EMPLOYMENT TRIBUNALS

Claimants: Mr. J. Shah

Respondent: Horsham District Council

PUBLIC PRELIMINARY HEARING

Heard at: London South (via CVP video conference)

On: 15th August 2024

Before: Employment Judge Sudra

Appearances
For the Claimant: Failed to Attend
For the Respondent: Mr. S. Barratt of Counsel

JUDGMENT

The claim is struck out in its entirety under rule 37(1)(a) because it has no reasonable prospect of success.

REASONS

Introduction

1. This matter came before me today at a Preliminary Hearing held in public to determine an application made by the Respondent for the claim to be struck out for:

(i) Lack of jurisdiction, as being out of time; and/or
(ii) because it has no reasonable prospect of success.

2. The Claimant failed to attend the Hearing today. The Claimant was well aware of the Hearing – which he had been notified of on 20th February 2024 – and during the past week or so, he had made repeated applications for a postponement on the basis that he had started a new job on 29th July 2024 (the Claimant was aware on **10th July 2024** that he had been successful in a job application and would be beginning his new job on 29th July 2024. Although the Claimant had this knowledge, he failed to mention this at a Preliminary Hearing on 19th July 2024; had the Tribunal been made aware of his new employment, it may well have made a difference to the amount of the Deposit Order made at that Hearing).

3. The Claimant's applications to postpone today's Hearing, as he had started a new job, were refused by Acting Regional Employment Judge Khalil and this was made explicitly clear to the Claimant in various correspondence from the Tribunal. Despite AREJ Khalil asking the Claimant for evidence that his present employer had refused him leave to attend this Hearing, none was forthcoming. The only action the Claimant took was to email the Tribunal his new contract of employment and to accuse AREJ Khalil of *'passive aggression.'*

4. Mr. Barratt informed me that the Respondent had received an email from the Claimant at 4.34pm yesterday, stating that he was 'unwell' albeit, no further explanation or evidence in support was provided. The Tribunal had not received this email.

5. At 10.05am and 10.10am today my clerk telephoned the Claimant but the calls were not answered. At 10.20am my clerk emailed the Claimant stating,

> '*Good Morning*
> *Please contact the tribunal at your earliest convenience to confirm whether you will be attending today's hearing or not. Please note the*

hearing will be starting at 10:25 and a Judgement (sic) *may be issued in your absence'*

but received no response. I decided to proceed with the Hearing under r.47 in the Claimant's absence. I was fully satisfied that the Claimant was aware of today's Hearing, least of all, as I had reminded him of it at the Preliminary Hearing on 19th July 2024 and in my Case Management Order of the same date I specifically stated:

'2. A Public Preliminary Hearing by video hearing has been listed for **1st August 2024**[1]. At the Hearing, an Employment Judge will consider the Respondent's application to strike-out the Claimant's claim:

(i) For lack of jurisdiction, as being out of time; and/or

(ii) Because it has no reasonable prospect of success.

The Hearing will start at 10:00.Sometimes hearings start late, are moved to a different address or are cancelled at short notice. You will be told if this happens.

3. No postponement of the hearing will be granted unless there are exceptional circumstances.' (My underlining).

6. I heard no evidence but I had regard to the following written information:

(a) A bundle of documents for the Preliminary Hearing which ran to 181 pages (any reference to page numbers in these Reasons is a reference to that bundle).

(b) A written skeleton argument from the Respondent which incorporated relevant authorities.

[1] This was a typographical error and should have read '15th August 2024.'

Findings of Fact

7. I made no findings of fact for the purposes of my decision, proceeding only on the basis of the documents available. I have been mindful to take the Claimant's claim at its absolute highest.

8. On that basis I can summarise the facts as follows.

Background

9. The Respondent is a Local Authority in Horsham and performs all the services expected of a Local Authority in the UK.

10. Prior to February 2023, the Respondent had had a vacancy for a Housing Officer ('the role') and the Claimant made an application in respect of it. The Claimant was successful in the Respondent's initial sift and was invited for interview to take place on, 15th February 2023. The Respondent sent the Claimant the interview invitation on 8th February 2024 and specifically stated, '*If you require any adjustments or equipment to be available whether you have declared a disability or not, please let us know as soon as possible.*'

11. The Claimant responded 22 minutes later confirming that he would attend the interview but made no mention whatsoever of any required adjustments or equipment to be made available.

12. The Claimant attended for interview on 15th February 2023 but was deemed unsuitable. Three applicants (including the Claimant) were interviewed but none were appointed as they were not suitable. The Claimant had scored the lowest of all three applicants. The other two applicants were white British. The Claimant had not been treated less favourably than the two other applicants as none of them were offered the role.

13. As the Respondent was unsuccessful in filling the role, it re-advertised the vacancy on or around 24th February 2023. Also on 24th February 2023, the Claimant enquired if he could re-apply for the role he had been unsuccessful in being appointed to nine days prior. The Respondent advised that due to the very short passage of time that had passed and as the Claimant's skills were unsuited to the role, it would be highly unlikely that a second interview for the same role would result in a different outcome. It is also appropriate to note at this juncture that the Claimant had scored the *lowest* of his cohort. The Respondent doubted that, within a nine-day period, the Claimant would have acquired the requisite experience and skill for the role he had been unsuccessful in when interviewed initially.

14. Undeterred, the Claimant did re-apply for the role but was again unsuccessful. The Respondent found two suitable candidates whom were each offered a role. One candidate was of black origin and the other was of mixed Asian origin. One of the successful candidates also had a disability.

15. There then ensued considerable email traffic between the Claimant and Respondent where the Claimant stated that the Respondent had discriminated against him for his '*profile'* and that they were threatened by him as he was *'highly educated.'* In his email 'sign-offs' the Claimant added the prefix 'LLB (Hons),' presumably to display that he was learned in the law.

16. On 24th February 2023 the Claimant requested the Respondent's grievance policy. The Claimant's degree in law had not informed him that a grievance can only be raised by an actual employee. The same day, Robert Laban (Head of HR and OD), again, advised the Claimant on how he could raise a complaint rather than a grievance, which he did.

17. Rob Jarvis (Head of Housing & Community Services) responded to the Claimant's complaint on 21st June 2023, and informed him that his complaint of discrimination etcetera had not been upheld.

Relevant Law

Time

18. S.123 of the Equality Act 2010 ('EqA') provides (so far as material):

123 Time limits

(1) 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.

….

19. Rule 37 of the ET Rules provides (so far as material):

'*(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;

….

20. The effect of a strike out is to terminate the claim or the part of the claim. It is a draconian jurisdiction, and the relevant case authorities underlie its exceptional nature. This is particularly so where the substantive case features allegations of unlawful discrimination, as it is *'a matter of high public interest'* that such cases are heard (as per Lord Steyn in *Anyanwu v South Bank Students' Union* [2001] IRLR 305).

21. The application here is made under Rule 37(1)(a), and Mr. Barrat clarified that the Respondent's argument is based on the third category in that rule, that each of the claims '*has no reasonable prospect of success.*'

22. Plainly, on the wording of the Rule, the threshold for the Respondent to persuade me that the Claims have no reasonable prospect of success is a high one, and the Employment Appeal Tribunal ('EAT') has cautioned against striking out a claim on that basis.

23. Furthermore, the cases of *Ezsias v. North Glamorgan NHS Trust* [2007] EWCA Civ 330 and *Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly* [2012] IRLR 755 indicate that it would be wrong to make a strike-out Order where there is a dispute on the facts that needs to be determined at trial.

24. As HHJ Eady (as she then was) put it in *Mbuisa v. Cygnet Healthcare Ltd EAT 0119/18*at [20]:

> '*Such an exceptional case might arise where it is* ***instantly demonstrable that the central facts in the claim are untrue*** *or* ***there is no real substance in the factual assertions being made****, but the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents, see Ukegheson v. London Borough of Haringey [2015] ICR 1285 at para 21 per Langstaff J at para 4'* (my emphasis).

25. Mitting J, summarised the law in *Mechkarov v Citibank NA* UKEAT/0041/16, [2016] ICR 1121 as follows at [14]:

'*(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 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.*'

26. However, taking the Claimant's case its highest does not mean that there is no burden on the Claimant at this stage – Lord Justice Underhill in the Court of Appeal case of *Ahir v. British Airways* [2017] EWCA Civ 1392 at [19] observed that:

> '*where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it.*'

27. The Court of Appeal in *Madarassy v. Nomura International plc [2007] IRLR 246, CA.* stated:

> '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.'*

28. All of the Claimant's claims are the subject of the application to strike-out, or in the alternative, an application for a deposit order, and again I remind myself that strike out should only be ordered in exceptional circumstances in discrimination cases. The binding authorities cited above emphasise that where there are core issues of fact in dispute, they should not be decided without hearing relevant oral evidence.

29. However, whilst the rationale of the EAT cannot be faulted it is important to understand that a caution is not a prohibition and that the EAT and Court of Appeal, recognises that there may be, and indeed are, instances where a strike out of a discrimination claim may be entirely appropriate and just.

Time

30. S.123 EqA provides (so far as material):

123 Time limits

(1) 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.

….

31. The Claimant began Acas early conciliation on 12th June 2023 ('Day A') therefore, any complaint relating to a period prior to 13th March 2023, is prima facie out of time.

32. In the present case I use the same nomenclature Mr. Barratt enunciated in his skeleton argument i.e. periods 1 (7th to 20th February 2023), 2 (24th February to 16th March 2023), and 3 (22nd May to 21st June 2023). The first question to address is for those acts which are outside of the primary time limit, 13th March 2023, was there conduct extending over a period so as to constitute a continuing act? If the answer is no, the second question is would it be just and equitable to provide an extension of time?

33. In respect of periods 1, 2, and 3 it is unclear how there is sufficient linkage between the periods so as to constitute a continuing act. What is clear is that there were a series of discrete acts which were not sufficiently linked so as to amount to conduct extending over a period so as to constitute a continuing act. Therefore, an extension of time on this basis is not appropriate.

34. Possessing graduate level legal knowledge and having had experience of the Tribunal process in the past, the Claimant should have submitted his claims sooner than he did. However, what he *should* have done is not sufficient to defeat the clear public policy reason that discrimination claims should be heard save in the most obvious circumstances where there are no reasons of justice or equity to validate an extension of time. There is a very good reason why discrimination claims should be heard and taking this into

account, as well as the length of the delay and the fact that the Claimant is a lay person, I have decided that it is just and equitable to extend time for the allegations which fall outside of the primary time limit.

No Reasonable Prospect of Success

35. I now turn to merit and whether the Claimant's claims have no reasonable prospect of success and in doing so, I have carefully considered the appellate authorities (and in particular the very sage and practical judgment of HHJ Tayler in *Cox v. Adecco* [2021] ICR 1307) and the Claimant's claims.

36. The Claimant has the impairments of anxiety and depression and he says that by virtue of these impairments, he is disabled so as to attract the protection of s.6 EqA. However, the gaping hole in the Claimant's assertion is the total lack of any medical evidence to support his contention. Stating that one has a mental or physical impairment, or even if one actually possess a mental or physical impairment does not automatically qualify one as disabled under s.6 EqA. Whilst I accept, as the Respondent has accepted, that the Claimant may well have anxiety and depression, the paucity of any evidence means that the Claimants claims of disability discrimination have no reasonable prospect of success.

37. In respect of the Claimants allegations of race discrimination it is clear that he relies on the mere possession of the protected characteristic as evidence in *itself* of discrimination. This does not, and cannot, go anywhere near raising a prima facie case of unfavourable treatment due to race. There must be something more. The Claimant, apart from stating that he is mixed Pakistani British, does not provide any cogent reason as to why he feels he has been treated unfavourably due to his race.

38. Regarding harassment related to race, I struggle to see, even taking the Claimant's case at its highest, how the Respondent's alleged actions can be taken to reasonably have had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him and how those alleged actions can be said

to be related to his race. For these reasons, the Claimants claims of race discrimination have no reasonable prospect of success.

39. Finally, the Claimant's claim of victimisation is a non-starter. Even if he had done a protected act (which is not admitted by the Respondent) of, *'On 24th February 2023 the Claimant emailed Kendra Barrington complaining of race discrimination,'* there are two fatal factors which weigh against he Claimant. Firstly, Ms. Barrington is not an employee of the Respondent and there is no basis to establish that the Respondent was aware of complaints the Claimant may have made to an external individual. Secondly, even if the Claimant had done a protected act and the Respondent were aware of it, he was not subjected to any detriment.

40. The detriment the Claimant complains of is, preventing him from re-applying for the HO role. The documents are clear that the Claimant was not forbidden from re-applying for the HO role but rather, was advised that

> 'Generally, we would welcome reapplications from previously unsuccessful applicants, particularly after some passage of time, as people gain further experience and skills.
>
> As you attended for an interview recently it might be best to discuss that with the recruiting manager. I trust that you have received some feedback on your application and interview already.' [114-115].

41. Therefore, the Claimants claim of victimisation also has no reasonable prospect of success

42. The Claimant's offence seems to flow instead from beliefs he holds about the Respondent without any corroborating factor. In all those circumstances I am satisfied that there is no proper basis in this case for alleging that the Respondent had breached the Equality Act and I do not consider the Claimant has shown that his allegations have any prospect of success.

43. I then consider whether it was appropriate to exercise my discretion to strike the claim out. I can see no possible reason for allowing it to continue. The claim is struck out under rule 37(1)(a).

44. All claims are struck out and the Final Hearing listed for 23rd to 24th June 2025 is vacated.

Endnotes

45. You can appeal to the Employment Appeal Tribunal if you think this decision involves a legal mistake. There is more information here https//www.gov.uk/appeal-employment-appeal-tribunal. Any appeal must be made within 42 days of the date you were sent the decision / these written reasons.

46. There is also a right to have the decision reconsidered if that would be in the interests of justice. An application for reconsideration should be made within 14 days of the date you were sent the decision / these written reasons.

47. A decision may be reconsidered where there has been some serious problem with the process, such as where an administrative error has resulted in a wrong decision, where one side did not receive notice of the hearing, where the decision was made in the absence of one of the parties, or where new evidence has since become available. It is not an opportunity to argue the same points again, or even to raise points which could have been raised earlier but which were overlooked.

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Employment Judge Sudra

15th August 2024