EMPLOYMENT TRIBUNALS

Claimant: Mr Kwame Arthur
Respondent: LHR Airports Ltd

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Watford Employment Tribunal (by CVP)
On: 3 February 2025
Before: Employment Judge Alliott

Appearances
For the claimant: Ms Elizabeth Lanlehin (counsel)
For the respondent: Mr Jason Braier (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant is granted permission to amend his claim to include a claim of direct race discrimination.

2. The claimant's claims of unfair dismissal and direct race and/or sex discrimination are struck out pursuant to Rule 38(1)(a) of the Employment Tribunal Procedure Rules 2024 as they have no reasonable prospect of success.

REASONS

Amendment

1. On 17 October 2024, the claimant made an application to amend his claim to include a claim of direct race discrimination.

2. The application to amend has been set out in a particulars of claim which expands on the original claim form. The only objection made to the application is in relation to the race discrimination claim. The balance of the particulars of claim is not objected to by the respondent.

3. Ms Lanlehin and Mr Braier both put in skeleton arguments for which I am grateful.

4. The facts relied upon in support of the application to amend are the same as arise in so far as the unfair dismissal and/or sex discrimination claims are concerned. The claimant accepts that the application is late but states that he did not include a race claim as he was not represented at the time.

5. I have to take into account the principles set out in Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT and the more recent cases which emphasise that the balance of hardship is, at the end of the day, the key issue.

6. The nature of the amendment is to add a new head of claim, albeit in the context where the factual allegations have not changed. In my judgment, this is a relabelling exercise.

7. The applicability of time limits indicates that this claim is being raised five months out of time. I do not accept the claimant's explanation for the delay being that he needed representation as he was clearly capable of ticking the sex discrimination box on the ET1 claim form and would have been able to do so had race been in his mind at the time. Further, the claimant did not raise his race as an issue either in the disciplinary hearing or in the appeal hearing. That said, it is always open to an individual, upon reflection, to consider that their treatment may have been as a result of their race and so want to include such a claim after initiating an employment tribunal claim. If the amendment is allowed, the respondent would still be able to take the time issue at the full merits hearing.

8. The timing and manner of the application is that it was made at the first preliminary hearing and once the claimant had representation. In my judgment, the application will not interfere with the course of the litigation of this case.

9. I have to balance the hardship between the parties. Obviously enough in not granting the application the claimant would be deprived of a head of claim. In granting the application the respondent's three witnesses would have a serious allegation added to the allegations against them.

10. In all the circumstances, in my judgment, the balance of hardship comes down in favour of the claimant and I allow the amendment.

Strikeout and/or deposit order

11. I was provided with a hearing bundle of 113 pages. Both Ms Lanlehin and Mr Braier provided skeleton arguments. I had an authorities bundle.

12. Pursuant to Rule 38 of the Employment Tribunal Procedure Rules 2004 I have a discretion to strike out all or part of a claim if it has no reasonable prospect of success. Further, I may make a deposit order if I consider that the claim or parts of the claim have little reasonable prospect of success.

The law

13. I take into account that the Employment Appeal Tribunal has, on numerous occasions, stressed that it is only in the most obvious of cases that a strike out order would be appropriate in a discrimination claim.

14. The respondent accepts that this is a high bar. In Behad v HSBC Bank Plc [2022] EAT 83,, HHJ Tayler stated:-

> "To strike out a claim the Employment Judge must be confident that at trial, after all the evidence has come out, it is almost certain to fail, so it genuinely can be said to have no reasonable prospect of success at a preliminary stage, even though disclosure has not taken place and no witnesses have given evidence,"

15. The respondent also acknowledged that extra care had to be taken in discrimination cases, and that in Anyanwu v South Bank Students Union [2001] IRLR 305, the House of Lords noted the high public interest in determining discrimination claims on the merits. However, their Lordships acknowledged that strike out was appropriate in the "most obvious and plainest of cases" and, per Lord Hope:

> "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."

16. Further, in Chandhok v Tirkey [2015] IRLR 195, Langstaff P noted that the Anyanwu decision stops short of a blanket ban on strike out applications succeeding in discrimination claims, and that there may still be occasions when they can properly be struck out. Examples given include where:

> "…there is really no more than an assertion of a difference in treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura International Plc [2007] IRLR 246 (CA):
>
> "…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 discriminaiton. "

17. Further, whilst a claimant's case must ordinarily be taken at its highest when determining a strike out application on the merits (Mechkarov v Citybank NA [2016] ICR 1121), it will only be in an exceptional case that there will be a strike out where the central facts are in dispute. The Court of Appeal held in Ahir v British Airways [2017] EWCA Civ 1392 that:

> "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."

The facts

18. In this case I have to take the claimant's claim at its highest.

19. The claimant accepts that on 1 November 210232 he had a meeting with a security operations manager during which he was informed that a fact finding

investigation was being commenced due to an allegation of sexual assault which had been made against him by a junior colleague. The claimant was suspended

20. It is the claimant's case that on 16 November 2023 he had an investigation meeting. I have read the notes of that investigation meeting and the junior colleague's allegations were put to the claimant in detail.

21. It is the claimant's case that at a disciplinary hearing on 28 December 2023 he was dismissed. It is the claimant's case that he had full details of the allegations made against him at least five days in advance.

22. It is the claimant's case that his appeal was not successful on 14 February 2024.

23. The claimant's basic complaint in his claim form is that from the beginning of the investigation he was treated unfairly because he was male and the assumption was already made that he was guilty. By virtue of the amendment that I have allowed, that complaint essentially extends to on the grounds of his race as well.

24. The full merits hearing will have placed before it the statement made by the junior colleague which is summarised in the investigating officer's report. The junior colleague was interviewed on 1 November 2023 and gave a detailed account of what she alleged took place. I do not set out here what her evidence was but it is clear she was alleging a very serious sexual assault and attempted rape.

25. The evidence that would be before the full merits hearing was that the claimant accepted that he was alone on 13 October with the junior colleague in a restroom.

26. The evidence before the full merits hearing would include a statement from a colleague to whom the claimant complained about her treatment the next day. As such, there would be evidence of contemporaneous complaint.

27. The full merits hearing would not be deciding on the claimant's guilt or whether he had in fact committed the sexual assaults alleged. The issue for the full merits hearing would be whether the decision makers, whether at the disciplinary hearing or at the appeal stage, had reasonable grounds upon which to base their decision. In my judgment they clearly did. Further, in my judgment, the claimant is plainly just making an assertion that it was on the grounds of his sex and/or race when it is as plain as plain can be that it was due to the serious allegations of sexual misconduct.

28. I have considered the various procedural flaws that the claimant is seeking to allege in paragraph 12.1 of the amended particulars. The claimant was provided full details of the sexual allegations in good time before his disciplinary hearing. Statements were taken from the junior colleague and her colleague who she spoke to the next day. CCTV was irrelevant as the restroom was not covered. The notes of the interviews are disputed by the claimant, but nothing really turns on this. The claimant categorically denied the allegations when they were put to him. That is recorded. The respondent did not ignore the claimant's evidence. It was clearly taken into account but the junior colleague's evidence was preferred. Any argument that the decision to dismiss was outside the band of reasonable responses of a reasonable employer is doomed to failure in my judgment.

29. Further, even if a procedural defect was to be established, in my judgment it would be inevitable that it would be established that with a fair procedure there was 100% certainty the claimant would have been dismissed in any event (Polkey).

30. I have come to the conclusion that this is a hopeless case that has no reasonable prospect of success on all three heads of claim, namely unfair dismissal, sex and/or race discrimination. Accordingly I strike it out.

Approved by:

Employment Judge Alliott

Date: 27 February 2025

JUDGMENT SENT TO THE PARTIES ON
4 March 2025

FOR THE TRIBUNAL OFFICE

Recording and Transcription

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