



THE EMPLOYMENT TRIBUNALS

Claimant Ms C Ekwunife
Respondent Sage Housing Group Limited
Heard at London Central Employment Tribunal (by video link)
On 23 October 2024
Before Employment Judge Langridge

Representation:

Claimant In person
Respondent Mr G Baker, counsel

JUDGMENT

Rule 37 Employment Tribunals Rules of Procedure 2013

1. All of the claimant's discrimination claims under the Equality Act 2010 brought under case number 2218518/2024 are struck out under Rule 37(1)(a) on the grounds that they have no reasonable prospects of success.
2. All of the claimant's discrimination claims under the Equality Act 2010 brought under case number 6011185/2024 are struck out under Rule 37(1)(a) on the grounds that they have no reasonable prospects of success.
3. The claimant's remaining claim under case number 6011185/2024 in respect of an alleged failure by the respondent to comply with the flexible working provisions in Section 80G Employment Rights Act 1996 is not struck out.

REASONS

Introduction

1. The claimant has been employed by the respondent since 30 May 2022 as a lettings officer, and her employment continues. She has issued two applications to the Tribunal under the above case numbers. The claim under number 2218518/2024 was presented to the Tribunal on 15 April 2024 and is referred to in this judgment as the 'first claim'. The claim under number 6011185/2024 was presented on 9 September 2024 and is referred to as the 'second claim'. The claimant brought the second claim after a preliminary hearing on 7 August 2024 when Judge Wisby indicated that she could amend or issue a new claim in respect of any new or ongoing complaints.
2. At that hearing various case management orders were made, and Judge Wisby's Case Summary helped to clarify aspects of the claimant's allegations. The judge noted that if the claimant chose to issue a new claim, she should set out the legal and factual basis for her new allegations in detail. The claims were listed for a final hearing lasting 5 days starting on 26 June 2025. A further preliminary hearing for case management purposes was listed for 6 February 2025.
3. Before today's hearing the claimant had objected to her second claim being heard with the first claim. She was under the misapprehension that the substantive issues would be dealt with today. She said that none of her documents nor her witness statement were included in the respondent's bundle. The purpose and scope of this preliminary hearing was explained, and the claimant accepted that she was able to deal with both claims today.

The first claim

4. The first claim was presented to the Tribunal on 15 April 2024. The claimant alleged direct race discrimination in respect of the following:
 - a. On 29 November 2023 the respondent refused the claimant's flexible working request made on 17 November 2023. The flexibility the claimant wanted was to be able to work from home.
 - b. There was a disparity in her wages up to 1 October 2022 and an increase in her pay was not backdated.
 - c. In around February 2023 the respondent unilaterally decided to second the claimant without consulting her. She worked in the seconded role between 27 February and 31 May 2023. At this preliminary hearing the claimant clarified that this is not intended to be a complaint in its own right but is presented as evidence of discrimination.
 - d. By an email dated 7 December 2023 from HR, the claimant was told she had to increase her working days in the office from 2 to 3.
5. Other allegations were treated as complaints of harassment related to race:

- a. On 2 January 2024 the claimant was asked by HR to attend a return to work meeting after a period of sick leave. The claimant clarified that her complaint was being asked to attend this meeting when her line manager had already arranged this.
 - b. The claim form also alleged a breach of confidentiality relating to a staff survey, which led to detrimental treatment. Although presented as a potential complaint of harassment under section 26 of the Act, the claimant was not pursuing it as such, as noted by Judge Wisby in the orders made on 7 August 2024.
6. The claimant identified a comparator regarding the rejection of the flexible working request on 29 November 2023: Mr Chuong Dinh. At this preliminary hearing the claimant clarified that she believes Mr Dinh to be of Chinese origin. The claimant also relies on a hypothetical comparator, though no other specific comparator was named in relation to the other direct discrimination allegations.

The second claim

7. The second claim was presented on 9 September 2024 following the preliminary hearing. In part 8.1 of the form ET1 the claimant identified that this was a race discrimination claim. The key allegation is that on 21 May 2024 the respondent refused her second flexible working request dated 23 April 2024. The claimant was notified of the unsuccessful outcome of her appeal on 7 June 2024. The claimant's comparator for this claim has been named as Issy Player, a Caucasian colleague.
8. The refusal of the flexible working request was presented as a complaint of direct discrimination under section 13 of the Act.
9. The claim form also identified a potential victimisation claim under section 27, with the bringing of the first claim being a protected act. The claimant says she was subjected to the following detriments as a result of bringing her claim:
 - a. Being summoned repeatedly to irrelevant HR meetings;
 - b. Being accused of things she had not done and the respondent conducting investigations into fabricated concerns;
 - c. The respondent cancelling booked training at the last minute and citing invalid reasons;
 - d. The respondent's request that she attend an Occupational Health appointment to ascertain her illness, unlike others who had requested to work from home.
10. The claimant also characterised these allegations as amounting to harassment under section 26 of the Act.
11. This second claim form included an assertion that the respondent had repeatedly discriminated against the claimant and treated her unfairly "for several reasons

including my race". She did not provide the full and specific detail of the allegations as noted in Judge Wisby's orders, only the limited information set out above.

12. On the facts pleaded in the second claim form, the claimant identified a potential claim under section 80H Employment Rights Act 1996, relying on her flexible working request being made under section 80F. The factual basis for this complaint (as pleaded) is that the respondent did not give the claimant any valid reason for refusing the request, nor discuss any alternatives.

The Responses

13. In its Responses to the claims the respondent asserted that the complaints were out of time in respect of acts prior to 9 January 2024 (the first claim) or acts prior to 4 June 2024 (the second claim). It indicated that it would seek to strike out the claims on the grounds that they had no reasonable prospects of success. Alternatively, the respondent would seek deposit orders.
14. The respondent also challenged the claims on their merits. It said that the claimant's pay was aligned with others from 1 October 2022, a date falling well before the first claim was submitted. The secondment was in fact discussed with the claimant, and a number of colleagues of mixed races were also affected by the secondment arrangements. Similarly, all members of the team were invited to discuss issues arising from the staff survey, not just the claimant. On the allegation that fabricated concerns were investigated, it identified an incident on 11 April 2024 (an issue about providing tenants with keys) which was investigated and led to no further action being taken. A training course was rescheduled – not cancelled – from July 2024. This change of date affected everyone, not just the claimant. The Occupational Health referral was suggested at a meeting on 3 June 2024 (but not insisted upon), because the claimant had relied on health issues in making her flexible working request.

The application to strike out

15. The respondent's application to strike out the claims was formalised in writing on 23 August 2024, before the second claim was brought. During a discussion with both parties towards the end of submissions, Mr Baker clarified that his application had been made only in respect of the first claim. The second claim includes factors which distinguish it, namely victimisation and a claim under section 80H Employment Rights Act 1996 arising from the second flexible working request. Ultimately Mr Baker invited me to treat the application as applying to both claims, to the extent that I felt the arguments applied to both of them. In any event, I considered all aspects of the claims in the exercise of the Tribunal's powers to consider striking out on its own initiative under Rule 37(1).
16. The application was made under Rule 37(1)(a) on the grounds that the claims had no reasonable prospects of success. The respondent did not raise the time point as a jurisdictional issue in its own right, but rather as a factor relevant to the lack of prospects of success. Its alternative position was that deposit orders should be made on the grounds that the claims had little reasonable prospect of success.

Respondent's submissions

17. The respondent relied on the authorities of Chandock v Tirkey [2015] ICR 527 and Thomas v Expansys UK Ltd [2022] EAT 164. Mr Baker cited the following passage in Chandock:

“There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in *Madarassy v Nomura* [2007] ICR 867):

“... 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.”

18. Mr Baker also referred the Tribunal to Jamu v Asda UKEAT/0221/15/DA in support of the argument that;

“... A real unfairness can arise if the claims being made are not treated as those defined by the ‘pleadings’. Whilst ETs will properly wish to clarify the issues with the parties, the issues thus identified are still to be derived from the pleadings.”

19. Relying on Muschett v HM Prison Service [2010] IRLR 341, CA, Mr Baker submitted that it is not the Tribunal's role to “enter the arena” and conduct an enquiry into the possibility that there may be other facts or evidence not identified. The decision must be based on the facts identified in the claim forms, taking account also of the case management orders. If those facts are disputed, he conceded it would be impossible to strike out the claims, given that a higher bar applies in discrimination cases. But if on the facts as pleaded, there are no facts from which the Tribunal could conclude there was discrimination, then that warrants a strike out or deposit order. Even if Tribunals are to avoid undue formalities, following Chandock, the essence of the claims must be identifiable from the claim forms, and a mere assertion of discrimination is not enough.
20. In other words, an event which the claimant is unhappy about (a difference of treatment) and a difference of protected characteristic does not form the basis of a valid discrimination complaint. The burden of proof provisions under section 136 Equality Act 2010 mean that the claimant must prove facts from which the Tribunal could conclude that there was discrimination. There needs to be a factual basis on which the claimant's claim could lead to a conclusion that there was a connection between her race and the treatment. Mr Baker submitted that if there was some fact pleaded that might shift the burden of proof to the respondent, I should find for the claimant.

21. The above points apply to less favourable treatment for the purposes of a direct discrimination claim under section 13. The essence of a discrimination case is not simply that something happens to a person and they have a protected characteristic, but rather something happens *because of* their protected characteristic. The harassment allegation relating to the request to attend a return to work meeting would only succeed if the claimant could show that the conduct “related to” her race, so as to bring it within section 26 of the Act, and this is not apparent from the pleaded case.

Claimant's submissions

22. The claimant said she was the only Black person in the team and believes she has been subjected to ongoing discrimination going back to 2023. She had wanted an internal solution and made her claim as she understood it.
23. The claimant referred to Cox v Adecco [2021] ICR 1307 in support of the proposition that the Tribunal needs to carry out a clear analysis of the claims and issues in reaching its decision.
24. The claimant submitted that her case needs to go to a full merits hearing. She asserted that, contrary to the respondent's submission, a difference in treatment *is* enough, and she has evidence to prove discrimination. It is immaterial that the facts may be framed as different species of discrimination. Hers is a serious case and involves a continuing act of discrimination, which is why she brought the second claim. During her submissions the claimant said she made her flexible working request because of the cost of commuting.
25. In reply to a point made by Mr Baker, the claimant asserted that it is in fact unlawful to pay people different rates of pay when they are doing the same job. She was the only one paid differently. The claimant said she can only get vindication if she can bring out the issues in court and prove her points.
26. When asked for comments on the lack of particulars in her claims, even after the discussion at the previous preliminary hearing, the claimant said she had not understood she could do that.
27. The claimant also referred to Hendricks v Commissioner of Police [2003] ICR 999 on the subject of continuing acts taking place over a period of time.
28. The claimant explained that her second claim arose from the later flexible working request made on 15 April 2024, after the right to bring such a claim came into force on 6 April 2024. The claimant said she was refused flexible working on the basis of her race. She said the respondent did not give her a cogent reason, only performance, but the claimant feels she can prove this was not the case. She said the respondent “just did not want” to grant the request. When asked to clarify why not, the claimant said it was a constant refusal going back to last year. The respondent was seeking to discriminate against her regardless of whether the right procedure was followed or not.

29. The claimant clarified that this issue gives rise to two claims: one for a breach of the Employment Relations (Flexible Working) Act 2023 and one of direct race discrimination. When asked to explain how the respondent had failed to follow the new rules on flexible working requests, the claimant said there are 8 possible reasons and the respondent relied on the fact that the quality of the work and performance would diminish. However, the claimant said she has proof that this is not true. She did not identify that evidence.

Relevant law

30. Aside from the authorities referred to above, the Tribunal took into account a number of key legal principles in reaching this decision, as well as the overriding objective under Rule 2 of the Employment Tribunal Rules of Procedure 2013. This provides as follows:

“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

31. The case of Chandock makes clear that it will be a rare case where discrimination claims are struck out, and a sparing and cautious approach should be taken. There is a high public interest in examining the facts in such cases bearing in mind that discrimination claims are generally fact sensitive. However, there is no blanket ban and a Tribunal can properly strike out a discrimination claim. The court gave the example of cases which are out of time without any evidence suggesting it would be just and equitable to extend time. Another example is where cases as pleaded are no more than an assertion of different treatment and a difference in a protected characteristic.
32. One of the questions in this case was whether there is material from which a Tribunal could conclude that the claimant has been discriminated against. It is for the claimant to identify primary facts suggesting that she has been treated less favourably because of her race or colour, or that she has been harassed for reasons related to her race or colour. The respondent and the Tribunal can expect to see the key factual basis for the claims to be set out in the claim forms, perhaps

with the benefit of further information being provided, or clarification at a case management hearing. Those primary facts would then need to be established through evidence at a final hearing. If so, then the burden of proof would shift to the respondent.

33. Thomas v Expansys reminds us to consider carefully whether the central facts of the case are in dispute. As a general rule, Tribunals should be slow to strike out cases where the central facts are in dispute: Ezsias v North Glamorgan NHS Trust [2007] ICR 1126. In Ahir v British Airways [2017] EWCA Civ 1392 the court provided the following guidance:

“Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment ... Nevertheless, it remains the case that the hurdle is high ...”

34. In Cox v Adecco the court held that:

“... it was important to properly identify the issues in a case before considering whether to strike out a claim; ... that, in the case of a claimant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stress of a hearing, and reasonable care should be taken to read the pleadings and any other core documents that explained the case the claimant wished to advance...”

35. At this preliminary stage, where evidence is not generally heard, the claimant's case should be taken at its highest, based on the pleadings and any other documents in which the claim is set out. The exercise of evaluating the case may be assisted by asking the claimant to clarify her claims at a preliminary hearing, as happened here.
36. Another relevant consideration is whether there is any alternative to striking out a claim. The case of T v Royal Bank of Scotland plc [2023] EAT 119 emphasised the importance of considering alternatives, in the context of a claimant's unreasonable conduct of the claims and non-compliance with orders. In that case, the Tribunal “did not reasonably conclude that the claims were entirely incapable of being tried at the listed hearing, and that there were no orders it could make that could reasonably be expected to secure that”.

Conclusions

37. The claimant was on notice from receipt of the first Response dated 30 May 2024 of the respondent's concerns about her claims as pleaded. These concerns were aired at the preliminary hearing on 7 August, when the need for full particulars of any new claim was also discussed. After that, the claimant submitted a new claim which focussed on her second flexible working request and provided very limited

details of alleged detriments. The respondent made its position on striking out clear in its second Response and its formal application dated 23 August 2024.

38. The Tribunal's understanding of the issues in both claims was discussed and agreed at the start of this hearing. Further clarification was obtained during the course of the submissions, which helped to inform the summary of the claims set out above.
39. The Tribunal's analysis of the first claim is as follows. There were three complaints of direct race discrimination:
 - a. The refusal on 29 November 2023 of the claimant's first flexible working request dated 17 November 2023.
 - b. The disparity in the claimant's wages up to 1 October 2022, which was not backdated.
 - c. The email dated 7 December 2023 from HR, notifying the claimant that she had to increase her working days in the office from 2 to 3.
40. There was one complaint of harassment related to race, namely that on 2 January 2024 the claimant was asked by HR to attend a return to work meeting, even though her line manager had already done this.
41. The right to bring a complaint to the Employment Tribunal in respect of the flexible working request arose when the claimant was notified of the respondent's decision to refuse it on 29 November 2023. This predates the limitation period by more than 3 months, as the last date caught by the first claim was 9 January 2024.
42. A time point also arises in relation to the alleged disparity in wages up to 1 October 2022, which predates the limitation period by more than a year.
43. Having turned down the claimant's request to work flexibly, by working from home, the respondent emailed her on 7 December 2023 telling the claimant she had to work in the office 3 days a week instead of two. This allegation is also out of time as the email was sent around one month before the cut-off date of 9 January 2024.
44. The harassment allegation relates to a request by HR made on 2 January 2024 for the claimant to attend a return to work meeting after her sick leave. Like the other allegations, this complaint was not presented within the 3 month statutory time limit (allowing for early conciliation extensions).
45. All four complaints are therefore out of time on the face of the claimant's case. There was no dispute about the dates in question. The claimant offered no reasons for delaying her decision to bring her claims, beyond saying that she hoped to resolve matters internally. These are factors the Tribunal may take into account when considering whether to strike out. The time points may warrant a conclusion that the claims had no reasonable prospect of success.

46. Dealing with the merits of the allegations as pleaded, the Tribunal concludes that the allegations set out by the claimant do not support a decision to allow them to proceed to a final hearing. There are no facts in the first claim identifying a basis on which it could be said that race was the reason for any difference in treatment. The fact that the events took place is not at the centre of the issues between the parties, but rather the *reason why* the respondent took the steps that it did. Allowing for the inherent difficulties that can arise in proving discrimination, claimants are nevertheless expected to say what happened and why they think it was a discriminatory act. How that will be proved at a final hearing comes later, but at a preliminary stage the question is: what facts would the claimant be trying to prove? Here, the claimant has identified nothing which points to unlawful race discrimination, if only she were given the chance to prove it. Her allegations amount to bare assertions that because she is Black, that must be the reason why the respondent paid her differently, turned down her flexible working request and increased her office days in consequence.
47. As for the pay question, there is no general principle of law requiring employers to pay all staff doing the same job at exactly the same rate. Pay differentials may properly reflect, by way of example, levels of experience in the role. If there are reasons to believe the difference in pay relates to sex or was decided because of a person's race, that could amount to unlawful discrimination. However, on its own it is not enough simply to point to a difference in pay and a difference in race and assert that this must be a breach of section 13 Equality Act 2010. I note also that the claimant offered no comparator in respect of this allegation.
48. Similarly, the refusal of the first flexible working request discloses no information from which it could be inferred that the decision was discriminatory because it was less favourable treatment due to race. The claimant believes the comparator to be of Chinese ethnicity. While he is in principle a permissible comparator, realistically it might be expected that a White colleague would be more apt. The claimant has provided no information at all which, if proved, could entitle a Tribunal to conclude that race discrimination formed the basis for the respondent refusing her request to work from home.
49. The follow up email from HR instructing the claimant to attend the office one more day each week appears on its face to be a natural consequence of the flexible working request being refused. That presents an apparently innocent explanation for the instruction. Like the secondment arrangements (which the claimant relies on as evidence of discrimination), these are commonplace workplace interactions. On their own they do not warrant the bringing of Tribunal claims unless a claimant puts forward facts which could lead to a finding of discrimination.
50. The claimant offered no comparator to support this allegation of direct discrimination nor any other information at all that might suggest the email instruction was given because of her race.

51. Likewise, the claimant put forward nothing whatsoever to suggest that the January 2024 email requesting a return to work interview amount to unwanted conduct related to her race, an essential requirement of section 26 of the Act.
52. In this and all the other allegations there are no facts supporting the assertion of race being the reason for the treatment, and indeed there are apparently non-discriminatory reasons for all of the treatment, which arise from the normal business of managing an organisation. If anything, the context for the decisions would suggest that any suggestion of discrimination is displaced, in the absence of factual information pointing in a different direction. There is nothing in this or the other allegations in the first claim which is capable of shifting the burden of proof to the respondent.
53. Turning to the analysis of the second claim, this revolves around two discrimination complaints:
 - a. The refusal of the second flexible working request, which the claimant says was an act of direct discrimination under section 13 of the Act.
 - b. A victimisation claim under section 27, based on the claimant being subjected to four detriments as a result of bringing her first claim.
54. The first alleged detriment was described in the claim form as “being summoned repeatedly to irrelevant HR meetings”. No other information was provided; no details of which meetings, when they took place, or who required the claimant to attend them. This falls a long way short of identifying facts from which a Tribunal could conclude that the claimant was victimised for bringing the first claim. The absence of any dates means that the question of causation does not even get off the ground.
55. The second alleged detriment was said to be about the claimant being accused of things she had not done and the respondent conducting investigations into “fabricated concerns”. The respondent’s understanding is that this relates to one issue arising on 11 April 2024 relating to the provision of keys to some tenants. The claimant did not challenge that this was the incident in question. The respondent asserted that it took further action after looking into the issue. Again, the claimant did not challenge this fact. The allegation also appears on its face to be out of time, as it predates the cut-off date of 4 June 2024 applicable to the second claim.
56. The third alleged detriment is that the respondent cancelled a training course the claimant was booked to attend. She alleged that this was done “at the last minute” and the respondent gave “invalid” reasons for doing so. The respondent accepts that it rescheduled a training course due to take place in July 2024. It was not cancelled. The change of date affected all those booked to attend, not just the claimant. On the claimant’s pleaded case, there is nothing whatsoever that might

suggest she was subjected to a detriment because she had brought a discrimination claim to the Tribunal.

57. The fourth and final alleged detriment relates to the respondent's request that the claimant attend an Occupational Health appointment, in the context of her second flexible working request. The claimant says she did not agree to any such appointment and alleges that the respondent wanted to investigate her illness. She says this step was not taken with other (unnamed) colleagues who had requested to work from home. The respondent says the request was made because the claimant relied on her health in support of the flexible working request; however, it did not insist that she attend an appointment. This issue arose at a meeting on 3 June 2024, which falls short of the limitation cut-off date by one day.
58. The second flexible working request is said to be less favourable treatment than a Caucasian colleague, but again the claimant has offered no information at all to support her assertion that the decision was made because of her race.
59. Taking the claimant's allegations as a whole, so far as they rely on unlawful discrimination under the Equality Act 2010, there is nothing whatsoever in the pleaded case which elevates it above a series of bare assertions. Following Chandock, this permits the Tribunal to consider striking out the claims on the grounds that they have no reasonable prospect of success. At it best, the claimant's case relies on a series of broad and sweeping allegations of race discrimination, arising from a range of different types of interaction in the workplace.
60. I did consider whether any purpose would be served in ordering the claimant to provide further particulars of her allegations, but concluded that this would not be appropriate or proportionate. The claimant had months to consider her claims and deal with the respondent's concerns about the lack of substance or clarity, yet she did nothing. Despite being on notice from an early stage of the risk of a strike out decision, the claimant still made no attempt to provide additional written information. During our discussion at today's preliminary hearing the claimant had opportunities to clarify her allegations and why she believed her treatment to amount to race discrimination, but she was unable to offer any information which might weigh in favour of allowing the discrimination complaints to proceed to a final hearing.
61. For all of the above reasons, I concluded that there was nothing to be gained from allowing the discrimination claims to go forward. Doing so would inevitably mean the respondent being significantly prejudiced by virtue of the time and cost involved in defending wide-ranging allegations which appear to have no reasonable prospects of success. I am therefore satisfied this is one of those rare cases where the discrimination claims should be struck out. This applies to all complaints in the first claim and all the discrimination complaints in the second claim. This decision does not affect the potential claim under section 80F Employment Rights Act 1996, which is the subject of separate case management orders.

Employment Judge Langridge

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

28 November 2024

**JUDGMENT SENT TO THE PARTIES ON
4 December 2024**

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AND ENTERED IN THE REGISTER

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FOR THE TRIBUNAL