37 of the ET Rules gives the Tribunal the power to strike out all or part of a claim:

*“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;”*

21. Rule 37(2) says that a claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

22. The guidance on the Tribunal's duties in relation to strikeout applications against litigants in person in Cox v Adecco and ors EAT 0339/19 was particularly apt in the application before me. In the EAT, HHJ Tayler distils from the authorities 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, furthermore the Tribunal must consider, in reasonable detail, what the claim(s) and issues are.
23. At paragraph 28, HHJ Tayler states "*Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is*". He then goes on to say as paraphrased there needs to be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit order. "*In the case of a litigant in person, the claim should not be ascertained only by requiring the Claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person 'may become like a rabbit in the headlights' and fail to explain the case he or she has set out in writing. In some cases, a proper analysis of the pleadings, and of any core documents in which the claimant seeks to identify the claim, may show that there really is no claim and therefore no issues to be identified. More often, however, a careful reading of the documents will show that there is a claim, even if it might require amendment.*"
24. In Ahir v British Airways plc 2017 EWCA Civ 1392, CA, which was a constructive dismissal case, the Court of Appeal asserted that Tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored.
25. In Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, another constructive dismissal case concerning the last straw doctrine, Lord Justice Underhill observed: "*Whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed. There were in this case no relevant issues of primary fact. Had the matter proceeded to a full hearing the job of the tribunal would not have been to decide the rights and wrongs of the [final straw] incident of 22 April, and it would not have heard evidence directly about that question. The issue would have been whether the disciplinary processes were conducted seriously unfairly so as to constitute, or contribute to, a repudiatory breach of the Appellant's contract of employment. The evidence relevant to that question in substance consisted only of the documentary record. It is true that if there were any real grounds for asserting actual bad faith on the part of the decision-makers that could not have been resolved without oral evidence; but that was not the pleaded case, and the employment judge was entitled to conclude that there was no arguable basis for it.*"

26. The EAT has held that the striking out process requires a two-stage test in HM Prison Service v. Dolby [2003] IRLR 694 EAT, at paragraph 15. 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, order it to be amended or order a deposit to be paid. See also Hassan v. Tesco Stores UKEAT/0098/19/BA at paragraph 17 the EAT observed: *“There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of Dolby the test for striking out under the Employment Appeal Tribunal Rules 1993 was interpreted as requiring a two stage approach.”*
27. The principle that caution needs to be exercised before striking out a discrimination claim without a hearing where, even though the primary facts may not be in dispute, there is nevertheless a dispute about the inferences to be drawn from them, as Simler J explained in Zeb v Xerox (UK) Ltd UKEAT/0091/15 (24 February 2016, unreported), Simler J at paragraph 21 explains the question of what inferences to draw forms part of the critical core of disputed facts in any discrimination case, as do the Respondent's explanations for alleged less favourable treatment (see paragraph 23); accordingly, employment judges need to be alert to the possible inferences that might be drawn and the lines of enquiry that will need to be pursued at a hearing before striking out such claims.

### **Analysis & Conclusions**

28. I considered both parties submissions and the case law regarding the strike out and deposit orders.

#### **Redundancy payment**

29. Dealing first with the redundancy payment claim, there are no facts at all upon which I can see that the termination of the Claimant's employment was redundancy. The Claimant was not terminated according to the Claimant or her claim form because there was a diminishment or a ceasing of the work she had to do of a particular kind within the meaning of redundancy under the Employment Rights Act 1996. In fact, that Claimant's claim form (paragraph 4.1) states that the number of the hours of her work were to remain the same. The Claimant said the reason was a breach of the implied term of trust and confidence and that she resigned in response to it. It is plain and clear on the face of the claim form that there are no facts that could point to a redundancy, and the Claimant did not make any submissions that there were. I therefore strike it out.

#### **Discrimination & Harassment complaints**

- (i) *Time limits*

30. The matters dating from 13 October 2022 are out of time by approximately 10 months from the presentation of the claim. The matter on 8 February 2023 is approximately 6 months out of time. The Claimant said that she delayed because of her desire to resolve the issue. The reason for why the grievance took so much time must be a relevant issue as to whether it is just and equitable to extend time. We would need to hear evidence on that point. Whilst I consider prejudice to the Respondent regarding the delay Mr Pallister is a relevant witness to the Claimant's constructive dismissal claim which is in time and so the prejudice is not removed from having to deal with all the alleged breaches of the contract of employment that amount to the implied term of trust and confidence which replicate most of the discrimination and harassment claims. I therefore do not think that it has reached the threshold of having no reasonable prospect of success on the time point. The out of time complaints are therefore not struck out.

(ii) Complaint that the Claimant was turned down for promotion on 13/10/22

*Direct race discrimination*

31. The Claimant only points to the fact of her being Polish and the successful candidate Mr Pallister as being English. However, the Claimant wishes to rely upon the complaint that she says that one of the interviewers said her name in a sarcastic manner. In reality this is barely more than a difference of race, so whilst I would say it does not reach the bar of having no reasonable prospects of success, it does reach the bar of having little reasonable prospects of success. Thus, the complaint is not struck out.

*Direct age discrimination*

32. The Claimant relies upon Ms Blake's alleged comment to her that Mr Pallister was given the job because of the 'grow your own' scheme in the Respondent organisation. The Claimant says the comment indicates that the Respondent discriminated against her on the grounds of her age in refusing to promote her and promoting Mr Pallister (who is younger than her) instead. The Claimant interpreted the comment as meaning because Mr Pallister was younger than her then the suggestion is that the Respondent wanted to develop him as a younger member of staff and not the Claimant as an older member of staff. Ms Blake was one of the decision makers of the promotion and the comment the Claimant says suggest that she made the decision based upon the Claimant's age by preferring a younger candidate. Zeb v Xerox (UK) Ltd indicates that I must consider inferences that can be drawn from putting the Claimant's case at its highest. I therefore conclude it cannot be said that the interpretation of the comment is not a legitimate interpretation that could result in the Claimant succeeding in a direct age discrimination claim. It would depend on



evidence. In those circumstances I cannot see how this complaint has no reasonable prospects of success. I do not strike it out.

(iii) Complaint of comment that Ms Blake said 'grow your own' later the same day 13/10/22

*Direct age discrimination*

33. For the reasons I have already mentioned under complaint (ii), it seems to me that there is a possible interpretation of Ms Blake's words that suggest that the Claimant was not promoted because of a preference to develop Mr Pallister based upon his alleged youth. To determine that interpretation would require evidence. It is on that basis that I do not strike out this complaint.

*Age related harassment*

34. The same points apply to the Claimant's harassment related to her age complaint as I have applied to the Claimant's direct age discrimination complaint in respect of the 'grow your own' comment. There is again room for interpretation of the facts, putting the Claimant's case at its highest. It is possible for the Claimant to have felt that the comment created a hostile, degrading intimidating environment or was made to violate her dignity or had that effect. This is particularly the case where the scheme applied both to the Claimant and Mr Pallister so there may appear to be a suggestion that the Claimant was not to be grown. Therefore I do not strike out this complaint.

(iv) Comment of Mr Hancock sarcastically asking the Claimant how to pronounce her name

*Direct race discrimination*

35. The Claimant's name on the face of it is an English like name there is nothing to suggest that asking how to say the Claimant's name had anything to do with her nationality, the Claimant did not point to facts that would suggest that her name could be interpreted as Polish and therefore require pronunciation different from the English spelling. This complaint had no reasonable prospects of success, I therefore strike it out.

*Racial harassment*

36. For the same reasons as set out in respect of the direct race discrimination complaint. The Claimant had no facts from which it could be said that the comment was related in any way to the Claimant's race. It is also difficult to see how the request of a pronunciation of an ostensibly English name would or could create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant or violate her dignity on the facts. This complaint had no reasonable prospects of success, I therefore strike it out.

- (v) A senior manager's arrangement for an agency worker to attend as a waking shift whilst the Claimant was sleep in shift on 8 February 2023

37. The Claimant alleged that the arrangement for the agency worker to attend amounted to harassment related to the Claimant's age. However, the Claimant was not able to point to anything that would suggest the reason why the agency worker was called to work a waking shift whilst the Claimant was on a sleep in shift was related in any way to her age. The Claimant's reference to older women simply did not make sense, with the Claimant refusing to provide a further detailed explanation. There simply were no facts pointing to age at all. For these reasons, the complaint is struck out.

Constructive unfair dismissal

38. There is no time issue regarding dismissal. I did not see the Claimant's resignation neither was it included in the bundle. The Claimant did not address it in her submissions. However, it cannot be said that none of the alleged discriminatory conduct or alleged harassment that remains as standalone complaints cannot amount to a breach of the implied term of trust and confidence. Furthermore, the Claimant puts her claim as a last straw claim that her grievance was not dealt with in a timely manner. It is possible that this in of itself could amount to a breach of the implied term of trust and confidence. It cannot be said the Claimant's complaints of either discriminatory constructive unfair dismissal, constructive unfair dismissal based upon harassment or ordinary constructive unfair dismissal have no reasonable prospects or little prospects of success. So, it is for those reasons I do not strike out the Claimant's constructive unfair dismissal complaints.

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Employment Judge Young

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Dated 5 July 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

22/7/2024

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FOR THE TRIBUNAL OFFICE

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