EMPLOYMENT TRIBUNALS

Claimant: Mr A Madahar

Respondent: Sainsbury's Supermarkets Limited

Heard at: London Central **On:** 19 November 2024

Before: Employment Judge Khan

Representation
Claimant: Represented himself
Respondent: Mr H Zovidavi, counsel

JUDGMENT having been given orally on 19 November 2024 as follows:

(1) the claim for third party harassment is dismissed under rule 27;
(2) the remaining claims are struck out under rule 37(1)(e);

these are the written reasons for that judgment.

REASONS

The background to this hearing

The claim

1. The claimant presented his ET1 on 30 December 2023. This was more than six years after his employment with the respondent ended in May 2017 and after the alleged act of post-termination harassment in October 2017.

The respondent's application for strike out / deposit orders

2. On 21 June 2024, the respondent applied to strike out the claims under rule 37, as follows:

    a. Firstly, on the ground that the tribunal lacked jurisdiction to consider the following claims:

i. In respect of the unfair dismissal claim, the claimant lacked the requisite period of two years' continuous employment;
ii. Additionally, in respect of the unfair dismissal claim, the claimant had presented his claim more than six years outside the primary limitation period and he had not provided sufficient grounds to show that it had not been reasonably practicable to have brought his claim in time.
iii. In respect of the discrimination claims, the claimant had presented his claim more than six years outside the primary limitation period and he had not provided sufficient grounds as to why it would be just and equitable to extend the time limit.

b. Secondly, on the ground that it was no longer possible to have a fair hearing in respect of the claim and response.
c. Thirdly, on the ground that the claim was scandalous, vexatious and / or had no reasonable prospect of success.

In the alternative, the respondent applied for deposit orders to made of £1,000 per head of claim.

3. By a notice of hearing sent to the parties on 28 June 2024, the tribunal confirmed that a preliminary hearing had been listed on 4 September 2024, for 1 day, to consider the respondent's strike out application (no reference was made to the respondent's application for deposit orders).

The preliminary hearing on 4 September 2024

4. At the preliminary hearing on 4 September 2024 EJ Smart decided that further case management was required, for the reasons he gave and which are set out in the Case Management Order dated 13 September 2024 (the "CMO"), and he relisted the preliminary hearing for the respondent's strike out "application to be heard with some changes to what should be determined" (para 23, CMO). Although EJ Smart did not go on to enumerate the matters to be determined, he highlighted that "[t]he biggest difference to the new listing was that the out of time points would actually be heard rather than considered as a strike out" (para 25, CMO). EJ Smart recorded that the claimant had consented to this approach (para 26, CMO).

The claims and the issues

5. EJ Smart identified the following claims which the claimant had brought (para 1, CMO):

a. Automatic unfair dismissal
b. Harassment and / or direct race discrimination related to / because of race or religion / belief.
c. Post-termination race harassment.
d. Harassment under the Protection from Harassment Act 1997 ("PHA").
e. Personal injury because of discrimination.
f. Breach of contract.

6. The ET1 also included a claim for (ordinary) unfair dismissal.

7. EJ Smart recorded that the claimant withdrew his claim under the PHA and also the unfair dismissal claim (the claimant asserting instead that his dismissal was automatically unfair) (paras 11-12, CMO).

8. EJ Smart set out the remaining claims as follows (para 27, CMO):

27.1 [The claimant] claims that the reason he was dismissed was because he claimed personal injury against the respondent and that is a protected ground triggering an automatic unfair dismissal. That ground is not made clear, and the Claimant said he would seek advice and refer to the ground he relies upon under the Employment Rights Act 1996 when agreeing the list of issues with the respondent.

27.2 He also alleges 4 distinct acts of race or religion and belief discrimination as follows:

27.2.1 At some point whilst still working for the respondent and replenishing milk, the Claimant's manager Daniel Few said to him and others whom the Claimant describes as brown skinned colleague of Indian, Pakistani or Bangladeshi heritage "Why am I working amongst a bunch of bods?". When the Claimant asked him whether he was talking to him, the manager became angry, frowned and allegedly verbally abused the Claimant.

*27.2.2 The Claimant says that throughout October 2016, his supervisor Kabeer Hanif, failed to open the store doors in the early hours of the morning to allow the early morning shift into the shop to start their shifts. The area had unscrupulous drug and alcohol users as well as people leaving local clubs at "kick out time" who would be milling about the Sainsburys staff and would sometimes assault or verbally abuse them. On one occasion, a drug user asked the Claimant for a cigarette and the Claimant refused. The Man then pushed the Claimant and called him a "P*ki" amongst other verbal abuse. The Claimant claims the respondent should have protected him from this harassment and that was either a breach of contract and/or a breach of the Equality Act 2010 ["EqA"] as third party harassment.*

27.2.3 The Claimant claims that in May 2017, a colleague Joshua Moriarty, sent the Claimant nasty text message in WhatsApp saying that if the Claimant did not take back what he had said as part of his personal injury claim, Mr. Moriarty was going to tell the Claimant's wife that the Claimant was having affairs and also verbally abused the Claimant and made physical threats to him. The Claimant still has the WhatsApp messages.

27.2.4 Post termination of employment, the Claimant needed to pick up some documents from his former workplace

in approximately October 2017. He met a supervisor Danni Clemmings at the shop customer service desk and she let him through to the staff canteen area where the manager offices were. She sat the Claimant in the Canteen whilst she went to collect the documents for him. Mr. Moriarty entered the room and became immediately verbally and physically aggressive to the Claimant using racial slurs and had to be dragged away from the Claimant by a colleague called Mr. Kabeer Hanif and Ms Clemmings.

27.2.5 The Claimant claims that Ms Lesley Taylor HR manager was aware of these complaints because she dealt with the grievance process and that the complaints were upheld as part of that process.

Materially, EJ Smart added:

27.3 The Respondent argues that it has no documents or personal file for the Claimant given the efflux of time and only has a couple of high level general computer records for the Claimant showing his employment dates and broad reason for leaving.

Dismissal / strike out notice

9. EJ Smart decided to issue a dismissal / strike out notice to the claimant under rules 27 and 37, respectively, in respect of the claimant's claims that the alleged conduct set out at para 27.2.2 amounted to third party harassment under the EqA or a breach of contract. This notice, issued separately by the tribunal on the same date, warned the claimant that if he failed to provide his written reasons for why these claims should not be dismissed / struck out or to request a hearing at which he could make representations by 27 September 2024, or if he did provide his written representations and the tribunal did not agree with them, those claims would be either dismissed or struck out.

Dismissal of the third party harassment claim

10. The claimant responded on 11 September 2024 to object to the strike out of the breach of contract claim. In doing so, he provided the following reasons:

> "Legal advice given that loss of cash has occurred at nominal value in incident 2 [para 27.2.2, CMO] breach of employment contract causing future substantial monetary loss also including all other incidents toting up loss of income such as loss of earnings and future wages with the established inability to continue employment therefore a draft request to not strike out incident 2 breach of contract is to be filed asap in due course for the judges attention."

11. The claimant did not provide any objection in respect of the claim for third party harassment. During this hearing, the claimant confirmed that he did not proceed with that claim and I explained that it would therefore be dismissed under rule 27.

The claimant's application to adjourn this hearing

12. The claimant applied to the tribunal, on 14 November 2024, for a six-month adjournment of these proceedings on the grounds that he was in the process of securing legal representation, the respondent had not provided a specific document ("the red incident book") nor returned his phone calls and he cited "further illnesses delaying matters". No medical evidence was provided. The respondent objected to this application, on 18 November 2024, when it contended that: the claimant had had some 11 months to obtain legal advice; it had disclosed all relevant documents to the claimant; the phone calls the claimant had referred to had been without prejudice discussions; the claimant had failed to provide any medical evidence to support his application.

13. The claimant's application, which was treated as one to adjourn the proceedings for six months and also to postpone this preliminary hearing, was refused by EJ Adkin on 18 November 2024.

14. The claimant made a further adjournment application during this hearing.

15. I explained that rule 30A provided a discretion for a tribunal to permit such an application if there were exceptional circumstances.

16. Having identified the matters that fell to be decided at this hearing (see paragraph 17), I refused the claimant's application in the circumstances in which the claimant's previous application to adjourn these proceedings – which, as EJ Adkin had held, amounted also to an application to postpone this hearing – had been refused, the claimant was unable to explain nor substantiate the existence of any exceptional circumstances which potentially warranted an adjournment under rule 30A, the fact that this was not the first preliminary hearing at which at least some of the same issues fell to be determined and the claimant confirmed that he was able to proceed to address the issues I had identified, if necessary (although his preference was to adjourn this hearing to enable him to secure legal representation).

The issues to be decided at this hearing

17. Having reviewed the respondent's application dated 21 June 2024 together with the CMO and canvassed the parties, I was satisfied that the following matters fell to be decided at this hearing:

    a. Whether the tribunal had jurisdiction to consider the breach of contract claim?
    b. Whether the discrimination claim should be deemed to be in time on just and equitable grounds?
    c. Whether the unfair dismissal claim should be deemed to be in time because it had not been reasonably practicable for the claimant to have brought this claim in time and the further period taken to bring the claim was reasonable?
    d. Whether to strike out the claims on the ground that it was no longer possible to have a fair hearing?

18. Mr Zovidavi was broadly content with this approach. As noted, the claimant confirmed that he was able to address these issues, if necessary.

19. The claimant referred to several documents which were potentially relevant to issues (b) and (c) i.e. five psychiatric reports, a document concerning CBT treatment and two orders made by the First Tier Tribunal, which he said he had sent to the tribunal and hand-delivered to the respondent, which were not in the bundle and which Mr Zovidavi had not seen. The claimant had most recently referred to these documents in an email sent to the tribunal and the respondent on 5 September 2024. During the lunch adjournment I asked our clerk to search the tribunal's records for these documents. They could not be located. Accordingly, when we resumed after lunch I confirmed that in the time remaining the focus would be on issue (d) as this would not require any medical evidence to be considered.

The relevant legal principles

20. A tribunal has the power, under rule 37(1)(e) to strike out a claim or a response on the ground that it is no longer possible to have a fair hearing in respect of the claim or response.

21. Unlike the other grounds for which a claim or response can be struck out, this particular ground does not require the applying party to establish that it lacks merit (rule 37(1)(a)) nor is it referable to the other party's culpable conduct (rules 37(1)(b)-(d)). As was recently underlined by the EAT in Leeks v University College London Hospitals NHS Foundation Trust [2024] EAT 134, a claim can be struck out where a party against whom the application is made has done nothing wrong. The focus is whether or not a fair hearing remains possible.

The evidence

22. Reshma Chauhan-Patel, an Employee Relations specialist employed by the respondent, gave evidence under oath for the respondent. The claimant cross-examined this witness.

23. I made the following findings on the balance of probability.

Findings and conclusion

24. I found that the respondent had not retained any documents generated during the claimant's employment. This was evidently because of the respondent's data retention policy set out in the Colleague Privacy Policy, which provided as follows (emphasis added):

> "We will keep your personal information for the purposes set out in this privacy policy and in accordance with the law, relevant regulations and codes of practice. We won't retain your personal information for longer than is necessary. In most cases, our retention period will come to an end 4 years after the end of your employment with us."

During his cross-examination of Ms Chauhan-Patel, the claimant accepted that the respondent had this policy and did not dispute the relevant part of Ms Chauhan-Patel's witness statement (paragraph 8).

25. The only information about the claimant which the respondent had retained was on its case management system and was limited to the claimant's basic employment details (including, start and end date, working hours, place of work and reason for leaving). I found that the fact that the respondent had retained some information about the claimant on this database (in contrast to the individuals whom the claimant had named as alleged perpetrators or witnesses – see paragraph 27) was most likely because the claimant had brought this tribunal claim and a grievance to which these records referred.

26. Accordingly, had the claimant commenced proceedings in time or even out of time but within four years of his dismissal, any relevant documents generated during his employment which had been retained by the respondent would be available to it.

27. I also found that the respondent had not retained any documents in respect of the individuals named by the claimant as either alleged perpetrators (i.e. Mr Few, Mr Moriarty and Mr Hanif) or witnesses (i.e. Ms Clemmings and Ms Taylor). Nor were there any basic employment details relating to these individuals on the respondent's case management system. Accepting at face value the claimant's assertion that these individuals were employed on the dates when the alleged conduct is said to have occurred, I inferred from the absence of any documentary material or any other data, that they had each ceased to be employed by the respondent more than four years ago (nor more recently brought tribunal or other proceedings which remained ongoing). I should add that in relation to Ms Taylor, Ms Chauhan-Patel gave evidence that a search of the respondent's case management system had revealed that it employed someone with the same name, in the band 2 role of Customer Experience Colleague in one of its stores located in the west of England, since May 2023, and I found that it was very unlikely that this was the same person who had been employed by the respondent in 2016 as an HR Manager with responsibility for the claimant's store in north London.

28. Accordingly, had the claimant brought his claim in time or within four years of the date(s) on which their employment ended, the respondent would have been able to either contact the alleged perpetrators and witnesses in the course of their ongoing employment or attempt to make contact with them via any relevant employment documents which it had retained in order to investigate the claimant's allegations and obtain their witness statements.

29. To be clear, no criticism is made of the claimant for the delay in bringing his claims. I heard no evidence on the reasons for this delay and such evidence and those reasons were not relevant to the question of whether that delay meant that a fair hearing was no longer possible.

30. I concluded that the result of that delay was that were the claim to proceed to a final hearing, the respondent would be unable to adduce any witness

evidence to defend the allegations brought by the claimant regardless of any documentary evidence the claimant was able to disclose, whereas the claimant would be able to rely on his witness evidence. This would leave the respondent in the position of having to put the claimant to proof with no opportunity to adduce its own evidence to defend the claim. I was satisfied that in these circumstances, it was not possible to have a fair hearing.

31. To illustrate the point:

    a. In respect of the unfair dismissal claim – putting to one side the issue that the reason why the claimant claimed that his dismissal was automatically unfair remained unclear – even were the claimant able to disclose evidence relating to the investigation and disciplinary process which culminated in his dismissal, the respondent had been deprived of the opportunity to adduce evidence from the investigation manager, if there had been one, and from the manager who took the decision to dismiss the claimant ostensibly by reason of his ill-health. That evidence would be potentially of central importance to the tribunal's analysis of the reason for the claimant's dismissal as well as whether, if the respondent were able to show that it dismissed the claimant because of the potentially fair reason of capability (ill-health), that decision was fair or unfair.
    b. In respect of the discrimination claim: the respondent no longer had the opportunity to adduce evidence from Mr Few and Mr Moriarty, who were alleged to have discriminated against or harassed the claimant and whose alleged conduct save for a single WhatsApp message centred on alleged verbal abuse and in which the alleged language used was not intrinsically related to race (27.2.1 and 27.2.3) or had not been particularised by the claimant (27.2.4). That evidence would be potentially of central importance to the tribunal's analysis of whether the alleged conduct had occurred and, if so, on whether had been because of or related to the claimant's race.
    c. In respect of the breach of contract claim – putting to one side the issue of whether the tribunal had jurisdiction to consider such a claim – the respondent no longer had the opportunity to adduce evidence from Mr Hanif. That evidence would be potentially of central importance to the tribunal's analysis of whether the alleged conduct had occurred.

32. The claimant referred me to Phipps vs Priory Education Services Ltd [2023] EWCA Civ 652. I explained that as that case centred on the issue of whether the claimant could rely on the default of their legal representative when making an application for reconsideration in circumstances in which the claim had been struck on the grounds of a failure to comply with an order of the tribunal and that the claim had not been actively pursued, it was not relevant to the question I was required to decide.

33. I should also record that the claimant submitted that the respondent's strike out application was based on false pretences and concealment. However, in the absence of any evidence to substantiate those allegations and in the circumstances in which the claimant accepted, and I found, that the respondent had a data retention policy which generally limited the

retention of employee records to a 4-year period following the cessation of their employment, and in which I also found that the respondent had not retained any records in respect of the alleged perpetrators and witnesses named by the claimant and in which it had retained only very limited information in relation to the claimant, I rejected these submissions.

34. I therefore decided to strike out the claim under rule 37(1)(e) as I was satisfied that a fair hearing was no longer possible.

Employment Judge Khan

Date 20.12.2024

REASONS SENT TO THE PARTIES ON

31 December 2024

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FOR EMPLOYMENT TRIBUNALS