



EMPLOYMENT TRIBUNALS

Claimant: Mr D Easters

Respondents: Ms J Saddington (1)
University of Leicester (2)

Heard at: Leicester Employment Tribunal

On: 5 November 2024

Before: Employment Judge K Welch

Representation

Claimant: In person
Respondent: Mr Chegwiddden, Counsel

PRELIMINARY HEARING IN PUBLIC JUDGMENT

The judgment of the Tribunal is as follows:

Strike out of claim

1. The complaints of direct age discrimination and harassment related to age are struck out under Employment Tribunal Rule 37(1)(a) because they have no reasonable prospect of success.
2. The application to strike out the complaints of direct disability discrimination, direct sexual orientation discrimination and harassment related to disability and/or sexual orientation are refused.

Deposit orders

3. The respondent's application for deposit orders in respect of the complaints of direct disability discrimination, direct sexual orientation discrimination and harassment related to disability and/or sexual orientation are refused.

REASONS

1. This is a claim brought by the claimant on 1 December 2023 following a period of ACAS early conciliation on 6 to 8 November 2023. The case had been case managed on two prior occasions.
2. At the second case management preliminary hearing before Employment Judge Clark, he listed the case for an open preliminary hearing to determine the following issues: –

“The issues to be determined at the Preliminary hearing are:

- a. Whether any part of the claim has little reasonable prospect of success and if so, whether a deposit should be imposed as a condition of the claim being permitted to continue.*
- b. Whether any part of the claim has no reasonable prospect of success and if so, whether it should be struck out.*
- c. To the extent it is maintained, to determine whether to grant the claimant’s application of 15 July 2024 for an order under rule 50.*
- d. To make further case management orders as necessary.”*

The hearing

3. The hearing had been listed to be in person at the Leicester Employment Tribunal. It commenced at 10am.
4. The respondents had sent in an electronic file of documents (referred to as the bundle) for use at the preliminary hearing which consisted of almost 850 pages. A further updated bundle had been sent to the Tribunal and the claimant the day before the hearing, which included additional documents requested to be included by the claimant. This updated bundle had not been forwarded to me. Following discussion, it was agreed that I would continue to use the bundle I had prepared for the hearing and the parties would take me to any additional

documents in the amended bundle should that prove necessary. I was referred to no additional documents. References to page numbers within this Judgement refer to pages within the bundle I used for the hearing.

5. At the start of the hearing, I confirmed to the parties which documents I had read before the hearing commenced and asked them to highlight any other required reading. It was not appropriate or proportionate for me to read the whole bundle, which would have resulted in there being no time in which to deal with the case.
6. The respondents had sent in an opening note which had also been sent to the claimant and for which he raised no objection.
7. The claimant confirmed that, having done some research, he had withdrawn his application under rule 50 of the Employment Tribunal Rules of Procedure for a privacy/ a restricted reporting order. He had sent this withdrawal to the Tribunal on 19 October 2024. Therefore, it was unnecessary for me to deal with this application during the hearing.
8. On 22 August 2024, the claimant sent an email to the Tribunal and the respondent with three documents attached to it. One of these documents called, "*Claimant's Summary Amendments & Notes – Accuracy & Incomplete Information*" [P327-347] contained the claimant's comments and proposed amendments to the Case Management Order of Employment Judge Clark dated 6 August 2024. There were extensive changes and/or comments made by the claimant to the claim as set out by Employment Judge Clark and agreed during the preliminary hearing. This had not been dealt with prior to this public preliminary hearing.
9. It was agreed that, as the claimant sought to make amendments to all of his claims before the Tribunal, his amendment application would be considered only for the parts of the claim for which there was an application to strike out or alternatively for which a deposit order was sought. The other proposed

amendments (to the claims of victimisation and/or constructive unfair dismissal) were left to be considered at a later hearing as there was not sufficient time to deal with them during this hearing and these claims were proceeding to a final hearing in any event.

10. Having heard from both parties, I refused the claimant's application to amend his claims of direct age, disability and/or sexual orientation discrimination and harassment and gave reasons for doing so during the hearing.
11. The claimant had himself made an application to strike out the respondents' amended response on 30 August 2024 [P362] and 30 September 2024 [P374, 376-384]. The Tribunal had written to the parties on 24 September 2024 to confirm that the decision on whether to accept the amended response would be dealt with at this hearing, and that consideration would be given, should there be sufficient time, as to whether the claimant wished to apply to strike out the original response.
12. I heard representations from both parties on whether the amended response should be accepted. The amended response was ordered to be filed by 23 August 2023. The respondents made an application for an extension of time of 14 days in which to do so two days before the expiry of the time limit, namely on 21 August 2024. The claimant agreed to an extension of 7 days (i.e. until 30 August 2024) on 24 August 2024 [P352]. I accepted the amended response as it had been presented on 30 August 2024 in accordance with the agreement reached between the parties.
13. The claimant confirmed during the hearing that he still wished to pursue an application to strike out the respondents' response. It was agreed that the claimant would provide the basis for this application as set out in the Case Management Order from the hearing.

14. Following this, we went on to consider the respondent's application for strike out or alternatively deposit orders to be made in respect of the direct age, disability and sexual orientation discrimination and harassment complaints. The application was sent to the Tribunal and the claimant on 19 September 2024 [P372-3]. It was made clear that there were no applications for strike out or deposit orders relating to the complaints of victimisation and/or constructive unfair dismissal which proceed to final hearing regardless of this decision. I heard from both parties and reserved by decision since, by that time, it was past 5pm.

The respondents' submissions

15. The prevailing reasons for saying that the claims of direct discrimination and harassment have no reasonable or little prospects of success are firstly, that all the claims are out of time, and, secondly, that even on the claimant's own case taken at its highest, they show no, or little, prospects of success.
16. The respondent contended that the claimant's direct age discrimination and harassment related to age claims were significantly out of time. The only allegation of age discrimination relied upon was the sending of a get well card on or around 31 August 2022, which it contended made the complaints over 11 months out of time. The respondents stated that there were no just and equitable grounds on which to extend time in this case. There was no other claim related to age discrimination. Also, that of the pre-printed parts of the card, namely "Get well soon, you moaning old twat – at least it's not herpes" the word "old" had been manually crossed through, as confirmed in the second preliminary hearing for case management. Therefore, they contended that it should be struck out on the ground that it was both out of time and further that it had no reasonable prospects of success. Alternatively, it should be made subject to a deposit order.

17. The direct disability discrimination or alternatively harassment related to disability claims were again out of time. Part of the claims related to the card sent in August 2022 referred to above, and for the reasons already stated were also out of time. Even taking into account the additional claims of disability discrimination allowed at the second case management hearing on 16 July 2024, these events spanned the period between November 2022 and May 2023, and so are still out of time.
18. Even if they were presented within time, the respondents contend that the claims have little reasonable prospects of success, as some relate to general workplace disagreements and show little obvious prospect of relating to the claimant's disability. Also, that the respondent denies knowing that the claimant had a HIV diagnosis at the relevant time. Therefore, a deposit order was requested for these claims.
19. The claimant's direct sexual orientation discrimination and harassment related to sexual orientation claims were also presented out of time, even when including the additional claims permitted at the case management hearing on 16 July 2024. Further, there was little reasonable prospects of success as the first respondent was unaware of the claimant's sexual orientation until July 2023 and even if the "open and honest about sexuality" comment was made as set out in point 5 of the Case Management Order dated 6 August 2024, a comment encouraging general openness as to sexual orientation has little prospects of amounting to less favourable treatment. Finally, the sexual orientation of the claimant's comparators was not known to the first respondent.

The claimant's submissions

20. The claimant contended that the response was not entirely factual and that there were significant numbers of documents which would establish the facts of the claim. It was unfair to strike out claims without hearing from witnesses. The

claimant accepted that following receipt of the card in August 2022, there were no other incidences of age discrimination.

21. The claimant had been able to discuss the card and sexuality comments within his grievance hearing on 16 August 2023 and he believed that the delay in dealing with his grievance was to ensure that he was out of time in bringing these complaints.
22. Whilst the respondent admitted to deliberately removing “moaning old” from the card, the respondents had made every effort to insert, “at least its not herpes” in relation to his card, which the claimant contended was not pre-printed. The respondent had knowledge of the claimant’s disability. He contended that there was deliberate malice and an intention to cause him harm regarding his disability.
23. There was no objective justification for telling employees how they should behave in their personal lives. Only a straight person would suggest being open about sexuality. The way that the first respondent stated this comment was in a malicious way, not to encourage the claimant to come out. This was a personal decision for individuals to take when they felt comfortable to do so.
24. There had been continuous discussion between the claimant and the respondents about the facts relied upon for his discrimination and harassment complaints.
25. The claimant gave evidence of his means during the hearing, should I have considered it appropriate to consider making a deposit order. In respect of any of the complaints.

RELEVANT LAW

26. Rule 37 of the Employment Tribunal Rules of Procedure 2013 (“the Rules”) deals with striking out claims and states:
“(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”...

“(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.”

27. Rule 39(1) deals with deposit orders and, so far as is relevant, states:

“(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 the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.”

28. Lord Steyn in the in the case of Anyanwu v South Bank Students' Union [2001] IRLR 305, Court of Appeal stated,

“... For my part such vagaries in discrimination jurisprudence underline the

importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. ...”

29. In the same case, Lord Hope (at paragraph 37) made the following observations:

“... I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the Claimant may be able to establish if given an opportunity to lead evidence.”

30. In Ezias v North Glamorgan NHS Trust (2007) ICR 1126 Court of Appeal, Maurice Kay LJ (at paragraph 29) said:

“It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the Claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.”

31. The Court of Appeal confirmed in *Ahir v British Airways plc [2017] EWCA Civ 1392* that where Tribunals are satisfied that there is no reasonable prospect of the facts necessary to find liability being established, they should not be deterred from striking out discrimination claims even when involving disputes of facts.

32. In Van Rensburg v Royal Borough of Kingston-upon-Thames & others (UKEAT/0095/07) the Employment Appeal Tribunal made it clear that whilst the threshold for making a deposit order is lower than that for striking out a claim, the Tribunal must still have a sound basis for doubting the likelihood of the party being able to establish essential facts.

CONCLUSION

33. I considered, taking the claimant's case at its highest, the prospects of him succeeding in his claims against the respondent for direct discrimination on the grounds of age, disability and/or sexual orientation and harassment related to the same protected characteristics.
34. For strike out, I have to consider whether the claimant has no reasonable prospects of success. I noted that this was a high threshold, particularly for discrimination cases in light of the case law referred to above.
35. In order to make a deposit order, I reminded myself that this is a lower threshold than for strike out, but still requires some credible and sound basis for saying that the complaints have little reasonable prospects of succeeding.

Direct age discrimination and harassment related to age

36. The complaints of direct age discrimination and harassment related to age should be struck out on the grounds that they have no reasonable prospects of success for the following reasons.
37. Firstly, they were presented out of time. The claim form was presented on 1 December 2023 following a period of ACAS early conciliation from 6 to 8 November 2023. Therefore, any acts before 7 August 2023 are, on the face of it, out of time unless there is conduct extending over a period such that time runs from the last event, or where it is considered just and equitable to extend time. As the card was sent in or around August 2022, the complaints are almost a year out of time.

38. No good reason was given as to why the claimant was unable to present the claim within the time limit. He was clearly aware of the card when it was received and therefore knew of the allegation giving rise to the complaints. There appeared to be no grounds on which to extend time on a just and equitable basis.
39. Whilst the claimant says that he complained about the card, there were no further allegations of direct age discrimination or harassment related to age to possibly amount to conduct extending over a period. The only allegation of age discrimination was the sending of the card itself. Therefore, on this basis alone, the claim should be struck as it has no reasonable prospects of success, or alternatively, the Tribunal does not have jurisdiction to consider it as it was presented out of time. I therefore strike out the complaints of direct age discrimination and harassment related to age.
40. Even if I did not consider that the direct age discrimination and harassment related to age complaints should be struck out on the basis that they were presented out of time, I would have struck the complaints out on the grounds that they have no reasonable prospects of succeeding in any event. The only reference to age on the card referring to a moaning "old" twat had been purposefully crossed through prior to it being sent to the claimant. Whilst I accept that the claimant believes that someone had highlighted the word "old" before it had been blanked out, I still consider that there are no reasonable prospects of the allegations of age discrimination succeeding. Therefore the complaints of direct age discrimination and harassment related to age are struck out.

Direct disability discrimination

41. The claimant contends that the get well card sent in August 2022 also amounted to direct disability discrimination and/or harassment related to disability (HIV).

Again, these allegations are out of time unless they form part of conduct extending over a period or the Tribunal considers it is just and equitable to extend time.

42. The claimant was permitted to add further particulars of his claim for disability discrimination (which were also allegations of sexual orientation discrimination) at the preliminary hearing on 16 July 2024 (being set out in paragraph 23) a) to d). The latest of these allegations, which are also relied upon for the claimant's constructive unfair dismissal claim, took place on 10 May 2023, and therefore on the face of it are also out of time.
43. However, I am not satisfied that these claims should be struck out on the basis that they have no reasonable prospects of success in respect of them being presented out of time. It is not clear whether any of the later acts relied upon will be found to be acts of discrimination, nor whether the claimant will be able to convince the Tribunal to extend time on a just and equitable basis in respect of these allegations. Additionally, the respondent rightly acknowledges that this is not a case where the claimant has no reasonable prospects of succeeding, and is only requesting that a deposit order be made should the claims not be struck out for being out of time.
44. I am not satisfied in this case that there are no prospects of the claims for direct disability and/or harassment related to disability succeeding. Whilst time remains a live issue for the Tribunal to determine in respect of these complaints at the final hearing, I consider that they should continue.
45. Further, I am not satisfied that this passes the threshold of having little reasonable prospects of success in order to warrant a deposit order to be made. It will be for a Tribunal to decide whether the allegations relied upon by the claimant are substantiated, once they have heard all of the evidence. Additionally, as these allegations are relied upon for the claimant's constructive

unfair dismissal claim, evidence will need to be considered in respect of these allegations in any event.

46. Therefore, I do not strike out the complaints of direct disability discrimination and/or harassment related to disability, nor do I make a deposit order.

Direct sexual orientation discrimination and/or harassment related to sexual orientation.

47. The complaints of direct sexual orientation discrimination and/or harassment related to sexual orientation relate to allegations which took place between January 2023 and 10 May 2023 (since they include the same allegations referred to above for the disability discrimination complaints). For the same reasons I do not consider that they should be struck out on the basis that they are out of time.

48. In relation to the application for a deposit order, I have to take the claimant's case at its highest and therefore, do not take into account the first respondent's contentions that she was unaware of the claimant's sexuality, or that of the comparators relied upon, something which may be disputed by the claimant in any event.

49. I understand that the respondents consider that, even if the comment about being open and honest about sexuality in January 2023 was made, it encouraged general openness as to sexual orientation and therefore has little reasonable prospects of amounting to less favourable treatment. However, I am not satisfied that that necessarily follows. It does not, in my view, pass the threshold of little reasonable prospects of success and should be tried at a full hearing. As stated above, these allegations are relied upon for the constructive unfair dismissal claim in any event.

50. Therefore, I do not strike out the complaints of direct sexual orientation discrimination and/or harassment related to sexual orientation. Nor do I make them subject to a deposit order in order to pursue them.

**Employment Judge Welch
27 November 2024**

Judgment sent to the parties on:

...29 November 2024.....

For the Tribunal:

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