EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

CLAIMANT **Mr D Endrojono**

RESPONDENT **High Commission of Brunei Darussalam**

ON: **13 December 2024**

Appearances:

For the Claimant: In person
For the Respondent: Ms Cho, litigation consultant

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(i) The Claimant's claim that he was subjected to a detriment for making a qualifying protected disclosure has no reasonable prospect of success and is struck out;

(ii) the Claimant's claim that the Respondent's failure to provide him with a house in Brunei upon retirement amounts to unlawful race discrimination has no reasonable success and is struck out;

(iii) the Claimant's claims that the Respondent discriminated against him because of his age and or race when they paid him less than his comparators and or failed to promote him have no reasonable prospect of success and are struck out.

(iv) The Claimant's claims under section 44 of the Employment Rights Act 1996 and in relation to the claim relating to his retirement benefit may, subject to clarification as set out in the accompanying order, proceed to a hearing.

REASONS

1. By a claim presented on 29 December 2021, the Claimant bought a number of complaints. In his ET1 he ticked boxes for race discrimination, redundancy payment, arrears of pay and "other payments". He asked for (i) arrears of pay since his salary had stopped, (ii) his "retirement benefit to be paid in full and (iii) the Respondent to buy him a house so that he could retire. He attached a number of documents to his claim.

2. Following a preliminary hearing before Judge Brown, the claim was set down for full merits hearing in over five days in June 2024 but, for reasons set out in the resulting case management order, communication difficulties meant that hearing was postponed and the time was used to further clarify the issues in the claim. Those issues are set out in the schedule to this Judgment.

3. This case was then listed for a one day open preliminary hearing to consider the Respondent's application for a deposit and/or a strike out order made on 21st June 2024. The Claimant had responded to that application by a number of different emails which I had before me. This included a document headed "Summary of my claims" and another which contained his response to the strike out application. He also sent a further email after the hearing (referring me to a letter he had written to the Deputy High Commissioner in 2024 i.e. after the presentation of the claim) which I have read, but which does not change the conclusions that I have reached.

4. The Claimant's first language is not English and there were some difficulties in communication. I had a bundle and the Respondent's application in writing and several documents from the Claimant. The bundle had been prepared for the abortive full merits hearing in June, and it was not appropriate for me to have regard to all the documents in the bundle. A strike out application requires a Claimant's case to be taken at its highest and should not be turned into a short and peremptory hearing.

5. The liability issues are set out at the end of this Judgment. The Claimant brings claims of:

    a. detriment for making a qualifying protected disclosure
    b. health and safety detriment
    c. direct race discrimination: and
    d. direct age discrimination
    e. detriment for making a protected disclosure.

<u>The law</u>

6. The provisions for strike out are set out under Rule 37 of Schedule 1 of the Employment Tribunal Rules of Procedure 2013[1], which provide that a Tribunal may strike out all or part of a claim on the basis that it has no reasonable prospect of success (Rule 37(1)(a), that the manner in which the proceedings have been conducted by on or behalf of a party have been scandalous, unreasonable or vexatious (Rule 37(1)(b)) or for non compliance with the Rules or any Order of a Tribunal (Rule 37(1)(c)).

7. A strike out order is only appropriate in exceptional cases: Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 CA. It is an extremely high test, and is particularly high where the complaint is one of discrimination. The power to strike out has been described by the Court of Appeal as draconian and not a power to exercise lightly: Blockbuster Entertainment Ltd v James [2006] IRLR 630.

8. The main principles relevant to the striking out of discrimination claims were summarized in Mechkarov v Citibank NA [2016] ICR 1121. They are:

   a. Only in the clearest case should a discrimination claim be struck out;
   b. Where there were core issues of fact that turn on oral evidence they should not be decided without hearing oral evidence;
   c. The claimant's case must ordinarily be taken at its highest;
   d. If the claimant's case was "conclusively disproved by" or was "totally and inexplicably inconsistent" with undisputed contemporaneous documents it could be struck out.
   e. A tribunal should not conduct an impromptu mini trial of oral evidence or resolve core disputed facts

9. Notwithstanding the high threshold which applies before any strike out of discrimination complaints, it is clear that such complaints may be struck out in appropriate cases. In Anyanwu v South Bank Student Union (CRE intervening) [2001] ICR 391 Lord Hope stated

   "Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail."

10. In Ahir v British Airways [2017] EWCA Civ 1392 Underhill LJ stated

    "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.

[1] I refer to the 2013 rules as the case was decided before the new rules came into effect but the relevant provisions of the 2024 rules are the same.

11. Deposit orders are addressed at Rule 39 of the 2013 Rules as follows:

> "(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.
>
> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21."

12. The test for the ordering of a deposit is that the party has *little* reasonable prospect of success; as opposed to the test under Rule 37 for a strike-out (*no* reasonable prospect of success). Although that is a less rigorous test, the Tribunal must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim.

13. When determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to considering purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case. Given that it is an exercise of judicial discretion, an appeal against such an order will need to demonstrate that the order made was one which no reasonable Employment Judge could make or that it failed to take into account relevant matters or took into account irrelevant matters

Undisputed facts.

14. The Claimant began working for the Respondent in 1997 and latterly was employed as an assistant public relations officer. His duties included meeting and greeting dignitaries who were arriving in the UK from Brunei and ensuring their accommodation and transportation.

15. The Claimant's contract of employment, issued in 1997 and never updated, provided a normal retirement age of 55, but with mandatory retirement at 60. Following the introduction of age discrimination legislation the Claimant continued to work for the Respondent after the age of 60.

The contract also provided for a "retirement benefit". This, subject to conditions provides, inter alia, that employees with 16 years service or more will receive "*8% of the total salary earned throughout the whole period of service".*

16. When the Claimant reached his 60th birthday in 2016 the Claimant was informed that he would be paid a retirement gratuity in relation to his service from 3 November 1997 until 22 December 2014 and the cheque was available for collection. The Claimant said he was not retiring and did not collect the cheque.

17. Following the national lockdown for Covid 19 in March 2020 the Claimant was permitted to work from home, (though it is not clear whether he had any duties to perform.)

18. The Claimant was instructed to return to work in a letter dated 18 May 2021. On 18 July 2021 he informed the Respondent that he would not be returning to work because of the worsening conditions of Covid 19, and the associated risks given his age, his diabetes and his ethnicity.

19. At a meeting on 3rd August 2021 the Claimant said it was unsafe to work in a room with 2 other people and he was not near a window. In August 2021, the Respondent offered the Claimant a desk in a room by himself which had two windows. The Claimant objected because it was a room through which others had to pass in order to get to another office. The Claimant described this as an "alleyway room". He refused to return.

20. The Respondent notified the Claimant that as from 20 September his salary would be "deferred" as he was absent without authorisation.

21. Various letters were sent to the Claimant requiring him to return to work and outlining the health and safety measures that the Respondent had put into place to mitigate against the risk of Covid 19.

22. The Claimant did not respond to a number of letters seeking consent for the Respondent to obtain a medical report from his GP or consultant. He remained at home.

23. The Claimant submitted his claim on 29 December 2021, (after early conciliation from 28 October to 9 December 2021). The parties understood that the Claimant was still in employment although he had not been paid, or attended work, since 20 September 2021.

24. In March 2022 he received a payment of £22,307 referred to as a gratuity payment for his service from 3 November 1997 until 22 December 2014 (his 60th birthday). I infer from this that the Claimant is no longer employed by the Respondent.

25. The Claimant was not promoted during his time at the Respondent. He complains of direct race discrimination in relation to his pay and

promotions. The Claimant is Indonesian and compares his treatment to those who are not Indonesian.

26. His comparators are Ms Sehmi, Ms Sadiq, and Mr Batraj. Ms Sehmi and Mr Sadiq are British and Mr Batraj is Singaporean. All were employed as Public Relations Officers. Ms Sadiq had been promoted to that position in 1997 and Mr Batraj and Ms Sehmi in 2012.

27. The Claimant said he had

> (i) complained about his salary and others being promoted over him in 2005 but did not get a response,
> (ii) applied for the job of Deputy Head the Protocol Department in 2012
> (iii) written to the High Commissioner to complain again in 2014.

28. The Claimant says he should be given a house "because many of my colleagues who had returned home to Brunei had been given a house for free". He was unaware of any specific person, however, who had been received a house on retirement.

29. The Brunei government runs a scheme "The National Housing Scheme" open to all citizens of Brunei whereby they can apply. I was referred to a Wikipedia article headed "public housing in Brunei" which refers to a government development programme which aims to provide ownership of land or homes to the citizens of Brunei. It is not dependent upon employment by the High Commission of the government of Brunei.

Conclusions

House in Brunei. Issues 6.1-6.5

30. The Claimant's case that the Respondent's refusal to provide him with a with a house in Brunei amounts to direct race discrimination because he is not a citizen of Brunei has no reasonable prospect of success.

31. It is clear that this is not a benefit provided by the High Commission or by virtue of employment. The Claimant's case is that, by virtue of the Vienna Convention on Diplomatic Relations, the High Commission is effectively the same as the government of Brunei, which is in turn an absolute monarchy. However it is clear that the scheme is not an employment benefit. The Tribunal has no jurisdiction to consider this claim.

Pay and promotion Issue 6.5 - 6.10 and 7.1 – 7.6

32. The Claimant's case that he was paid less than his colleagues on the same level/grade as him because of his race/ because he was Indonesian has no reasonable prospect of success.

33. The Claimant accepts that none of his comparators were at the same level or grade as he was. None were therefore in materially comparable circumstances. All three were Public Relations Officers. The Claimant was at all times an Assistant Public Relations Officer. There was therefore no basis for the allegation that he was paid less then others in materially similar circumstances. The reason for the difference is the grade, not race. For the same reason the Claimant's case that he was paid less than they were because of his age also has no reasonable prospect of success.

34. It is also Claimant's case that the Respondent failed to promote the Claimant and that this amounted to less favourable treatment because of race. He relies on the same comparators, all of whom are younger than he is. The Claimant appeared to accept that he did not apply for promotion when they did. However the Claimant says he wrote numerous letters of complaint about the Respondent's failure to promote him. The last such letter of complaint in 2014.

35. The last of his comparators to be promoted to Public Relations Officer was promoted in 2012. Even if the Claimant had applied for these positions the last comparator was appointed in 2012. There are strict time limits in the Tribunal for the presentation of claims and the Claimant has not explained any reason why he did not bring his complaints before 2021. There is no reasonable prospect of this claim being held to be in time.

<u>Retirement Benefit Issues 7.7 – 7.12</u>

36. Before Employment Judge Brown has put his claim for an additional retirement benefit as a claim of direct age discrimination. The Order records (at paragraph 18) that the Claimant "relies on age discrimination only in relation to the retirement payment." The Claimant has not resiled from that position and EJ Nash recorded that the list of issues was final.

37. As identified by the Nash Tribunal the less favourable treatment alleged is that "the Respondent paid all staff a retirement payment based only on their years of service up to age 60, rather than on their service up to date of retirement, or to put it another way, that service up to age 60 counted towards a retirement payment, whereas service after 60 did not."

38. Logically this cannot be a claim of direct age discrimination as all employees are treated the same. Some staff may choose to work beyond 60 and others may not but the condition applies to all staff.

39. The claim could be a made as a claim of indirect age discrimination though it has not been pleaded in that way. It also appears to me from the original particulars of claim that it has been pleaded as a breach of contract claim, (rather than as a discrimination claim). At the time the parties believed that he was still employed by the Respondent so that a breach of contract claim would not have been possible, and no payment had been made. Although he told Employment Judge Brown that his claim was one of age discrimination only, I am not entirely convinced that his

was a formal concession although, as I was not at that hearing, the position remains moot.

40. As was said in Cox v Adecco UKEAT/ 0339/19 is not possible to decide whether a claim has reasonable prospect of success if it is not clear what it is. For that reason I have concluded that it is not appropriate to strike out the claim and I have made an order for the Claimant to provide further particulars to clarify this aspect of his claim.

Protected disclosure detriment. Issues 3.1 - 3.4

41. It is not reasonably arguable that the Respondent refused to permit the Claimant to work from home because he had told them that his office was unsafe. The instruction to the Claimant was the same instruction that was given to all locally engaged employees. The first such instruction was given to the Claimant before he had raised issues as to safety. The Respondent sought to accommodate the Claimant, but the proposed accommodation was not acceptable to the Claimant.

42. The instruction to work at the desk in the photograph page 367 of the bundle was not a detriment but an accommodation because the Claimant had objected to the first proposed workstation.

43. I conclude that the claim that he was subjected to a detriment for making protected disclosure has no reasonable prospect of success.

Health and safety detriment. Issues 4.1- 4.3

44. As identified in the list of issues the Claimant claims that he was subjected to a detriment, namely the withholding of his wages, because "in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he– while the danger subsisted – refused to return to his place of work".

45. The Claimant says that he reasonably believed he could not return to work because of his age, diabetes and Covid. The Claimant told the tribunal that he was not concerned with travel to work because he had bought himself a moped. He also said that he was not concerned with the meet and greet element of his job because he could wear a mask and was provided with a car and a driver but that he was concerned about having to work at a desk which was in an "alleyway" where people had to pass through.

46. Case law binding upon me makes it plain that neither a strike out application nor an application for the payment of a deposit should be turned into a sort of "mini trial". In the absence of hearing proper evidence from the Claimant I cannot say on the basis of the snapshot I have had today that this claim has no reasonable prospect of success. While on the face of it the claim appears to be a weak one, (by August 2021 there were no longer any government-imposed restrictions, and the older population had had the opportunity be vaccinated) I do not consider that it

is appropriate to make a deposit order. However, the Claimant should consider carefully how he is to show that he can satisfy the relevant legal test.

47. I have listed the remaining parts of the claim for a two day hearing in July.

_____
Employment Judge Spencer

Date: 12 February 2025

JUDGMENT SENT TO THE PARTIES ON

19 February 2025
.....

.....
FOR THE TRIBUNAL OFFICE

LIST OF ISSUES

Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, some complaints may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the detriment complaint made within the time limit in the Employment Rights Act 1996? The Tribunal will decide:
1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Protected disclosure

2.1 It is agreed that the claimant made a qualifying protected disclosure as defined in section 43B of the Employment Rights Act 1996 by telling the respondent that his office was unsafe during the Covid pandemic including on 4 December 2021 by way of a letter to the High commissioner.

Detriment (Employment Rights Act 1996 section 48).

3.1 It is agreed that the respondent told the claimant to work at the desk in the photograph at p367 of the bundle.

3.2 Did the respondent do the following things:
3.2.1 Refuse to permit the claimant to work from home.

3.3 By doing either or both of the above, did it subject the claimant to detriment?

3.4 If so, was it done on the ground that they made a protected disclosure?

Health and Safety Detriment (Employment Rights Act 1996 section 44(1A)(a))

4.1 It is agreed that the claimant refused to return to work in September 2021 and his stated reason was he believed that his workplace was unsafe due to Covid concerns.

4.2 Did the claimant's failure to return to work come within s44(1A)(a) in that in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonable have been expected to avert, he– while the danger subsisted – refused to return to his place of work?

4.3 The respondent accepts that it failed to pay the claimant because of his refusal to return to work and that this amounted to a detriment.

6. **Direct race discrimination (Equality Act 2010 section 13)**

6.1 The claimant is Indonesian, and he compares his treatment with people who are not Indonesian.

6.2 It is accepted that the respondent failed to provide the claimant with a house in Brunei upon retirement.

6.3 Was that less favourable treatment? The respondent contends that it does not provide houses to any employee.

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant has not named anyone in particular who they say was treated better than they were.

6.4 If so, was it because of race?

6.5 Did the respondent's treatment amount to a detriment?

6.6 Did the respondent pay the claimant less than colleagues at the same level/grade?

6.7 Did the respondent fail to promote the claimant?

6.8 Were either of these acts at 6.6 or 6.7 less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.
If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant compares his treatment with the following people, referring to the numbers in the respondent's table at page 356
1. Mr Sadiq
2. Ms Sehmi
3. Mr Balraj.

6.9 If so, was it because of race?

6.10 Did the respondent's treatment amount to a detriment?

Direct age discrimination (Equality Act 2010 section 13)

7.1 The claimant's age group is 60 years old and over and they compare their treatment with people in the age group under 60 years old.

7.2 Did the respondent do the following things:
7.2.1 Paying the claimant less than colleagues on the same level/grade?

7.3 Was that less favourable treatment?
The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.
If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant compares his treatment with the following people, referring to the numbers in the respondent's table at page 356
1. Mr Sadiq
2. Ms Sehmi
3. Mr Balraj

7.4 If so, was it because of age?

7.5 Did the respondent's treatment amount to a detriment?

7.6 In respect of salary, the respondent does not rely on a justification defence.

7.7 It is agreed that the respondent paid all staff a retirement payment based only on their years of service up to age 60, rather than on their service up to date of retirement, or to put it another way, that service up to age 60 counted towards a retirement payment, whereas service after age 60 did not.

7.8 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.
The claimant compares his treatment with staff whose service under age 60 accrued to their retirement payment.

7.9 If so, was it because of age?

7.10 Did the respondent's treatment amount to a detriment?

7.11 In respect of the calculation of the retirement payment, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

7.11.1 To provide for employees upon retirement at age 60.

7.12 The Tribunal will decide in particular:

7.12.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
7.12.2 could something less discriminatory have been done instead;
7.12.3 how should the needs of the claimant and the respondent be balanced.