



EMPLOYMENT TRIBUNALS

Claimant: Mr K C'tunge

Respondent: Holding Creatives Limited t/a Peter Mikic Interiors

Heard at: London Central **On:** 25 April 2024

Before: Employment Judge Khan (sitting alone)

Appearances

For the claimant: No attendance

For the respondent: Mr M Green, counsel

JUDGMENT

1. The judgment of the tribunal is that the following parts of the first claim are struck out, (as enumerated in the List of Issues in the Case Management Order dated 26 September 2022):

- (1) 3.1.2 save for the allegation of direct race discrimination or race-related harassment that in the claimant's first week of employment, Kam Islam insinuated that the claimant hated Tamils because he is Sri Lankan Sinhalese.
- (2) 3.1.4
- (3) The victimisation complaint.

Public preliminary hearing

2. This was a public preliminary hearing which I listed to do the following:

- (1) *Determine whether the claimant has materially complied with the unless order set out in the Case Management Order dated 25 November 2022 and to dismiss any part of the first claim in respect of which it is found that there has been no material compliance with the unless order. This relates to the complaints of direct discrimination and harassment and includes the allegation of discriminatory dismissal*
- (2) *Determine any application to amend the first claim which it is necessary for the claimant to make.*

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- (3) *Determine the respondent's application for strike out or a deposit order (as set out in its letter dated 24 October 2022) i.e. whether the first claim or part of it (which should be struck out because it is scandalous, vexatious or has no reasonable prospect of success; or, alternatively, whether any allegations be made the subject of a deposit order because they have little reasonable prospects of success, and if so, in what amount, taking account of the claimant's means.*
- (4) *Make any case management orders as necessary, including listing a final hearing.*

3. The hearing was a remote public hearing, conducted in person.
4. There was a hearing bundle of 168 pages. I heard no oral evidence. I considered the pages in the bundle to which I was referred and the respondent's submission.
5. Having decided that it was in the interests of justice to proceed with this hearing in the claimant's absence, under rule 47, and made findings on the whether the claimant had materially complied with the terms of the unless order dated 25 November 2022, for the reasons set out in the Case Management Order dated 25 July 2024, I heard the respondent's application for strike out / deposit orders.
6. The respondent's application dated 24 October 2022 proceeded in relation to the complaints of direct discrimination, harassment and victimisation which had not been dismissed under rule 38, although Mr Green invited me to find that all the complaints brought under the EqA should be struck out, under rule 37, in the alternative to being dismissed under rule 38.
7. The strike out application was brought on the grounds that the these complaints were scandalous or vexatious or have no reasonable prospect of success (rule 37(1)(a)). In the alternative, the respondent applied for an order that the claimant be required to pay a deposit of £200 as a condition of continuing with each allegation / complaint, on the ground that they had little reasonable prospect of success (rule 39).
8. Mr Green also applied to add a new ground for strike out i.e. that the claimant was not actively pursuing the claim (rule 37(1)(d)) which I refused on the basis that the respondent had not put the claimant on notice of this additional ground.

Relevant legal principles

Strike out

9. Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides, materially:

(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—*

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(a) *that it is scandalous or vexatious or has no reasonable prospects of success*

...

(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 a party, at a hearing.*

...

Scandalous

10. The word 'scandalous' in the context of rule 37(1)(a) means irrelevant and abusive to the other side. It is not to be given its colloquial meaning of something that is 'shocking' (see *Bennett v Southwark London Borough Council* [2002] ICR 881, CA).

Vexatious

11. A 'vexatious' claim or defence has been described as one that is pursued not with the expectation of success but to harass the other side out of some improper motive (see *ET Marker Ltd v Robertson* [1974] ICR 72, NIRC). The term is also more widely used to include anything that is an abuse of process (see *Attorney General v Barker* [2000] 1 FL 759, QB).

No reasonable prospect of success

12. Particular care must be taken where a claim has been poorly pleaded by a litigant in person (see *Mbiusa v Cygnet Healthcare Ltd* UKEAT/0119/18); and an attempt should be made to identify the claim and issues in the first instance (see *Cox v Adecco and ors* UKEAT/0339/19).
13. A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined. This is of particular importance in relation to a discrimination or whistleblowing case (see: *Anyanwu and anor v South Bank Student Union and anor* [2001] ICR 391, HL; *A v B* [2011] EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias* [2007] ICR 1126, CA; *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] IRLR 755, Ct Sess (Inner House). This stems from the proposition that it is unfair to strike out a claim where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to them to be considered. However, there may be cases in which the tribunal is in a position to resolve crucial core disputes as to facts and to go on to assess the prospect of success of a claim.
14. In *Mechkarov v Citibank NA* [2016] ICR 1121, EAT, Mitting J summarised the approach that should be taken in a discrimination case, as follows:

"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed

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contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.”

15. Even where there are disputes of fact, including in discrimination claims, a tribunal should not be deterred from striking out a claim if it satisfied that there is no reasonable prospect of the facts necessary to find liability being established but a tribunal must be astute to the dangers of reaching such a conclusion where the full evidence has not been tested (see Ahir v British Airways plc [2017] EWCA Civ 1392, CA; and also Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, CA).
16. Where a case has no reasonable prospects of success it does not follow automatically that an order to strike out should be made. A tribunal should consider alternatives to striking out including ordering further particulars of a claim or response (see Lambrou v Cyprus Airways Ltd UKEAT/0417/05).
17. As has been emphasised in White v HC-Oval Ltd [2022] IRLR 576, strike out is for the clearest of cases where the outcome is plain and obvious (see paras 22 to 23).

Deposit order

18. Rule 39 of the Employment Tribunals Rules of Procedure 2013 provides, materially:

(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 on the amount of the deposit.

...
19. This test is plainly not as rigorous as the “no reasonable prospect of success” threshold applicable to a strike out under rule 37, however, a tribunal must have a proper basis for doubting the likelihood of a party being able to establish the facts essential to the claim (and in doing so reach a provisional view as to the credibility of the assertions being put forward) (see Van Rensburg v Royal Borough of Kingston-upon-Thames and ors UKEAT/0096/07, [2007] All ER (D) 187).
20. In discrimination cases, it will rarely be suitable to make a deposit order where there are underlying factual disputes requiring a trial of the evidence (see Sharma v New College Nottingham UKEAT/0287/11; Anyanwu and anor v South Bank Students’ Union and anor [2001] ICR 391, HL).
21. The purpose of a deposit order “is to identify at an early stage claims with little prospects of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails” (see Hemdan v Ishmail [2017] IRLR 228, EAT).

Direct discrimination

22. Section 13(1) EqA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
23. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or “effective cause” of it. The basic question is “What, out of the whole complex of facts before the tribunal, is the ‘effective and predominant cause’ or the ‘real or efficient cause’ of the act complained of?” (see O’Neill v Governors of St Thomas More RC Voluntarily Aided Upper School and anor [1997] ICR 33, EAT; and also Nagarajan V London Regional Transport [2000] 1 AC 501, HL).

Harassment

24. Section 26(4) EqA provides that:
- (1) A person (A) harasses another (B) if –
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of –
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
 - ...
 - (4) In deciding whether conduct has the effect referred to in section (1)(b), each of the following must be taken into account –
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
25. In deciding whether the conduct “related to” a protected characteristic consideration must be given to the mental processes of the putative harasser (see GMB v Henderson [2016] IRLR 340, CA).

Victimisation

26. Section 27(1) EqA provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes B has done, or may do a protected act.
27. Section 27(2) EqA enumerates the four types of protected act which include making an allegation (whether or not express) that A or another person has contravened this Act.
28. As to causation, the tribunal must apply the same test to that which applies to direct discrimination i.e. whether the protected act is an effective or substantial cause of the employer’s detrimental actions.

Analysis and conclusions

29. Having considered the respondent’s submissions together with the relevant documents, I make the following findings in relation to the claimant’s

remaining complaints of discrimination, harassment and victimisation, with reference to the numbering in the List of Issues set in the Case Management Order dated 26 September 2022 and the headings¹ and numbering which the claimant has used in his response to the unless order dated 9 January 2023.

Allegation 3.1.1

30. Although this allegation has been dismissed under rule 38, I agreed to hear the respondent's submission on strike out / deposit order and set out the following findings in the alternative. The claimant alleges that on every day of his five months' employment with the respondent, all of his colleagues, which the respondent confirmed was around 30 people, called him a "paedo". Ahead of the previous preliminary hearing when the respondent's application for strike out / deposit order had originally been listed to be considered, the claimant was ordered to disclose the audio recordings that he made whilst working at the respondent, identify a maximum of one hour of these recordings on which he wished to rely at the hearing and to provide a transcript of these excerpts. I agree with Mr Green that the purpose of that order was for the claimant to provide his best evidence to corroborate this allegation. At the previous hearing, I heard some of these excerpts and found them to be inaudible and therefore inconclusive. I would add that the excerpts I heard bore no resemblance to the claimant's transcript. Allied to this being an inherently implausible allegation, I am satisfied that it has no reasonable prospect of success and it would have been struck out if it had not been dismissed under rule 38.

Allegation 3.1.2

31. A.14: I am satisfied that this allegation has no reasonable prospect of success because the claimant has stated that he did not disclose that he used to be a Buddhist to anyone at the respondent and it was implausible that without this knowledge Tin and Michelle implied that the claimant was not a Buddhist or claimed that his actions were not Buddhist.
32. B3, D2: I agree with Mr Green that taking the claimant's case at its highest it is difficult to see how this alleged conduct (i.e. a social event at which heterosexual men were discussing other women) amounts to baiting, entrapment or less favourable treatment or harassment because of or for a reason related to the claimant's age, sex or sexual orientation. The claimant's reliance on this conduct taking place for the entire duration of his employment is implausible. Overall, I am satisfied that this allegation has no reasonable prospect of success.
33. C1: In the absence of further particularisation of this allegation which the claimant shall be ordered to provide, I am not able to assess whether this claim is vexatious, scandalous or has no (or little) reasonable prospect of success.

¹ The claimant used the following headings: "A – Religion, Philosophical and Political Beliefs" "B – Age" "C – Race, Nationality, Ethnic / National Background" "D – Sex / Sexual Orientation" "E – Disability" and "F – Whistleblowing".

34. C2: I agree with Mr Green that taking the claimant's case at its highest there is nothing objectively derogatory or offensive about the statement which Tin is alleged to have made ("Italians are nice"). It is difficult to understand how this statement amounts to less favourable treatment because of / conduct related to the claimant's race (if the claimant is relying on his race and not race more generally) nor how, in relation to an allegation of harassment related to race, more generally, this created the proscribed environment or violated the claimant's dignity. In fact, although the claimant has set out this allegation under heading C, the claimant complains that the reason for this alleged conduct is the "alleged belief" that he was xenophobic or racist and not his race. I was satisfied that this allegation had no reasonable prospect of success.
35. C3: Taking the claimant's case as its highest, the claimant will show that Adele made derogatory comments towards Australians. It is difficult to understand how this statement amounts to less favourable treatment because of / conduct related to the claimant's race. In respect of an allegation that this amounted to harassing conduct by reason of race, more generally, the claimant does not complain about the effect of this conduct but asserts that its purpose was to entrap him into being derogatory towards Australians. The claimant's assertion that this conduct continued for the entire duration of his employment is implausible. Overall, I was satisfied that this allegation has no reasonable prospect of success.
36. D6. The claimant alleges that Adele was directed to speak to him about the incident (i.e. an alleged explicit gay sex show) and homosexuals in a derogatory way to entrap him. The claimant links this alleged conduct with an allegation that two years before this incident an unrelated person was trying to entrap him into being homophobic. This is inherently implausible. The claimant does not complain about this alleged treatment being because or related to his sex or sexual orientation but his "alleged belief" of being homophobic. I was satisfied that this allegation had no reasonable prospect of success.

Allegation 3.1.4

37. B4, D3: The claimant complains that four colleagues spoke about prostitutes and his internet history to insinuate that he was a "dirty old man". The claimant also alleges that this conduct took place from the second month of his employment and continued thereafter throughout his employment. I agree with Mr Green that this allegation is inherently implausible. I am satisfied that this allegation has no reasonable prospect of success.

Victimisation

38. The claimant relies on five protected acts. I agree with Mr Green that there is no reasonable prospect that the claimant will show that any of the statements he relies on amounts to a protected act.
39. The first alleged protected act is that on 28 September 2022 the claimant told four colleagues, that he was not a paedophile, racist, left-wing, snob, homophobic, sexual predator, Nazi, rapist, bad at his job or a bad person.

40. The claimant also relies on four emails dated 8 and 26 October 2021, 1 December 2021, 14 and 21 February 2022. I was taken to these documents which were in the hearing bundle. In the first of these emails, sent to Peter Mikic, the claimant refers to a “witch hunt against me for over a decade now”, being slandered, “malicious rumours” and the difficulties he has had finding work, and thanks Mr Mikic for giving him this opportunity. In the email dated 26 October 2021 (which appeared to be a draft / unsent email), the claimant repeats the reference to a witch-hunt, and complains that he is being “stalked and slandered”, “getting bullied”, “getting trolled”, being “harassed and violated”, “poisoned and threatened” and states “I’m not racist, homophobic”. In his email to Hardus Hoon, Dan Gavan and Peter Mikic dated 1 December 2021, the claimant reiterates that he is being subjected to a “malicious witch hunt”, being drugged and poisoned, implies that he has been called a Nazi and explains that he is unable to work. In his email to Hardus Hoon dated 14 February 2021, the claimant refers to “your relentless trolling”, “entrapment and bullying” and being an “anti paedo”. It was not clear which of the two emails that the claimant sent to Kam Islam on 21 February 2021 is relied on so I considered both in which the claimant refers to saving a girl’s life and about a “maniac [who] was lying and witch hunting me” and a “malicious fake maniac [who] was destroying me”.
41. None of the statements include an allegation, whether express or implicit, that there has been a breach of the EqA or have any reasonable likelihood of amounting to something done for the purposes or in connection with the EqA.
42. Overall, I am satisfied that it is in the interests of justice to strike out the allegations / complaints that I have found to have no reasonable prospect of success. In coming to this conclusion, I have considered and rejected the alternative option of ordering the claimant to provide further particulars of his claim. I have not lost sight of the fact that the claimant is a litigant in person. However, in the circumstances in which the claimant has had the benefit of two case management hearings when he was given extensive time to set out his case and was ordered subsequently to provide further particulars of his claim, I do not believe that this would be a necessary, proportionate or even fruitful exercise. The central issue is not that these allegations / complaints are unclear or poorly pleaded, it is that the basis on which they are advanced is plainly misconceived.

Employment Judge Khan

25.07.2024

JUDGMENT SENT TO THE PARTIES ON

.....26 July 2024.....

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FOR THE TRIBUNAL OFFICE