Neutral Citation Number: [2022] EAT 14

Case No: EA-2020-000588-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 January 2022

Before :

MICHAEL FORD QC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MR L GARCIA	**Appellant**
- and -	
BRITISH AIRWAYS PLC	**Respondent**

- -
- -

Mr L Garcia for the **Appellant**
Ms H Cooper (instructed by Harrison Clark Rickerbys) for the **Respondent**

RULE 3(10) HEARING – APPELLANT ONLY
Hearing date: 24 September 2021

- -

JUDGMENT

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MICHAEL FORD QC, DEPUTY JUDGE OF THE HIGH COURT

1. Mr Garcia, who was the Claimant in the Employment Tribunal, seeks to appeal against a judgment of Employment Judge ("EJ") Smail at a preliminary hearing ("PH"), reasons for which were sent to the parties on 1 June 2020. EJ Smail struck out the claimant's claim of age discrimination and refused permission to add claims of disability and race discrimination.

2. On 24 September 2021 a hearing took place under rule 3(10) of **EAT Rules** to determine if there were no reasonable grounds for bringing an appeal. Unfortunately, I could not deliver judgment on the day because of difficulties in understanding and reading some of the documents in the appeal bundle. Following the appeal, the claimant sent in the relevant documents by an e-mail dated 28 September.

3. The background to the PH was that the Claimant's claim form was received on 27 July 2018. In it he claimed age discrimination. He explained that he failed in his application for a post of a Spanish-speaking Customer Service Representative ("CSR") with the Respondent following an assessment day on 17 March 2018. He said that he "could have been unsuccessful" owing to his age because during the day he had been requested to show proof of his ID with his date of birth on it. He was, at time, aged 54.

4. In its response, the Respondent said it was standard practice to ask candidates who had passed an online assessment to provide four pieces of ID when they attend their Assessment Centre for interview, to confirm the candidate's identity, their right to work in the UK and their national insurance number. The Respondent said the Claimant did not progress further because he did not score highly enough on the assessments, which had nothing to do with his age.

5. A PH took place on 7 November 2018, which identified the issues for a full merits hearing, envisaged to start on 21 May 2019, and at which EJ Lewis summarised the issues and made directions. That hearing was postponed, the Claimant told me, after disclosure had taken place on 28 November and witness statements had been exchanged.

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6. Following disclosure, on 5 March 2019 the Claimant applied to amend his claim. After he saw a reference in the assessor scoring sheets disclosed by the Respondent that he "struggled to articulate", he sought to bring a claim for direct disability discrimination, contending he was disabled by reason of a mild stammer. He also sought to amend his claim to bring a complaint of direct race discrimination because another of the score sheets said he had a "very strong French accent". He also sought to include claims that the use by the respondent of subjective assessments was indirect age, disability or race discrimination.

7. The respondent made an application to strike out the claim and the case came before EJ Smail at the PH, who also considered the application to amend. He referred to the test for striking out in rule 37 of the **Tribunal Rules of Procedure** and summarised the guidance on granting amendments (Judgment, paragraphs 4-7). No witness gave oral evidence.

8. The EJ analysed the documentary evidence, which included spreadsheets from BA, saying it showed that 29 people were appointed to the role the Claimant applied for, including five who were over-50. In addition, of those who were assessed on the same day as the Claimant, one person over 50 was appointed to the role (paragraphs 6-7). The EJ summarised the documents on the Claimant's scoring on the assessment day and which were set out in an "Assessor Scoring Pack", supported by notes and detailed marking. These showed, for example, that the claimant had passed a "Business Information Exercise", including the communication element of that test, with a mark of 2, the second highest mark (paragraph 11). But he had scored low marks in the interviews, as shown by the scoring against various criteria in the documents before the EJ (paragraphs 13-15). The claimant also obtained low marks in the two role pays that day (paragraphs 16-17). His overall score was low because he failed the interview and role plays (paragraph 18).

9. In relation to the strike out, the EJ concluded that "disclosure simply contradicts the theory in the claim form", that the Claimant's age could explain his failure because he had been asked to show his passport (paragraph 19). The EJ said that the Claimant only floated the possibility that his age played a role and there was an ostensibly innocent explanation why the Claimant was asked to

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produce his passport, to confirm his nationality and right to work in the UK. In addition, according to the EJ, when you took account of the fact that five people over 50 got the job and there was an ostensible reason why the claimant failed the assessment - his low scores in relation to which there was nothing to suggest age played a role - there was "little doubt" that the age discrimination claim had no reasonable prospects of success.

10. As for the amendment application, the EJ took into account that the claims were out of time; the amendment application had not been made promptly after disclosure (it was made over three months after disclosure); and there was no good explanation for the delay (paragraph 21). The EJ doubted the Claimant's "mild stammer" amounted to a disability, but in any event considered the "weight" of other evidence showed that his stammer played no effective role in the decision (paragraph 22). He summarised his conclusions for not granting the amendment to bring a disability claim at paragraph 23.

11. The EJ reached the same view for similar reasons in relation to the race claim. He said it was true that the claimant had a strong French accent but the claimant had passed the element of the test where there was a reference to his "very strong French accent". He refused to exercise his discretion to grant the amendment (paragraph 25).

12. The Claimant provided me with a copy of **Ahir v British Airways** [2017] EWCA Civ 1392 in which Underhill LJ summarised some of the earlier cases and the familiar principles on strike out. Where core issues of fact are in dispute, a tribunal should only strike out discrimination claims in exceptional cases. An example may be where the claimant's case is "totally and inexplicably inconsistent with the undisputed contemporaneous documentation" (Maurice Kay LJ in **Ezias v North Glamorgan NHS Trust** [2007] ICR 1126 at paragraph 29). In **Ahir**, Underhill LJ made clear that these were not the only circumstances in which tribunals may strike out discrimination claims involving factual disputes, provided they are keenly aware of the danger of doing so without hearing full evidence, and the hurdle remains high (paragraph 16). He also considered that, where there is an ostensibly innocent series of events which lead to the act complained of "there must be a burden on

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the claimant to say what reason he has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story" (paragraph 19).

13. On amendments, the leading authority remains **Selkent Bus Co Ltd v Moore** [1996] ICR 836, to which EJ referred at paragraph 5 of his judgment. A tribunal should consider all relevant factors, having regard to the interests of justice, including the nature of amendment and whether it raises new facts; whether any new claim is out of time and, if so, whether the time limit should be extended; and the timing and manner of the application, including delay and why the application was not made earlier. In an appropriate case a tribunal may have regard to the merits of a case.

14. There is limited scope for challenging a tribunal's decision to refuse an amendment on appeal because a tribunal has a wide ambit of discretion in such matters.

15. The grounds of appeal fall into what the Claimant referred to as "Parts", though each part raises individual points.

16. **Part 1**. The grounds of appeal here are related: they are that, in essence, EJ Smail's long judgment and the issues he dealt with in detail show that this was a matter which could only properly be resolved at a full merits hearing. The Claimant also raises other points, such as challenging the genuineness of the spread sheets produced by the Respondent and argues that it had concealed that it was recruiting for more than one position.

17. The Claimant's claim on age discrimination rested on a rather insecure foundation because the *only* evidence he relied on to infer age discrimination was that he, along with every other candidate, was asked to show his passport on the assessment day (as confirmed at the earlier PH before EJ Lewis, paragraph 5.5). While the Claimant raised various matters of disputed fact in his skeleton argument, such as whether he was unsuitable for the role, there was no reason to doubt the reason why the Respondent asked all candidates to produce a passport, nor that the assessments of his performance on the day were genuine contemporaneous records, nor to question the genuineness of the data in spreadsheets. Nothing in them supported the claimant's theory.

18. While the EJ may not have got the exact numbers right - so far as I can tell from the documents

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33 (not 29) people were appointed as CSRs, of which six (not five) were over 50 - the essence of what the data showed was clear. Even if the Claimant is correct that the data showed one individual over 50 passed the test on 7 March rather than that individual being appointed to the role of CSR, it still counted strongly against his theory that being asked to show a passport could, of itself, demonstrated age discrimination. While the Claimant raised various matters which he said were in dispute in his notice of appeal and skeleton argument, none undermines the Respondent's explanation in its response that it asked all candidates to show their passports to confirm matters such as their nationality, identity and address.

19. In light of the weak evidential basis for the claim in the first place, based as it was entirely on the fact that the Claimant was asked to produce a passport, and the support in the contemporaneous documents for an ostensibly innocent explanation, unrelated to age, as to why the claimant was not appointed, I consider the EJ was entitled to decide this was one of the exceptional cases where a strike out was justified. I consider his decision fell within the ambit of a permissible strike out in light of the principles of **Ahir**. The logic of the Claimant's case was that any employer who asked for proof of identity with a date of birth on it, such as a passport, in the application process would potential be liable for age discrimination to any disappointed candidate by virtue of that fact alone. In the exercise of his judgment, I consider the EJ was entitled to decide the claim stood no reasonable prospect of success because the "possibility" floated by the Claimant provided the lightest support for a potential finding of age discrimination – why ask for a passport when appearance is a reasonable guide to age? – and it was greatly outweighed by the plausible reason why the Respondent said it asked for a passport and the detailed contemporaneous scoring records of why the Claimant failed the tests.

20. **Part 2**. These grounds challenge the EJ giving his opinion about the Claimant's stammer and deciding that the reference about "struggling to articulate" in the interview notes was not a reference to a stammer (paragraphs 22-23).

21. The EJ addressed these matters as part of his assessment of the strength of the case, a factor

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which he was entitled to take into account in deciding whether or not to grant the amendment. Once again, the weakness of the foundation for the claim is relevant: the *only* evidential support the Claimant relied on to bring the claim was a written comment by an assessor in the notes about his role play addressing the criterion "communication". The notes said "Lack of information to justify explanation.... struggled to articulate".

22. Read in context, the phrase does seem to be about the content of the explanation rather than the manner of its delivery. Having heard from the Claimant myself, I can see why the EJ considered he had a "very mild stammer". In making his necessarily broad brush assessment of the strength of any claim for disability discrimination for the purpose of the amendment application, I consider the EJ was entitled to decide that the claim was weak. That, coupled with the other factors referred to at paragraphs 21-23 of the EJ's judgment, meant the decision to refuse the amendment fell within the generous ambit of discretion open to the EJ in case management decisions of this sort.

23. **Part 3**. In this Part, the Claimant raises contentions that EJ Smail had no evidence to support certain aspects of his decision.

24. First, it is said that EJ Smail rejected any evidence of *prima facie* disability or race discrimination because of a comment that the Claimant's "career history does not suggest suitability for his role" (paragraph 14). But the EJ only referred to the history in passing in paragraph 24, to show that the Claimant's employment history did not show he was particularly suitable for a CSR role, so tending to support a conclusion that he did not pass the assessment day for reasons which were not related to race. It thus provided some, albeit minor, support for one of the EJ's reasons for refusing permission - that the claim was weak (and it notable, as the EJ held at paragraph 24, that the Claimant *passed* the element of the test on which the comment about his French accent was noted). In that light, and coupled with his conclusion that the amendment application was made too late, the EJ was entitled to refuse the amendment.

25. Second, it is said that there was "no evidence" that the information in the spreadsheets provided by the Respondent was accurate. But, conversely, nor was there any sufficient basis to

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question their accuracy, and the central message that some individuals over 50 were appointed to the CSR role (see **Ahir**, paragraph 19).

26. Third, criticism is made of the EJ's comment that the Claimant failed the test badly (Judgment paragraph 18), saying that the assessments were subjective. It is true the assessments were matters of impression and opinion, not fact; but nonetheless the general picture was of different individuals giving the Claimant mostly low scores. The EJ was entitled to conclude the overall score was a "comprehensive fail" in circumstances where the Claimant failed the interview and each of the two role plays.

27. Fourth, it is said the EJ failed to take account of the fact that it was only on disclosure, on 28 November 2018, that the claimant had evidence to justify bringing the claims of disability and race discrimination for which he sought amendment. However, EJ Smail did take this into account: see Judgment paragraph 21. He accepted that disclosure could unearth discrimination and the delay he considered was that between disclosure and the application to amend, not any earlier delay.

28. **Part 4**. Finally, the Claimant raises various allegations of bias against EJ Smail. The essence of these claims is that the EJ did not decide the relevant questions in favour of the Claimant: the points said to support bias rehearse the arguments which the Claimant made or now makes against the reasons of the EJ for rejecting his claims. They are not sufficient to show bias.

29. **Additional matters in skeleton.** Before me the Claimant raised an additional point. He contended that EJ Smail did not consider his claims for indirect age, disability and race discrimination, contrary to s.19 **EqA.**

30. I do not consider it would be right to allow these matters to be added to the notice of appeal at this stage (there was no application to amend the notice). In any case, however, I struggle to see how a claim of indirect age discrimination could get off the ground on the basis that the being asked to show a passport put people over 50 at a particular disadvantage: the disadvantage was the same to everyone, so the argument only works if the respondent was already disposed against older people. The fact that candidates over 50 were appointed as CSRs was also a formidable obstacle to such an

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argument, as was the Respondent's assertion in its response why such a practice was justified.

31. The Claimant also formulated new claims of indirect discrimination based on race and disability, alleging the respondent had a practice of taking account of candidates' accent or their difficulty in articulating. However, this was not the basis of the Claimant's application to the amend before the EJ, which focused on the subjectivity of the assessments, so I do not think the EJ can be criticised for failing to deal with these matters in refusing leave to amend.

32. For these reasons I consider that the notice of appeal discloses no reasonable grounds for bringing the appeal for the purpose of rule 3(10) of the **EAT Rules**. I regret the delay in producing this judgment which was for administrative reasons beyond my control.

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