



## **EMPLOYMENT TRIBUNALS**

**Claimant:** Mr. M. Alphonse

**Respondent** Booker Limited

**Heard at:** Newcastle upon Tyne Employment Tribunal

**On** 18 March 2025

**Before:** Employment Judge T.R. Smith

### **Representation**

**Claimant:** In person

**Respondent:** Mr. Grundy (counsel)

## **JUDGMENT**

1.The claimant's complaints of direct discrimination and harassment are struck out as having no reasonable prospect of success.

**Written reasons pursuant to a request of the claimant dated 15 April**

**2025**

## **The evidence**

- 1.The tribunal had before it a bundle purportedly consisting of 117 pages although there were errors in the pagination, for example documents numbered 197, 208 and 230 appeared.
- 2.A reference in this judgement to a page number is a reference to a document in the bundle.
- 3.The tribunal did not hear oral evidence.

## **The issues**

- 4.This matter came before the tribunal pursuant to an order made by Employment Judge Martin on 16 December 2024 when she determined that there would be a public preliminary hearing to consider: –

*“Whether the claimant’s claims of race discrimination should be struck out on the basis that the claimant has no reasonable prospect of success in establishing that the claims were presented in time and/or were part of a continuing act and/or that it would be just and equitable to extend time*

*Alternatively, whether the claimant should be ordered to pay a deposit order to pursue his claims of race discrimination on the basis that those claims have a little reasonable prospect of success in him establishing that the claims were presented in time and/or part of a continuing act and/or that it would be just and equitable to extend time”*

- 5.The tribunal considered the key issue was whether there was no reasonable prospect of the claimant establishing a continuing act given the claimant had expressly conceded his claim was not presented within time . The tribunal determined it would be undesirable to look at the just and equitable point without hearing evidence as there would be an overlap with the evidence heard at trial ( if it so proceeded).It was for this reason that the issue has not been addressed by the tribunal.
- 6.The claimant had made an application to amend his claim form prior to the hearing and it had been directed that the application would also be addressed at the public

preliminary hearing. The amendment application was opposed by the respondent (52/53) but granted by the tribunal for the oral reasons it gave.

### **The undisputed facts**

7.The claimant was employed by the respondent as an area manager. The respondent is a wholesale cash-and-carry food and drink business.

8.The claimant self identifies as British Caribbean.

9.His employment commenced on 25 September 2015 and ended on 09 September 2024 when he resigned with immediate effect. The reasons he gave was ongoing stress and direct racial discrimination (112).

10.The claimant presented his claim form to the tribunal on 11 September 2024.

11.Prior to presenting his claim form he entered into early conciliation on 31 July with a certificate being issued on 01 August 2024.

12.Thus any act or omission that occurred prior to 01 May 2024 was, on its face, out of time.

13.The claimant had been suspended by the respondent on 20 July 2024 pending an investigation into allegations of gross misconduct.

14.On the same day the claimant raised a grievance alleging discrimination on the grounds of his race. (105/106). A grievance hearing was eventually arranged for 06 September.

15.The claimant was absent from work from 02 August 2024 due to ill health. Prior to the completion of the respondent's disciplinary and grievance investigation the claimant resigned his employment.

### **The pleadings**

16.The claimant pursued complaints of direct race discrimination and harassment. He did not pursue a complaint of ordinary constructive unfair dismissal or allege that his dismissal was discriminatory.

17.The claim form can be summarised as follows: –

- the claimant alleged in December 2021 his supervisor Ms MacDonald told him to *“play the white man”*. He raised a formal complaint and considered that the complaint was not adequately dealt with.
- A few weeks later he alleged Ms MacDonald asserted the claimant had allowed staff to vape in the depot which was untrue and he was issued with a letter of concern.

18. It is proper to say at the private preliminary hearing held before the Employment Judge Martin on 16 December 2024 the claimant said there were further incidents .

19. Employment Judge Martin indicated to the claimant if he wished to raise those matters he would need to make an application to amend his claim form.

20. He promptly did so on 17 December (45 to 48).

21. The tribunal granted the amendment although not without considerable hesitation.

22. The new allegations can be summarised as follows: –

- he had raised a grievance in 2022 and was informed that no further action would be taken on it and had raised a grievance on 20 July 2024 and what the respondent then did lacked transparency and showed a failure to conduct a thorough investigation. Of course because there is no relation back principle with an amendment application even if the claimant was right the incident of 20 July 2024 was out of time.
- On a date in May 2024 whilst reviewing job applications Ms MacDonald said words to the effect *“you can’t take any of the Asians on as we won’t be able to understand them...”* The claimant appeared to assert this was direct discrimination as he contended that a branch manager Mr Trewin would not have been exposed to the same situation. Again because there is no relation back principle the incident of May 2024 was out of time.
- On 08 April 2023 and 24 August 2024 Ms MacDonald told the butchery manager to *“fuck off”* because of concerns she had as to his performance. The tribunal had before it a statement from the butchery manager, a Mr Ward and he made no reference to such an incident of 08 April 2023. The incident on 24 August 2024 occurred whilst the claimant was absent from work due to ill-health. Again because there is no relation back principle the incident of May 2024 was out of time.

## **Time**

23.The claimant accepted his claim form was out of time (41) and summarised the reasons as follows: –

- at the time of the white man incident ( ie., 2021) his line manager advised him not to pursue matters and this led him to believe that matters would be addressed properly
- over time what the claimant perceived to be unresolved incidents and “continuous harassment” causing severe anxiety which required medication from his GP
- personal circumstances led him to being off work for some three weeks due to stress and anxiety and as a single father with an autistic daughter the situation impacted upon by his health and personal life prompting him then to file his claim.

24.In terms of the claimant’s health, which was relevant to the second and third points, the claimant produced a number of fit notes. The first dated 02 August 2024 indicating he was not fit for work. The reasons given were “*neurological issues and stress*” (197). A subsequent fit note dated 16 August referred only to urological issues and then the final fit note of 02 September 2024 referred to stress at work.

## **Strikeout/deposit orders, the legal framework.**

25.The approach the tribunal took was to look at the claimant’s case at its highest, given it was not hearing evidence, as Employment Judge Martin had set this case down for hearing under rule 52(1)(c).

26.“At its highest” did not mean that if were there were facts asserted by the claimant which were clearly directly contradicted by contemporaneous documentation or express concessions that those documents or concessions could not be taken into account.

27.The respondent sought a strike out order pursuant to rule 38. It had to establish that all of part of the claim had no reasonable prospect of success.

28.If that application was unsuccessful it then sought a deposit order or orders pursuant to rule 40. The threshold for such an order is lower namely the tribunal

must consider whether any specific allegation or argument had little reasonable prospects of success.

29.The tribunal began by reminding itself that in deciding whether or not to strike out a party's case it had to have regard to the overriding objective.

30.The tribunal also reminded itself that it should not strike out discrimination cases except in the clearest of cases, **Anyanwu -v- South Bank Student's union [2001] UKHL 14** although that was not to say that discrimination complaint could not be struck out in appropriate circumstances , see **ABM AMRO Management Services Ltd -v- Hogben UKAET/0266/09**

31.Even if the respondent satisfied the tribunal that a trigger point for strike out had been established, the tribunal still had to consider whether or not to exercise its discretion.

32.Turning to time limits and the position in respect of continuing acts the tribunal applied section 123 EQA 2010 which states:

*"Proceedings on a complaint...may not be brought after the end of –*

*(a) the period of three months starting with the date of the act to which the complaint relates, or*

*(b) such other period as the Employment Tribunal thinks just and equitable...*

*(3) for the purposes of this section – (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it.*

*(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*

*(a) When P does an act inconsistent with doing it, or*

*(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

### **No reasonable prospect?**

33.The first incident relied upon by the claimant was a comment made by Ms McDonald to *"play the white man"*. The claimant put his case on the basis that the allegation was not properly dealt with (38). Although the claimant said the incident

occurred in December 2021 it occurred a number of months earlier because there was a discussion with Ms Mac Donald about the issue on 22 October 2021.

34.The respondent did address the matter. It issued a letter of concern (akin to a warning) to Ms MacDonald on 04 November 2021. If the claimant believed the action taken by the respondent was inadequate and an act of racial discrimination he was almost three years out of time.

35.The way it was investigated and addressed had nothing to do with Ms Mc Donald. The matter was dealt with by Ms Smith, the HR and development manager, as is evidenced from the correspondence (198). She was the person responsible, on the claimant's assertion for not having not properly dealt with the matter. The tribunal will explain the relevance of this finding later in its judgement.

36.The second incident relied upon was the claimant said he was disciplined (i.e. given a letter of concern) for allowing people at the branch to vape.

37.Again the claimant's timeline was wrong. It was not a few weeks after the "*play the white man*" incident.

38.The claimant did receive a letter of concern but dated 23 September 2022 (102/103). The claimant accepted, as is evidenced from the documentation, that some of the matters that the respondent raised in that letter were valid. There was no suggestion that the penalty was capricious even on the admitted matters. The issue of the letter of concern as an act of discrimination has no reasonable prospect of success. More importantly the reason for the letter had nothing to do with vaping, the central allegation made by the claimant. Indeed there was no reference to vaping whatsoever in the letter. It follows that a fundamental plank of the claimant's complaint was undermined by the undisputed contemporaneous evidence. He was never disciplined for allowing vaping.

39.Significantly the author of that letter, and the person who imposed the concern was Mr Diskin, a regional director. Whilst on the claimant's case the allegation of vaping may have come from Ms McDonald the discriminatory act, the disciplining had nothing whatsoever to do with her.

40.The third incident lacked significant particularity. There was no suggestion Ms MacDonald had any involvement in either of the two grievances (i.e. the grievance in 2022 and the grievance dated 20 July 2024.. The first grievance was addressed and

the claimant did not pursue it further . He was years out of time in respect of the first grievance. Turning to the second grievance the claimant could not even start to adequately explain how a hypothetical white employee would have had his grievance resolved before resignation whereas the claimant did not.

41.The claimant could not explain how the lack of transparency, as he asserted, had anything to do with race

42.The fourth incident, the alleged comment made by Ms McDonald as regards the recruitment of Asians faced an insuperable difficulty. He told Employment Judge Martin that the incident occurred in March 2023 (38). That was contemporaneously recorded by the judge. The claimant asserted this was an error by the Employment Judge but at no stage, despite having her order for some months, had he written to the tribunal or to the respondent to correct that error.

43.Indeed, following the hearing in front of Employment Judge Martin the claimant wrote to the respondent's solicitors on a 25 February 2025 (113) to clarify his claim and made no reference to any such error.

44.Before this tribunal the claimant changed his account and said it was May 2024. The significance of what the claimant now said was May 2024 was not lost on the tribunal. The claimant had no reasonable prospects of showing the incident was , as he now claimed, in May.

45.The claimant put his case on the basis that Ms McDonald comments were made on the basis of an assumption that a black man would be more tolerant of such discriminatory comments than a white man. The empirical evidence is black people suffer greater levels of discrimination. The claimant's assertion had no reasonable prospect of success.

46.The fifth incident relied upon by the claimant was he alleged Ms McDonald told Mr Wood to *"fuck off"*. When the claimant was probed as to how it could be said this was discriminatory the claimant's case, at its highest was that Mr Wood was picked upon because he was friendly with him .That did not even start to go close to a complaint of discrimination against the claimant in any of its formats. . Even without that, the claimant faced insurmountable evidential difficulties because the incident he alleged occurred on 08 April 2023 was not a matter referred to by Mr Wood in a witness statement the claimant placed before the tribunal. The second swearing incident, on



24 August 2024 cannot have been an act of discrimination towards the claimant because he was not at work and did not hear it.

47.The tribunal had to determine whether the claimant had no reasonable prospect of establishing there was a continuing act, that is an act extending over a period as distinct from a succession of unconnected or isolated specific acts.

48.The case law makes it clear the obligation of the tribunal is to focus on the substance of the complaints. The tribunal has to examine whether the acts complained of were linked and whether there was evidence of a continuing discriminatory state of affairs, see **Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548**.

49.One factor that may be relevant in such an exercise is whether the same person or persons were responsible for the acts see **Aziz –v- FDA 2010 EWCA Civ 304** The claimant relied upon Ms McDonald. On the undisputed facts there is no reasonable prospect of that argument succeeding .The reality was there were a number of perpetrators of the alleged discriminatory conduct, as the tribunal has previously identified.

50.There were significant gaps in the chronology during which nothing unlawful was said to have occurred. That again pointed away from a continuing act.

51.The tribunal then stood back to carry out a holistic overview.

52.For a continuing act to exist the claimant must establish that what he says is discriminatory is at least arguable. As the tribunal have identified the purported continuing acts have no reasonable prospect of success on the basis of the clear and contemporaneous evidence.

53.The threshold for a strike out has been established. The tribunal then considered disposal and determined in this particular case the only proper order was to strike out the claim in his entirety. No lesser sanction was appropriate.

Employment Judge T.R.Smith

Date 07 May 2025

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