EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr S Sousa **v 22 Hotel Management Limited**

Heard at: **Central London Employment Tribunal**

On: **3 December 2024**

Before: **Employment Judge Brown**

Appearances:
For the Claimant: **In Person**
For the Respondents: **Mr B Frew, Counsel**

JUDGMENT
AT A PUBLIC PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. **The Claimant does not have permission to amend his claim to include complaints of protected disclosure detriment and/or victimisation.**
2. **The Claimant's complaints of sex and race discrimination have no reasonable prospects of success and are struck out. The claim is therefore struck out in its entirety.**

REASONS

This Hearing

1. This Public Preliminary Hearing was listed by EJ P Smith at a private case management preliminary hearing on 16 August 2024 to consider:

    1.1. Whether the claimant's claims of race and sex discrimination have no reasonable prospects of success and should be struck out, under rule 37;
    1.2. Any application by the claimant for permission to amend the claim form to include claims of victimisation and/or detriment pursuant to section 47B Employment Rights Act 1996; and,

1.3. Any case management orders the Tribunal considers it appropriate to make to progress any surviving claims to the full hearing.

2. There was a bundle of documents for the Public Preliminary Hearing.

3. There were no witness statements. I heard evidence from the Claimant.

4. Both parties made oral submissions.

5. I said that I would decide the amendment application first, because if I decided the strike out application first – and struck out the claim - there would be no claim to amend and the amendment application would have been decided by default. That would not be fair. This was particularly so, given that EJ Smith had indicated that the amendment application would be heard today, rather than EJ Smith indicating that there was a possibility that the claim could simply be struck out, and that, if the Claimant wished to bring protected disclosure detriment and victimisation complaints, he might have to present new claims in this regard. In any event, it was in accordance with the overriding objective to have all matters determined at this hearing, rather than the Claimant potentially bringing new victimisation and protected disclosure detriment complaints in new proceedings, which would then need to be case managed and time points addressed in further hearings.

Background

6. As set out by EJ Smith in the Case Management Discussion Summary of the Private Preliminary Hearing on 16 August 2024, the Claimant was employed by the Respondent, a luxury boutique hotel, members club and restaurant in Mayfair, as a waiter from 2 October until 31 December 2023. Early conciliation started on 3 December and ended on 5 December 2023. The claim form was presented on 20 December 2023, before his dismissal.

7. In his claim form, the Claimant alleged that he had been been subjected to race and sex discrimination. He told EJ Smith that he describes his race as “Caucasian” and that his sex is male.

8. At the Preliminary Hearing on 16 August 2024, the Claimant initially told EJ Smith that he was not complaining that he had been treated badly because of, or related to, his race or sex. Instead, he wished to complain of bullying. He confirmed that he had written to the Tribunal on 13 March 2024 stating, “I believe I haven’t been discriminated based on my gender or ethnicity but the way I carry myself and, in this case, the role as a waiter.”

9. When EJ Smith explained that there was that under is no standalone legal cause of action in relation to bullying, the Claimant stated he would not withdraw the claims of race and sex discrimination. However, EJ Smith decided that his race and sex discrimination complaints may have no reasonable prospects of success and might be liable to be struck out, under rule 37 of the Employment Tribunal Rules 2013. EJ Smith therefore listed today’s hearing.

10. The Claimant had also ticked the box on the claim form saying that he wanted a copy of the form to be sent to a relevant regulator, if it was a protected disclosure

claim. As EJ Smith noted, the Claimant had not included the details of a protected disclosure claim in the body of the claim form.

11. After discussion with the Claimant, EJ Smith also considered that the Claimant may be alleging that he was victimised.

12. The Claimant told EJ Smith that he had made protected disclosures / done protected acts in three emails sent towards the end of his short employment. He also told EJ Smith that the sole detriment was that the Respondent did not change the working environment. EJ Smith noted that the Claimant did not mention this in the claim form, nor that any detrimental treatment had occurred because of the (unspecific) email.

13. The protected disclosure complaint which the Claimant seeks to add by way of amendment is:

    13.1. The claimant was subjected to unlawful victimisation by the respondent when it did not change his working environment, because of protected disclosures he made in three emails he sent to the respondent on and after 7 December 2023.

14. The proposed victimisation amendment is:

    14.1. The claimant was subjected to unlawful victimisation by the respondent when it did not change his working environment, because of protected acts done in three emails he sent to the respondent on and after 7 December 2023.

15. EJ Smith ordered the Claimant, by 23 August 2024, to send the Respondent copies of specific emails he wished to rely upon as potential protected disclosures or protected acts.

16. At today's hearing the Claimant confirmed that the emails he relies on as being whistleblowing/ protected acts are a review he posted on the Respondent's Google Maps webpage in the last week of December 2023, p96 and a written email of complaint dated 7 December 2023.

17. He also told me that he had personally spoken to restaurant managers raising discrepancies in the business during his employment.

18. I heard evidence from the Claimant about why he had not brought his claims of victimisation / protected disclosure earlier.

19. Having heard evidence, I found the following facts:

20. Before the commencement of his employment with the Respondent, the Claimant knew about the existence of Employment Tribunals and his ability to bring employment claims to them

21. By conducting his own research, the Claimant knew that he needed to contact ACAS before bringing an Employment Tribunal claim.

22. The Claimant does not have English as a first language. He did not know the legal terms whistleblowing and victimisation. However, that did not to prevent him from putting any of the facts which he knew about his claim in the claim form.

23. The Claimant was aware about time limits for bringing claims, from his own research, although he thought that the time limit for bringing claims to the Tribunal was 6 months rather than 3 months.

24. Neither his language skills nor any lack of knowledge prevented him from alleging the facts of whistleblowing or victimisation earlier than he did.

25. The Claimant does not allege that he was treated badly because of his 7 December 2023 email. That email was simply a letter before action. The claim that the Claimant wishes to bring to the Tribunal is not that he was bullied because he complained. He is bringing a claim to the Tribunal because he wants to highlight poor standards, including poor standards of hygiene, at the Respondent, but not because he was treated detrimentally for doing so.

Amendment Law

26. In deciding whether to allow an amendment the Employment Tribunal is guided by the principles set out in *Selkent Bus Company v Moore* [1996] IRLR 661. In deciding whether to grant an application to amend, the Tribunal must balance all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include the nature of the amendment: applications to amend range, on the one hand, from correcting clerical and typing errors and the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to and, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.

27. Other factors include the applicability of time limits: if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time limit should be extended. Other factors to be considered include the timing and manner of the application: an application should not be refused solely because there has been a delay in making it, as amendments can be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made, for example the discovery of new facts or new information appearing from the documents disclosed on discovery.

28. Regarding prejudice faced by a Respondent, in *Miller and Others v The Ministry of Justice and Others* UKEAT/0003/15/LA at §§12-13 Laing J said:

"12. … There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the

forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses...

13. … DCA v Jones also makes clear (at paragraph 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts; and the facts are for the ET..." .

Time Limits

29. By *s123 Equality Act 2010,* complaints of discrimination in relation to employment may not be brought after the end of
    29.1. the period of three months starting with the date of the act to which the complaint relates or
    29.2. such other period as the Employment Tribunal thinks just and equitable.

30. In *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634 the EAT said at para 109 "109 (a) Amendments to pleadings in the employment tribunal, which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend and there is no doctrine of "relation back" in the procedure of the employment tribunal. "

Amendment – Decision

31. I did not allow the Claimant to amend his claim to include complaints of victimisation and/or protected disclosure detriment.

32. The amendments sought were substantial amendments, pleading new facts and new causes of action. The Claimant did not say, in his original claim form, that he had complained during his employment, or that he had been subjected to any detrimental treatment because he had complained. He did not set out the facts of a victimisation or protected disclosure detriment complaint.

33. Given that these were substantial amendments which pleaded new facts and new causes of action, the time limits for brining claims to the Tribunal would apply to them. They had been brought out of time. They were first intimated on 16 August 2024, more than 7 months after the Claimant's employment had ended and well beyond the 3 month time limit for bringing claims to the Tribunal.

34. I would not extend time for the claims. It would not be just and equitable to do so. The Claimant was aware of his ability to bring claims to the Tribunal and he was aware of time limits. He did bring other claims to the Tribunal in time, and there was nothing to prevent him putting the facts of the alleged victimisation and protected disclosure claims on his original claim form.

35. In any event, the balance of hardship and injustice indicated strongly that the amendment should not be allowed. In evidence, the Claimant confirmed that he was not saying that he was bullied because he had complained in his email on 7 December – he said that that was simply a letter before action, sent so that he could bring a legal claim later.

36. It was not clear to me at all that the Claimant actually wanted to bring a victimisation / protected disclosure complaint at all. He is not saying that he was treated detrimentally because he complained. He is saying that he wants to highlight poor hygiene standards, not that he was treated detrimentally for doing so.

37. That being the case, there would be little hardship and injustice to the Claimant in not permitting him to bring victimisation and protected disclosure detriment complaints to the Tribunal. On the other hand, there would be significant injustice and hardship to the Respondent in having to defend wholly new complaints brought substantially out of time. The hardship to the Respondent includes, as set out *Miller and Others v The Ministry of Justice and Others*, the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence.

Law - Strike Out – No Reasonable Prospects of Success

38. An Employment Judge also has power to strike out a claim on the ground that it is scandalous, vexatious or has no reasonable prospect of success under *Employment Tribunal Rules of Procedure 2013, Rule 37(1)(a).*

39. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, *Teeside Public Transport Company Limited (T/a Travel Dundee) v Riley* [2012] CSIH 46, at 30 and *Balls v Downham Market High School & College* [2011] IRLR 217 EAT. In that case Lady Smith said: “The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word ‘no’ because it shows that the test is not whether the Claimant’s claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral recessions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect”.

40. A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined, *A v B* [2011] EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias*, [2007] ICR 1126; Tayside *Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46.

Decision: Strike Out

41. The Claimant confirmed at this hearing that, he is alleging that he "was discriminated against not because of how I look and my gender but because of the way I carry out the role as a waiter."

42. He therefore repeated what he had told EJ Smith, that he is not alleging that he was discriminated against because of race or sex.

43. That being so, I struck out his claims of race and sex discrimination. They have no reasonable prospects of success because he agrees that the Respondent did not subject him to any treatment because of his race or sex.

44. His claim, which is a race and sex discrimination claim, is therefore struck out in its entirety.

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Employment Judge **Brown**
Date: 3 December 2024

SENT to the PARTIES ON

6 December 2024
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FOR THE TRIBUNAL OFFICE