



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr O Ogunbayo

**Respondent:** Amazon UK Services Limited

**Heard at:** Birmingham (by CVP)

**On:** 12 July 2024

**Before:** Employment Judge Wright

## REPRESENTATION:

**Claimant:** In Person (Representing himself)

**Respondent:** Ms Anderson (Counsel)

## PRELIMINARY HEARING IN PUBLIC JUDGMENT

The judgment of the Tribunal is as follows:

### Strike out of claim

1. The claims under case reference 1307966/2023 are struck out under Employment Tribunal Rule 37(1)(a) because they have no reasonable prospect of success.

### Dismissal

2. The claim for a redundancy payment was withdrawn by the claimant at the hearing on 12 July 2024 and is dismissed.

## Reasons

### Background:

3. The Claimant has made applications to work for the Respondent both on full-time and fixed-term contracts. He brought a previous claim against the Respondent related to

his employment with them as a warehouse operative which terminated on 26 February 2022 (under case number 1302015/22). He entered a binding settlement with the Respondent in respect of that claim on 25 September 2023.

4. The Claimant then entered ACAS conciliation on 1 October 2023 – 31 October 2023 and issued a further claim against the Respondent on 19 November 2023.
5. The Claimant confirmed that this claim relates to indirect race/nationality discrimination and harassment on the grounds of race going back to 2021, when he failed to secure a permanent position with the Respondent because, whilst his immigration status is that he has indefinite leave to remain in the UK, he did not have the physical documentation evidence of his statutory right to work and needed the Respondent to conduct a manual right to work check with the Home Office.
6. The Claimant states that the Respondent told him that it did not have the physical resources to keep conducting a check on the Claimant's right to work. The Claimant's position is that, as he has indefinite leave to remain, there is no need to keep conducting checks.
7. The Claimant was not given a permanent role back in 2021 owing to him not holding the documentation proving his right to work and requiring a manual right to work check with the Home Office, and instead was given a temporary role. He later secured a further seasonal contract in 2022, some time after his role in February 2022 had come to an end. In 2023 the Claimant again made an application for a permanent role. The Respondent initially refused to carry out the manual right to work check but was then persuaded to do so by the Claimant. This was however completed incorrectly and came back saying that the Claimant did not have the right to work, when in fact he does. The Claimant states he was then shouted at by the Respondent over a video call and told to never apply to the Respondent again as he did not have the right to work in the UK. The Claimant was then blocked from the Respondent's website and remains so, preventing him from making future applications. The Claimant considered this to be unnecessary conduct and harassment.
8. It is the Claimant's case that this is an entirely new claim to that issued under case number 1302015/22, which he accepts was compromised under the COT3 agreement dated 25 September 2023.
9. It is the Respondent's case that the COT3 agreement that the parties entered into prevents the Claimant from pursuing any further claims against the Respondent and therefore he is prevented from bringing these proceedings.
10. The Respondent's position is that this case should be struck out. It relies on clause 5 and specifically the following section: *"that the settlement recorded in this COT3 Agreement shall relate specifically to the Claim and shall also apply to any claim that the Claimant has or may in the future have relating to his employment with the Respondent or its termination against the Respondent..."* and clause 13: *"that the Claimant agrees that: (a) any past or current claim raised by his arising from or in connection with his employment with the Respondent and/or the termination of his employment with the Respondent is unconditionally withdrawn and that the Respondent and no Group Member shall have any obligations to the Claimant to*

*consider any such claim; (b) he will not raise any claim, either internally with the Respondent or externally against the Respondent, arising from or in connection with the facts or matters set out in the claim, his employment with the Respondent or the termination of his employment with the Respondent; and (c) he has no outstanding claims with or in relation to the Respondent or any Group Member, which he has not already raised with the Respondent or the relevant Group Member to support this assertion.”*

11. In the alternative, the Respondent argues that the Claimant’s claims for indirect race discrimination and harassment should be struck out for having no reasonable prospects of success.
12. I had been provided with an electronic hearing bundle of 69 pages. In addition, during the course of the hearing I was provided with 3 case authorities from the Respondent’s counsel, a skeleton argument from the Claimant and a number of further emails from the Claimant concerning job applications he had made to the Respondent and paperwork that he had provided to the Respondent to enable them to carry out a manual right to work check. Both parties had copies of all of these documents.

**Claims and issues:**

13. The first part of the preliminary hearing was spent identifying the claims that the Claimant was seeking to pursue. These were confirmed as:
  - . Indirect discrimination on the grounds of nationality/race (the Claimant confirmed when asked that he is Nigerian African).
  - a. The Claimant confirmed that since 2021, the Respondent had applied tighter conditions than the home office policy required, in respect of the Claimant’s right to work check.
  - b. The Claimant stated in his written submissions that the Provision, Criteria or Practice (PCP) being applied was that *“everyone that has an indefinite leave to remain that was employed during that period was in the same category as me, however I would have been the only person that was secluded as I did not have the physical proof despite the check already completed confirming that I was allowed to be employed and work.”* Upon discussion in the hearing, the PCP was confirmed as a requirement to provide documentation to show a right to work in the UK and a reluctance by the Respondent to carry out manual right to work checks.
  - c. Harassment on the ground of race/nationality

On 20 October 2023 the Claimant was shouted at by Ewa Khashiwhira on a video call and told to never apply to the Respondent for a role again as he did not have the right to work in the UK. He was then blocked from the Respondent’s website and from applying for future roles. By the time the right to work check was re-done correctly, the permanent role he had applied for was no longer available.

14. In relation to the Claimant's claim for Indirect race discrimination, the tribunal will need to decide:

- . Did the respondent have the PCP referred to at 13.c. above?
- a. Did the respondent apply the PCP to the claimant?
- b. Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic, e.g. those who are not Nigerian African, or would it have done so?
- c. Did the PCP put persons with whom the claimant shares the characteristic, e.g. those who are Nigerian African, at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic?
- d. Did the PCP put the claimant at that disadvantage? The Claimant states the disadvantage is him not being provided with a permanent role in 2021 and not securing a permanent role in 2023.
- e. Was the PCP a proportionate means of achieving a legitimate aim? The Respondent's aim is yet to be confirmed, but the Claimant stated that the Respondent had expressed it was to avoid the administrative burden of carrying out manual right to work checks.
- f. The Tribunal will decide in particular:
  - i. Was the PCP an appropriate and reasonably necessary way to achieve those aims?;
  - ii. Could something less discriminatory have been done instead?;
  - iii. How should the needs of the claimant and the respondent be balanced?

15. During the hearing the Claimant expressed that his comparator for his indirect race discrimination complaint was "Anyone else who needs a right to work check". This was then revised to anyone who needs a "manual" right to work check, as the Claimant understood that the Respondent was prepared to carry out work checks where a prospective employee had a share code enabling an online check on the Home Office's website, which is the case if the applicant has a digital file, but not where the right to work check required was a manual check - which is required when an applicant does not have a digital file.

16. Regarding the Claimant's claim for harassment at paragraph 13.d, the issues the tribunal need to decide are:

- . Did the respondent do the acts complained of as set out in 13.d.?
- a. If so, was that unwanted conduct?

- b. Did it relate to the Claimant's race?
- c. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- d. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

**COT3 Agreement:**

17. I will first address the COT3 agreement and my decisions as to what claims have been compromised under this agreement.
18. The sections that are being relied upon by the Respondent, which the Respondent states to mean that the Claimant is not entitled to bring this claim, are the sections in clause 5 and 13 quoted above at paragraph 10.
19. To settle future claims, whether known or unknown to the parties, it is well established law that the wording of a COT3 agreement must be absolutely clear to this effect.
20. The Respondent's counsel argued that in this case the wording was clear. She referred to the fact that, by the time the COT3 was entered into, the Claimant had had a further temporary period of employment with the Respondent that has both started and terminated, which would be covered by this clause and that he was applying for further roles with the Respondent and as such, was alive to the fact that there could be further claims that may arise from these applications and subsequent roles. From the Claimant's part, he made it clear that he understood that he was only compromising claims under case number: 1302015/22.
21. I find that the wording of clause 5 *"that the settlement recorded in this COT3 Agreement shall relate specifically to the Claim and shall also apply to any claim that the Claimant has or may in the future have relating to his employment with the Respondent or its termination against the Respondent..."* is sufficiently wide to cover the Claimant's employment with the Respondent under the Claim, i.e. his employment that terminated on 26 February 2022 and any future claims that could arise from this employment that terminated on 22 February 2022. I do not find the wording to be sufficiently clear to cover future employment with the Respondent or future claims that did not arise out of that employment and the termination of it.
22. Turning to clause 13, I find that the effect of the wording: *"The Claimant agrees that...(c) he has no outstanding claims with or in relation to the Respondent or any Group Member, which he has not already raised with the Respondent or the relevant Group Member"* is that the Claimant has compromised all claims that he had or may have up to an including the 25 September 2023 against the Respondent. The Respondent's counsel argued that by this date, the Claimant was already going

through further applications with the Respondent and would have been alive to the possibility of future claims or issues with securing these and had not raised these.

23. The Claimant stated during this hearing that he raised the possibility of future claims with ACAS and states that he was told it was just claims related to this case number he was settling.
24. The Respondent's counsel warned me against considering the pre-contractual negotiations that the Claimant was referring to and reminded me that it was terms of the agreement that were relevant and that I was not able to verify what the Claimant was saying regarding conversations with ACAS.
25. I find that the actual wording that has been agreed here settles any claim up to and including 25 September 2023 against the Respondent, whether related to his employment with the Respondent or otherwise. In respect of the further applications that the Claimant was making with the Respondent for roles both on a permanent and temporary basis, I find that he has settled any claims in relation to those applications he made where he had had a pre-interview appointment with the Respondent up to and including 25 September 2023. I do not find that he has settled any future claims beyond this point.
26. As to roles that he applied for that predate 25 September 2023, by this point, the Claimant understood that the Respondent would carry out a manual right to work check on his right to work, so he would not have considered that "*he had any outstanding claims with or in relation to the Respondent or any Group Member*" regarding these applications, as he would have been expecting the right to work check to have come back confirming his right to work, as it had done on the previous occasions that the Respondent had undertaken these. This would have resulted in him securing the roles where he had been offered these subjects to his right to work, which he knew he had. Indeed, had it not been for the administrative error made by the Respondent when making the right to work check, this would have been the case, as it later was when the Respondent re-did the check following the complaint made by the Claimant on 20 October 2023.
27. I therefore find that the Claimant is not precluded from pursuing claims against the Respondent that postdate 25 September 2023.
28. The claims that postdate 25 September 2023 that the Claimant has raised under this claim number are limited to indirect race discrimination and harassment. The indirect race discrimination claim concerning the Respondent applying a PCP of requiring "*physical proof*" of the right to work, despite checks already having been completed confirming his right to work, which led to him losing out on being appointed to roles with the Respondent post 25 September 2023 including the permanent role in October 2023. The claim of harassment concerning the incident on the 20 October 2023 in which he states he was shouted at and told he did not have the right to work in the UK and was blocked from the Respondent's website.

## Indirect Race discrimination

29. Taking these claims in turn, I will first address the Claimant's claim for indirect race discrimination.

30. Under s. 19 of the Equality Act 2010

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
  - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

31. Taking the Claimant's claim at its highest by assuming he can satisfy the steps set out under paragraph 14 a-c above, he also needs to satisfy 14 d, group disadvantaged. This is that other persons with whom the Claimant shares the characteristic, e.g. those who are Nigerian African, are put at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic.

32. When the Claimant was asked to clarify his claim at the preliminary hearing, he confirmed that the PCP was applied to *"all foreigners with indefinite leave to remain without the requested documents and who therefore required manual right to work checks to establish this"* and confirmed that all foreigners in this position would be placed at a similar disadvantage.

33. The Claimant confirmed that he understood that the Respondent was prepared to do right to work checks where applicants had a *"share code"* allowing their immigration status to be checked online with the Home Office. It was the administrative burden of a manual check which made the Respondent reluctant to carry this out.

34. When asked to confirm whether the fact that he did not have a digital file, which would have enabled him to obtain a *"share code"* which in turn could be used to do an online rather than a manual right to work check, was at all related to his race or nationality, the Claimant confirmed that it was not. Given this, it cannot be said that those who shared his race and nationality, whose immigration status was also indefinite leave

to remain in the UK, were more likely not to have a digital file and therefore require a manual right to work check. As such, I find that the Claimant cannot show that those who share his race/nationality were put at a disadvantage by this PCP compared to those that do not.

35. The reason why the Claimant did not get the role in October 2023 was in any event not related to any reluctance to carry out a right to work check but because there had been an administrative error when carrying out his right to work check which had resulted in it being returned stating that he did not have the right to work, when he did. There is no reasonable prospect of the Claimant establishing that the reason for this was his race, it clearly was an administrative mistake.
36. The Claimant then stated that he believed that if it were not for the fact that he was Black, the Respondent would not have been so reluctant to have carried out a manual check. When I asked him more about why he thought this was related to his race, nationality or colour, he confirmed that it was a feeling.
37. Section 136 of the Equality Act 2010 sets out the test regarding when a Tribunal can infer discrimination. Under this section the Claimant has the burden of establishing facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned. In this case the Claimant is unable to point to any facts that would indicate that his race was the reason for this.

### **Harassment**

38. Regarding the Claimant's claim for harassment, again taking the Claimant's claims at its highest and assuming that he can establish that the Respondent did the act complained of on 20 October 2023 as referenced in paragraph 16.a and 13.d and that it was unwanted conduct under 16.b, the Claimant would still need to be able to establish that it was related to race/nationality in order to be able to progress from 16.c.
39. When I questioned the Claimant on the event on 20 October 2023, the Claimant was again unable to give any information upon which it may be possible for a tribunal to infer that the interviewer's actions were related to his race or nationality.
40. On the Claimant's own telling of the event, the interviewer shouted at him saying that he did not have the right to work in the UK and forbade him from applying for future roles with the Respondent because of this and the Respondent then blocked him from its website.
41. Even based on the content of what was said to him according to the Claimant, the reason why he was shouted at and barred from applying for future roles with the Respondent, was because the interviewer genuinely (though mistakenly owing to the right to work check being carried out incorrectly) believed that he did not have the right to work in the UK. There are no facts on which it could be inferred that the reason why the interviewer did this was in any way related to the Claimant's race/nationality.
42. By the time the check had been redone, following the Claimant's complaint, the permanent role that the Claimant had been applying for was no longer available.



Again, there are no facts or information to indicate that this was related to his race/nationality.

### **Strike out**

43. Rule 37 in the Employment Tribunal's Rules of Procedure 2013 ('the ET Rules') provides that a Tribunal can at any stage of the proceedings strike out all or part of the claim on the grounds that it has no reasonable prospects of success.
44. The Tribunal should not strike out any claim where there is a Court of disputed fact and that discrimination issues "should as a general rule, be decided only after hearing the evidence" Ayanwu v South Bank Students Union and another [2001] ICR 391.
45. This is recognised as being a high test and the Tribunal must consider all material before it concludes that there is no reasonable prospect of success and should not make such a ruling save in the plainest and most obvious cases. The Claimant's case must ordinarily be taken at its highest when considering whether to strike out a claim. However, there is no bar on striking out discrimination claims.
46. Rule 39 of the ET Rules provides that where a Tribunal considers that any specific allegation or argument has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. The rule also provides that 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.
47. The test for deposit orders is therefore lower than the threshold required for striking out claims.

### **Decision**

48. The key issue regarding the Claimant's claim on indirect discrimination is the fact that I have found that the Claimant cannot establish group disadvantage. I therefore agree with the Respondent's counsel that this is not a case where there are facts that need to be established to decide this claim. This is fundamental to the Claimant's claim of indirect race discrimination succeeding and as I have found that he cannot show this, there are no reasonable prospects of his claim succeeding. For this reason, the claim is struck out.
49. I am also satisfied that, taking the Claimant's case at its highest as to why he believes that he has been harassed, that there is no reasonable prospect of him establishing the initial burden of proof under S.136 of the Equality Act 2010.
50. I accept that it is rare for claimants to be able to point to some tangible evidence of racism (as is also true of other forms of discrimination). I also accept that someone who has suffered racism is more likely to pick up on any racist undertones compared to someone who has never been a victim of, or been directly affected by, racism.

51. However, there are no facts or information provided by the Claimant from which a Tribunal could infer that what was said to the Claimant on 20 October was related to his race/nationality to satisfy the initial burden of proof. If the Claimant were able to establish the comment and the action of barring him from the website happened and, given his right to work in the UK that this was unfair, there is nothing that links that unfairness to the claimant's race or nationality.

52. The Claimant also mentioned about the Respondent's policy of applying a more stringent approach to right to work checks than the Home Offices requirements and the fact that the Respondent did not need to re-do these checks given that he had indefinite leave to remain. The Respondent had undertaken these checks previously in respect of both temporary roles the Claimant had undertaken with the Respondent. Again, there were no facts or information to indicate that the reason that the Respondent carried out checks each time rather than relying on previous checks undertaken was in any way related to the Claimant's nationality /race. Again, if the Claimant were able to establish this PCP and that it was applied to him, he would be unable to establish any group disadvantage in relation to this.

53. As such, I grant the application to strike out the Claimant's claim in full.

Employment Judge K Wright

31 July 2024

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