EMPLOYMENT TRIBUNALS

Claimant: Mr D Ireland

Respondent: University College London

On: **23 June 2020**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: In Person
For all respondents: Ms Tutin, counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

This was a remote hearing which had been consented to by the parties. The form of remote hearing was fully remote, video, by means of Cloud Video Platform. A face to face hearing was not held because it was not practicable and all issues could be determined fairly. The documents to which I was referred are in a bundle of 518 pages, and other documents as mentioned below, the contents of which I have recorded.

REASONS

1. On 23 June 2020, having heard full argument from the parties at a public preliminary hearing (held remotely via video) I informed the parties that I was not striking out the claim. Since this was decision that could (had it gone the other way) have finally determined the claim, it was a "judgment" within the meaning of Rule 1(3)(b) of the Employment Tribunal Rules of Procedure. Judgment was sent to the parties and written reasons for the judgment have been requested by the Claimant. Those reasons are hereby provided, as set out below.

2. On the same day, 23 June 2020, I also made several case management decisions, including making a deposit order, declining to strike out the response, and ordering exchange of witness statements. Except where those decisions were made by consent, written reasons for making them have already been supplied by way of separate documents. Strictly speaking, therefore, this document is not the document which supplies written reasons to the parties for those other decisions. However, for ease of exposition, some of those decisions (and the reasons for making them) are also mentioned below.

3. The history of this matter is set out in my case management summary from 1 May 2020. The claim was presented on 6 October 2019. The Claimant

received a conditional offer of employment from the Respondent and alleges that it was withdrawn because of his race.

4. Paragraph 2 of the summary set out the applications that would be considered at the 23 June 2020 hearing.

   4.1. In other words, strike out applications in reliance on Rule 37(1)(a) from each party, and deposit order applications from each party in reliance on Rule 39.

   4.2. The Respondent made an application dated 4 June 2020 for strike out in reliance on Rule 37(1)(b). It was agreed that that could be dealt with at the public preliminary hearing of 23 June 2020.

   4.3. The order did not specify that an application from the Claimant under 37(1)(b) would be dealt with on 23 June, and nor was there a request by the Claimant to amend the orders from 1 May 2020, or a new application after that hearing. That being said, the Claimant is a litigant in person. His February 2020 application at page 60 of bundle did specify that he also sought strike out on the basis of conduct of proceedings. I was satisfied that the Respondent had had sufficient opportunity to address the points raised, and so I also considered the Claimant's application to strike out based on Rule 37(1)(b).

5. For the 23 June 2020 public hearing, conducted remotely by video, I had a bundle of 518 pages and also a 3 page statement from the Claimant and a 9 page table prepared by the Respondent alleging unreasonable conduct by the Claimant. In addition, there was a pdf of material alleged to be without prejudice.

6. I did not have documentary evidence of the Claimant's means. He told me that he has no income and is effectively living off savings. He said he did not wish to argue that he could not afford to pay the maximum deposit of £1000 if I was otherwise satisfied that was appropriate. Likewise, there was no suggestion that the Respondent could not afford £1000.

7. The facts which I assume, for the purposes of assessing reasonable prospects of success, are largely common ground in any event.

   7.1. The Respondent made a job offer to the Claimant and withdrew it.

   7.2. The 18 June 2019 letter is the relevant offer letter. It says the offer is conditional and is subject to references.

   7.3. The Claimant named 3 people on his application as referees. These were, in the order he listed them: Ms Groves, Ms Montgomery and Ms Adams.

   7.4. The Respondent wrote to Ms Groves by email on 19 June 2019. There is a dispute about whether the Respondent received an auto reply to say she was on maternity leave. The Claimant argues they probably did (asserting that the maternity leave had commenced in May 2019 and that he received an autoreply when he emailed in July), and the Respondent says they did not. The Respondent sent a chaser to Ms Groves on 24 June 2019.

7.5. The Respondent wrote to Ms Montgomery and sent a chaser on 24 June 2019. Her reply on 24 June 2019 (as well as answering some questions posed to her) said, in part:

> Dominic was only with this team for a short while, he didn't finish his probation period and it would have been unlikely that he would have successfully completed this probation.
>
> Happy to discuss further via telephone if you think it would be useful.

7.6. The Respondent also wrote to Ms Adams, at the email address supplied by the Claimant. She replied the same day (19 June 2019) to say that she declined to give a reference.

7.7. On 24 June 2019, the Respondent informed the Claimant that the conditions of the conditional offer had not been met, and the conditional offer was withdrawn. Prior to doing so, the Respondent did not contact Ms Montgomery by phone, and did not contact the Claimant to inform him that Ms Adams had declined to supply a reference and that there had been no reference received from Ms Groves.

7.8. The relevant wording of the communication was "*I regret to inform you that due to receipt of unsatisfactory references we will not be proceeding with the appointment and are withdrawing our offer of employment*". The Claimant argues that this wording is false and misleading and that inferences of discrimination should be drawn. He alleges that one reference had been received, not references plural. (He also suggests that the one reference should not have been treated as unsatisfactory and/or that the Respondent should have further investigated the reasons for Ms Montgomery's opinions about his areas of weakness.)

8. The Claimant says that inferences of race discrimination in the withdrawal of the offer should be drawn from the arrangements for the composition of the interview panel. The Claimant says that he is white and that there should have been a white person on the panel. He says the Respondent and the panel chair took insufficient steps to ensure that that happened.

9. The Claimant also says that inferences of race discrimination in the withdrawal of the offer should be drawn from fact that the Respondent's advert encouraged applications from BAME applicants, and the fact that the Respondent's documentation at page 310 of bundle included (amongst other things) a paragraph which stated

> Overall, however, academic recruitment data show a very positive improvement from 2013 to 2014, specifically for UK BME staff. In 2014, 4% of applications were from UK BME candidates and but 13% of all appointments made were to this group. This means that UK BME candidates were more than 3 times likely to be appointed than white candidates. This is an extraordinary improvement from 2013 (4% of applications were from UK BME candidates and 4% of appointments made were to this group.)

The Law

10. The protection of the 'without prejudice' rule only arises if and when the parties are in dispute with one another. This means that the parties must be

conscious of at least the potential for litigation. The communication in question is privileged if it contains a genuine offer to settle the dispute or is part of a chain of correspondence about settlement. A communication is not privileged if there is unambiguous impropriety. Privilege can be waived if both sides agree.

11. The definition of direct discrimination is in section 13 of the Equality Act 2010:

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

12. The definition in section 13(1) incorporates two elements

    12.1. Firstly, whether A has treated B "less favourably than" than others, ("the less favourable treatment question")

    12.2. Secondly, whether A has done so "because of the protected characteristic", ("the reason why question".)

13. For the first of these elements, ("the less favourable treatment question") the comparison between the treatment of the claimant and the treatment of "others" can potentially require decisions to be made about the characteristics of a hypothetical comparator.

14. The two questions are intertwined and sometimes a tribunal will approach "the reason why question" first. If a tribunal decides that the protected characteristic was not the reason (even in part) for the treatment complained of it will necessarily follow that a person whose circumstances are not materially different would have been treated the same, and there will be no need to embark on the task of constructing a hypothetical comparator.

15. Section 136 of the Equality Act regulates the burden of proof in discrimination cases. It requires a two-stage process. A claimant must first prove facts from which the tribunal "could" conclude that unlawful discrimination had occurred and if he does so the burden shifts to the respondent. That means that the claim must be upheld unless the respondent proves that the treatment was in no sense whatsoever because of the protected characteristic

Strike Out Rule 37(1)(a)

16. The power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances. Generally, cases should not be struck out when the central facts are in dispute.

17. On a striking-out application the tribunal does not conduct a mini-trial to decide disputed facts. It is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. An exceptional case might exist where it is obvious that the central facts in the claim are untrue or there is no real substance in the factual assertions made, particularly if contradicted by undisputed contemporaneous documentation.

18. Furthermore, as a general principle, discrimination cases should not be struck out except in the very clearest circumstances. Discrimination cases are

generally fact-sensitive, and their proper determination is vital. It is in the public interest that the protections given by the Equality Act are upheld by the courts and tribunals, and it is frequently the case that a decision can only be made after hearing the evidence, including seeing how witnesses answer questions during cross-examination.

19. That does not mean that claims or responses in discrimination cases can never be struck out under Rule 37(1)(a). However, it does mean that a judge should exercise great caution before doing so. There is a high threshold to be met by the party seeking a strike out under Rule 37(1)(a) in a discrimination case.

Strike Out Rule 37(1)(b)

20. Rule 37(1)(b) allows a tribunal to consider strike out if satisfied that "*the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious*".

21. Where these conditions are fulfilled, it is necessary for a tribunal to go on to consider whether striking out is a proportionate response to the misconduct in question. The power to strike out under rule 37(1)(b) is "a Draconic power, not to be readily exercised".

22. A summary of what is required to be decided by an employment tribunal before making a striking out order appears at paragraph 55 of Bolch v Chipman *[2004] IRLR 140, EAT*, which takes into account the previous case law on the subject. That paragraph suggests that there are four matters to be addressed. I do not need to recite the entire paragraph for present purposes, but if striking out, a judge would have to be satisfied (amongst other things) that both of the following conditions were met:

    22.1. not simply that a party has behaved unreasonably but that the proceedings have been conducted by the party, or on the party's behalf, unreasonably;

    22.2. a fair trial is no longer possible.

Analysis

23. I deal first with the argument over the allegedly without prejudice material. In doing so, I have read the contents of the pdf emailed to me during the hearing.

24. The Claimant says that a communication dated 28 November 2019 was not privileged. He suggested that it was not a genuine offer to settle and that it relied on false information.

25. Having looked at the item, my finding is that it was sent after the parties were in dispute and after the litigation commenced. The allegedly false information that the Claimant refers to is information that the Respondent has referred to in open correspondence and pleadings. It is simply a re-statement of the basis of the Respondent's position as to why the conditional job offer was withdrawn. There is no unambiguous impropriety in the Respondent's asserting that it believes it will prevail at tribunal and/or stating its position as per the pleadings.

26. The Claimant suggests that the letter was an attempt to persuade him to bring the proceedings to an end. That is correct, but the letter did not overstep the acceptable boundaries of what might be said in this type of letter, and it did contain a settlement offer. It offered an agreement to the Claimant as to the terms on which the litigation would cease.

27. In summary, the letter was privileged at the time it was sent and that privilege has not been waived by the Respondent. I have therefore not taken the contents into account in reaching my decisions below. However, it is fair to also say that I do not regard the letter as relevant either (notwithstanding the Claimant's assertion that it was the cause of, and/or justification for, some of the comments of his which the Respondent relies on as unreasonable conduct). The contents of the letter would not have made any difference to my decisions even had I taken it into account.

28. I deal first with the applications to strike out on the basis of the conduct of the proceedings by the other party.

29. The Claimant's application fails. An argument by the Respondent that it received unsatisfactory references can be determined at the final hearing if necessary. As, if necessary, can the argument about whether there is a relevant difference between "receiving unsatisfactory references" and "not receiving satisfactory references". However, the Respondent's statement of its position during the proceedings and/or in correspondence is not unreasonable conduct. The numbering of the referees in the anonymisations used in the Grounds of Resistance is not unreasonable conduct.

30. The Respondent denies the assertion that any deliberately false statement has been made (albeit noting that a clear distinction between what was formal written policy, and what was procedure or practice or judgment call, was not necessarily made in email correspondence with the Claimant.) To the extent that the Claimant alleges that the Respondent has made a false statement about its policies in correspondence, that can be explored at hearing if necessary, but is not a basis for a strike out decision, even if true.

31. Disclosure has taken place and has been the subject of previous case management orders by me. The Respondent's conduct in relation to disclosure has not been unreasonable.

32. The Respondent's application to strike out on basis of the Claimant's conduct also fails.

33. I do not propose to go through the Claimant's remarks item by item. Some were certainly rude, and some were seemingly intended to cause offence. The Claimant did not, in fact, deny that they were rude or offensive. During submissions I twice asked the Claimant to specify whether he was arguing that – in fact – nothing he said was unreasonable (because it was a justified response, in his opinion, to the actions of the Respondent and/or its lawyers) or whether he was accepting that his conduct had been inappropriate, but was asking me to take into account – as a reason not to strike out the claim - that he had been (according to him) made ill by things said and done by the other party. The Claimant did not give a clear and unambiguous answer, but his responses to my questions implied that he was arguing the former.

34. If the Respondent were ever to make a costs application based on allegations of unreasonable conduct, I make no comment either way as to whether the tribunal would be satisfied that the threshold for a costs award had been met.

35. However, that is not what I am deciding. In considering strike out, I have to consider if a fair trial is still possible, and my judgment is that a fair trial is still possible. I am not satisfied that the Respondent's witnesses will be dissuaded from attending tribunal or that the Respondent's solicitors will be dissuaded from continuing to act. I am not satisfied that the Claimant has indicated an intention to be dishonest in the proceedings. Even if it is true that the Claimant has indicated that he would not agree with the outcome if the tribunal found against him (and I do not need to make a finding on that), then that would not be unreasonable conduct of the proceedings.

36. Even if I were to assume that (if a line by line analysis were done) some of the Claimant's remarks would be found to be unreasonable conduct of the proceedings, I would still be satisfied that a remedy short of strike out is possible at this stage. The Claimant has been made aware that the Respondent might seek costs and that inappropriate words or actions in the future, directed at the Respondent's representatives or (especially) any potential witness might be grounds for a future strike out application.

37. If there are future examples of allegedly unreasonable communications from the Claimant, and a future application for strike out is made under Rule 37(1)(b), then the Respondent is not necessarily precluded from referring again to the same items raised in this application as background material. It would be a matter for another judge, not me, to decide whether to take the correspondence to date into account. In any event, I have not made a finding that the Claimant's comments are unobjectionable, and I have not made a finding that a fair trial will remain possible even if the Claimant continues to send similar correspondence in the future. The basis for my decision is that, as of 23 June 2020, a fair trial remains possible.

38. In terms of reasonable prospects of success, both of the claimant's applications fail. He has not persuaded me that the Respondent has little (or no) reasonable prospects of satisfying a tribunal that its decision to withdraw the offer was not because of race.

39. In considering the Respondent's applications against the Claimant, I have not assumed that the Claimant will be able to make good on his contention that the Respondent received an auto-reply from Ms Groves. Disclosure has taken place, and the Respondent has disclosed no such auto-reply. Furthermore, the contemporaneous documents show that a chaser was sent on 24 June 2019, which implies that the Respondent had not received an auto-reply saying that Ms Groves was unavailable for the next few months. The Claimant does not allege that anyone has told him that her auto-reply was switched on in June. {NOTE: On 26 June, the Claimant wrote to tribunal. Amongst other things, he suggested that the inference in this last sentence ought not to have been drawn by me from his oral submissions or the documents before me at the hearing and implied he might allege that someone has told him Ms Groves' autoreply was operational by 19 June 2019.}

40. I cannot say that there are no reasonable prospects of success of the Claimant succeeding in his discrimination claims. The success or failure of those claims may require an analysis of the documents, and of the testimony of witnesses, including under cross-examination. Ultimately, the issue is: did the decision-maker withdraw the offer because of race? To succeed on that issue the Claimant does not need to prove all of the allegations that he may have made in correspondence or in his statement for this preliminary hearing. Therefore, the claim is not struck out in accordance with Rule 37(1)(a).

41. I decided, instead, that there were little reasonable prospects of success for the Claimant. I do not ignore the burden of proof provisions. However, the Claimant has not put forward any convincing reason for why he would be offered the job in the first place if he seeks to rely on an inference that the panel was selected to be biased against him. He is free to argue that inferences should be drawn from the evidence (and that is why the case is not being struck out). However, a simple difference in race between him and the decision-maker is nowhere close to being a sufficient basis for an inference of discrimination to be drawn. Nor is the fact that the Respondent might have said that it was pleased with its record in appointing (UK based) BAME applicants.

42. Furthermore, based on the undisputed facts, there are very plausible reasons that a tribunal might be satisfied that race played no part whatsoever in the decision. The Respondent received one poor reference (Montgomery), one express refusal (Adams) and (unless he can prove otherwise) one non-reply (Groves) from the 3 referees that the Claimant asked them to contact. The Claimant's comments and suggestions about what might have happened had the Respondent made further enquiries of him or his referees are irrelevant unless a tribunal is satisfied that the Respondent would have acted differently if his race had been different.

Employment Judge Quill

Date: 30 June 2020

REASONS SENT TO THE PARTIES ON

07/07/2020

FOR THE TRIBUNAL OFFICE