



EMPLOYMENT TRIBUNALS

Claimant: D A Mudannayaka

Respondents: (1) Tesco Stores Ltd.
(2) D Anthony

Heard at: East London Hearing Centre

On: 10 July 2024

Before: Employment Judge Housego

Appearances

For the Claimant: Represented himself
For the Respondent: Eleanor Wheeler, of Counsel

JUDGMENT

The claims are struck out.

REASONS

1. This hearing was listed at the request of the Respondent to seek strike out or deposit orders in respect of claims for race and disability discrimination brought by the Claimant.
2. In the hearing I discussed with the Claimant, at length, the basis of his claims in order to establish what he was alleging. My record of proceedings records what he said, and the submissions which followed. The Claimant's case is set out in my reasons below.

The law

3. In discrimination cases the Claimant's case has to be taken at its highest if strike out is being considered, and that requires the Judge to go to great lengths to find out what the case is before concluding that it has no reasonable prospect of

success¹. There are limits to the lengths to which the Tribunal is obliged to go². It is unhelpful to require a litigant in person to file further and better particulars of a claim, and better practice to elicit in a case management hearing exactly what the Claimant's case is³. That is what I tried to do in this hearing, as had EJ Park on 29 January 2024, the Claimant having failed to supply further and better particulars although ordered to do so multiple times.

4. As a general principle, discrimination cases should not be struck out, save in the clearest circumstances. The Claimant's case is to be taken at its highest. There are sound public interest reasons for the test being a high threshold. Ahir v British Airways Plc [2017] EWCA Civ 1392 provides clear guidance to be applied in applications such as this. I have read and considered that guidance in coming to my conclusions. I note that this is only to be done in the clearest of cases and is an exceptional course⁴. Nevertheless, it would be to shirk judicial responsibility not to do so in an appropriate case⁵.
5. The provision of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 (as amended) under consideration is Rule 37:

“Striking out

37.—(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;

(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 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).

¹ Tayler J in Daniel Cox v Adecco & Others UKEAT/0339/19/AT(V) “You can’t decide whether a claim has reasonable prospects of success if you don’t know what it is. Before considering strike out, or making a deposit order, reasonable steps should be taken to identify the claims, and the issues in the claims. With a litigant in person, this involves more than just requiring the claimant at a preliminary hearing to say what the claims and issues are; but requires reading the pleadings and any core documents that set out the claimant’s case.

² Marrufo v Bournemouth Christchurch And Poole Council (PRACTICE AND PROCEDURE) [2020] UKEAT 0103_20_0312 (about amendment, but §39 is relevant)

³ For example §20 of Morgan v DHL Services Ltd (STRIKE OUT) [2020] UKEAT 0246_19_1812

⁴ §11 of *Ahir*, and I note that §14 does not render a judgment unsound because it does not cite all the cases, as long as the relevant principles are applied.

⁵ §16 of *Ahir*

(2) 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.”

6. Discrimination claims should not be struck out for non-compliance with Tribunal orders unless a fair hearing is no longer possible⁶. The hearing date set for these claims is 8 days starting on 25 -28 February 2025 and 04 March 2025.
7. In this claim the consideration is whether the whole or parts of the claim should be struck out as not being actively pursued, for non-compliance with Tribunal orders, or as having no reasonable prospect of success. Counsel accepted that as the Claimant had attended today and had provided medical records it was now unlikely that the claims would be struck out as not being actively pursued.

Decision

8. I have concluded that the claims must all be struck out. The reasons are below.

The hearing

9. The hearing was a public preliminary hearing requested by the Respondents to consider their application to strike out the claims, primarily for non-compliance with Tribunal Orders, but as they did not know what the claims were about (because of the Claimant's failure to comply with orders requiring him to provide full details of the claims he wanted to make) also on the basis that they had no reasonable prospect of success.
10. I made a full note of the hearing, during which I sought to get clarity from the Claimant about his claims. The substance of what he said appears below. Counsel made clear balanced submissions which I also recorded, and which find their way into the rest of this judgment. There was no oral evidence. The Respondent helpfully provided a bundle of documents with the claim form and response, the Case Management Orders and correspondence, as well as the medical notes provided by the Claimant.

History of claim

11. The chronology is as follows:
 - 11.1. The claim form was lodged on 19 October 2023. It included a claim for unfair dismissal and notice pay and claimed race discrimination and disability discrimination and said there was a health and safety claim. It was not possible for the Respondent to file a sensible Grounds of Resistance on the basis of the information in the claim form, save as to unfair dismissal and notice pay.
 - 11.2. On 13 November 2023 the Tribunal arranged a preliminary hearing date of 29 January 2024.

⁶ T v Royal Bank of Scotland PLC (PRACTICE AND PROCEDURE - Striking Out) [2023] EAT 119

- 11.3. By the time the ET3 form was filed on 01 December 2023, the Claimant had been reinstated on appeal (on 01 November 2023).
- 11.4. On 10 January 2024 REJ Burgher ordered the Claimant before 21 January 2024 to file a schedule of loss. He did not do so.
- 11.5. On 29 January 2024 EJ Park dismissed (upon withdrawal) the claims of unfair dismissal and for notice pay because of the reinstatement of the Claimant.
- 11.6. EJ Park also gave orders for the progress of the case. The hearing dates were set (25-28 February 2025 and 04 March 2025). The Claimant was ordered to file further and better particulars of his claims by 19 February 2024. What he had to set out was made clear in the order. He had not filed a schedule of loss as ordered, and he was again ordered to do so, by 17 February 2024. By 11 March 2024 he was ordered to write to the Respondent setting out what disability he said he had, what effect it had on him, and provide GP notes (and if he could not provide the GP notes by then say when he expected to be able to do so). He did none of those things by the dates ordered. In the last month he has provided GP notes. He has still not complied with any of the other orders.
- 11.7. On 26 February 2024 the Respondent wrote to the Tribunal and to the Claimant pointing out the Claimant's failure to comply and stating that if he did not do so by 01 March 2024, they would ask for an order that unless he complied his claims should be struck out.
- 11.8. On 04 March 2024, no response having been received from the Claimant, the Respondent wrote to the Tribunal and to the Claimant making that application (for an "unless" order).
- 11.9. On 04 April 2024, EJ Massarella caused the Tribunal to write to the Claimant to tell him that unless he complied with those Orders (which were set out) by 11 April 2024 a judge would consider striking out the claims.
- 11.10. On 23 April 2024 further notice of the hearing dates was sent out.
- 11.11. On 24 April 2024, the Respondent wrote to ask that the claims be struck out for non-compliance with the Tribunal's Orders.
- 11.12. On 14 June 2024 EJ Jones directed this hearing to consider the Respondent's application to strike out the claims.
- 11.13. That same day the Claimant responded to say that he sent the medical information to the Tribunal on 31 May 2024.
- 11.14. On 26 June 2024 he sent that medical information and a grievance he had lodged against the 2nd Respondent (which is undated but which the Claimant said was submitted to his employer in April 2022), documentation which he said proved that his dismissal had been

processed internally before the disciplinary hearing, and information about the length of the disciplinary hearing, which he wrote was relevant to his disability discrimination claim. He did not comply with the Orders nor explain why he had not done so.

11.15. At today's hearing the Claimant did not offer any explanation for his failure to comply with the Orders (in particular those of 29 January 2024, now about 5 months late). He did not offer any explanation of his claims, and so I asked him questions to try to find out the basis for his claims.

11.16. The Claimant did point out that attached to his claim form was a statement setting out his financial claims and said that he thought this was what was needed. It is not, for it is largely about loss of wages and remedy for unfair dismissal. As the Claimant was reinstated (and all his pay for the period between dismissal and reinstatement paid to him) this is largely irrelevant to his other claims.

The claim form

12. The claim form says much about the unfair dismissal claim. It states that he was discriminated against by reason of his disability but does not say what that disability is. It appears to be mental health as he complains about anxiety and depressive episodes. This is a complaint that the way he was managed, stating that it caused him to become ill. It does not give any detail of a disability discrimination claim.

13. The claim form says he has been discriminated against by reason of race, but he gave no detail of his, or anyone else's, race, of what he said were the things he said were discriminatory, who did them and when, nor any person whose treatment he said was different to that which he received.

14. The section on health and safety was a generalised complaint about safety standards at his store, not directly connected with his own employment.

15. He referred to bullying and harassment by his manager in general terms, but did not connect this with any protected characteristic,

Conclusions

16. I have done my best to establish from the Claimant the bases of his claims against the Respondent.

17. Having done so, it is apparent that:

17.1. The race discrimination claims have no reasonable prospect of success. The Claimant described himself as "Asian" in his claim form. Today, he said he was "Sri Lankan". He said that David Anthony discriminated against him as a Sri Lankan and gave different and preferential treatment to those of Indian and Pakistani heritage. This was a wholly new assertion which would require leave to amend, which would be somewhat unlikely to be given. I observed to the Claimant that it was possible that someone

of Indian or Pakistani heritage might discriminate against someone of Sri Lankan heritage, but it seemed less likely for someone who was (as David Anthony) white British. The Claimant could point to no reason why this might be so, nor to any example (a comparator) which might suggest that this was so. I asked about the person named in the claim form as a multiple claim with his claim. This is Muhammad Waseem Akram, which I established is case 3200900/2023, which is not linked with this case and is due for hearing starting on 11 March 2025. The Claimant said that he was another store manager dismissed by Mr Anthony. I asked the heritage of Mr Akram. He has a Pakistani heritage. On the claim form description of the Claimant as Asian, this is consistent with the claim of race discrimination. However today the Claimant said that Mr Anthony preferred those of Indian and Pakistani heritage over those from Sri Lanka. This is therefore not a coherent claim, because Mr Anthony (according to the Claimant) dismissed another store manager who is from one of the ethnicities the Claimant says that Mr Anthony preferred over his racial identity . I asked the Claimant why he thought Mr Waseem had been dismissed. It was because (according to the Claimant) Mr Anthony liked yes men and had dismissed Mr Waseem for being outspoken. He said he too was outspoken. This fatally undermines the case for race discrimination.

- 17.2. The claim relating to health and safety is not one that can be brought in an Employment Tribunal. Nothing detrimental was done to him as a result of anything he may have complained about. It is a generalised expression about health and welfare and not anything an Employment Tribunal has jurisdiction to hear. The only thing he raised during this hearing was that staffing levels were too low, so that a shoplifter had pushed him over when stealing and running out of the shop. This cannot give rise to a claim in an Employment Tribunal.
- 17.3. The Claimant had not said what his claimed disability was before today. Today he said that he had both physical and mental health issues. While mental health can be seen as presaged in the claim form, there is nothing about physical disability. Leave to amend would be needed, and I would not, in these circumstances, grant it. There is nothing presaged in the claim form that looks remotely like a claim for disability discrimination based on physical disability. Even if I did grant such an amendment, and it was shown that the Claimant has that physical disability, he could point to nothing that might lead an Employment Tribunal to find that the Respondent knew or should have known of it, beyond a fit note which said that he should be on light duties after an operation. A claim related to physical disability (if amendment were allowed) would have no reasonable prospect of success for these reasons.
- 17.4. The claim of disability discrimination relating to anxiety and stress has the fundamental difficulty that the Claimant says that management and the disciplinary process which he says were the detriment and harassment was the cause of the mental health issues. Something that is the result of management action cannot be the cause of it – the causation is the other

way round. These claims have no reasonable prospect of success for this reason.

- 17.5. The claim for reasonable adjustments – if the Claimant had shown that he was disabled, and that the Respondent knew or should have known of it – has no reasonable prospect of success. This is because when asked what reasonable adjustments should have been made, the Claimant said that he should have been left to get on with his job and given a pay rise. These are not reasonable adjustments to cope better at work with mental health problems.
 - 17.6. The claim under S15 of the Equality Act 2010 has no reasonable prospect of success. I tried hard to establish what the “something arising” from the claimed mental health disability was, and what detriment (bad thing) had happened to him as a result of it. The Claimant could point only to working on a refit of the store at night when he was signed as fit for light duties. That has no connection with mental health issues. The Claimant linked it to his physical difficulties, dealt with above.
 - 17.7. It is remotely possible that if the Claimant succeeded in showing that he was disabled with mental health problems, and that the Respondent knew or should have known of it, that the allegation that the disciplinary hearing was overlong and was harassment would be arguable. The precursors to this have no reasonable prospect of success (for the reasons already given), but even if they were taken at face value, given the way the Claimant has ignored Tribunal Orders for months (despite multiple reminders) I have no confidence that the Claimant would address the preparation for the hearing adequately or at all, so that a fair hearing would not be possible and so I would strike it out for failure to comply with Tribunal orders, notwithstanding the fact that there is over 6 months to the hearing.
18. Accordingly, I dismiss the entirety of the Claimant’s claims against the Respondent.

**Employment Judge Housego
Dated: 10 July 2024**