Case No: 2600223/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr D Taylor

Respondents: (1) Rolls Royce plc
(2) Alexander Mann Solutions Ltd

PRELIMINARY HEARING

Heard at: Nottingham (in public) **On:** 20 July 2017

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: in person
For respondent (1): Mr C Rajopaul, counsel
For respondent (2): Mr D Hopper, solicitor

JUDGMENT & ORDER

(1) All applications to amend are refused.

(2) The claimant's entire claim is struck out pursuant to rule 37 on the grounds that it has no reasonable prospects of success.

(3) The respondents' applications for costs are refused.

REASONS

1. This is the written version of the Reasons given orally on 20 July 2017.

2. This is a preliminary hearing to deal with preliminary issues.

3. The claimant was born in December 1960. He self-describes as black African-Caribbean. He applied for the role of fitter / electrical fitter with the first respondent, Rolls Royce, in Derby, on 5 December 2016. There were 43 vacancies. His application was rejected by the first respondent's recruitment services provider, the second respondent. The claimant was told he was unsuccessful by email on 12 December 2016. There is no evidence that his application ever came anywhere near the first respondent itself before it was rejected; and the claimant has not alleged it did; and there is no reason to think that it did.

4. The claimant's last relevant work experience for the job he applied for was in 1992. Since 1992, he had worked in jobs such as sales or retail management.

5. He asked why his application had been unsuccessful and the substance of the answer, set out in an email of 16 January 2017, was: "*... we have received a significant number of applicants for these roles and we have to make decisions on who we invite to interview…. Our selection process focuses on the essential and desirable criteria required for positions and selection for interview is made against these. Based on these criteria the applicants selected for interview had more experience. ...*"

6. There were 324 applicants for the fitter / electrical fitter vacancies the claimant applied for. The claimant's application was one of 149 that were not progressed by the second respondent beyond its 'sift', i.e. that were passed on to the first respondent for further consideration.

7. None of what I have just set out is in dispute and the claimant conceded as much during the hearing.

8. Also not in dispute is the fact that the claimant was one of 14 candidates in the age bracket 55 to 65 who applied, of whom 8 made it through the sift. This means candidates in that age bracket has a 42.8 percent chance of being rejected at the stage the claimant was rejected. This compares favourably the chances of those in other age brackets. For example, candidates in the 16 to 24 age group had a 57.1 percent of being rejected at that stage. It is also not significantly different from the 42.0 percent rejection rate of the applicants in the age bracket with the largest number of candidates and the best success rate: the 25 to 34 year old age group.

9. I have also seen an internal email from the woman who made the decision to reject the claimant's application, dating from well before these proceedings, stating something to the effect that the reason his application was rejected was lack of recent relevant work experience.

10. On the basis of those facts, the claimant alleges direct age and race discrimination in relation to the rejection of his application in December 2016. The claimant alleges that younger people were more favourably treated than he was and that people who aren't black were more favourably treated than he was.

11. The second respondent has been joined as [allegedly] the first respondent's agent in relation to discrimination.

12. That is the background and I now turn to the preliminary issues I am dealing with.

13. The notice of hearing, contained within the written record of the preliminary hearing on 10 May 2017, is a little ambiguous in relation to precisely what the preliminary issues are. Thankfully, the claimant confirmed at the start of the hearing that he agreed we were dealing with:

    13.1 whether he needs permission to amend and if so whether he should be given permission to amend to pursue a claim of indirect age discrimination based on alleged PCPs as follows: "*attaching greater weight to modern qualifications, i.e. NVQ Level 3, than to historical qualifications, i.e. Tech Level 3 Engineering*"; "*attaching greater weight to recent work experience than to historical work experience*";

    13.2 whether possible [essentially identical] complaints about three previous similar unsuccessful job applications – in early 2016, in 2014 and in 2012 – were presented outside of the relevant time limits set out in section 123 of the Equality Act 2010; in other words, whether it would be "*just and equitable*" to extend time in relation to those;

    13.3 whether any part of his claim should be struck out or whether a deposit order should be made in relation to it on the basis of its prospects of success.

14. At the start of the hearing, it became clear that there was a further set of issues that needed to be dealt with in order properly to cover the second and third of the above issues. I suggested they be dealt with and nobody objected. They are:

    14.1 did the claim form actually contain any complaint about the job applications in early 2016, 2014 and 2012 that I have referred to?

    14.2 if it did not, did Employment Judge Dyal, who dealt with the previous preliminary hearing, effectively give permission to amend?

    14.3 if the answer to the second question is no, should the claimant be given permission to amend to add those complaints?

15. There is a lot of overlap between the issues, but something has to be dealt with first. I am going to start with the strike-out and deposit issues in relation to the direct discrimination claims relating to the December 2016 recruitment process.

16. Before I do so, I should perhaps mention, as an 'aside', that during the course of the hearing the claimant raised the prospect of some kind of indirect race discrimination complaint. I am not really sure what he has in mind. I asked him about it. I attempted to explain to him what the difference was between direct and indirect discrimination. Having done so, I asked him what the "*provision, criterion or practice*" ("PCP") was that he was saying was indirectly discriminatory on grounds of race and he was unable to come up with one. He then said just to "*leave*" that aspect of his case.

17. Insofar as the claimant is pursuing, or wishes to pursue, an indirect race discrimination complaint, in the absence of any coherent PCP that might

conceivably 'work', any such claim has no reasonable prospect of success and should therefore be dismissed on that basis come what may.

18. Returning to the direct discrimination complaints relating to the December 2016 recruitment process, as my decision is that those complaints should be struck out as having no reasonable prospect of success, I need not concern myself with the law relating to deposit orders.

19. Turning to the law relating to the strike-out issue, I refer to and adopt the statement of the law set out in first respondent's counsel's skeleton argument. I note, in particular, paragraph 24, part of Lord Steyn's speech, of the House of Lords' decision in Anynanwu v Southbank Student Union [2001] ICR 391 and paragraphs 29 to 32 of the Court of Appeal's decision in North Glamorgan NHS Trust v Ezcias [2007] EWCA Civ 330.

20. When assessing whether a claim has "*no reasonable prospects of success*", the test to be applied is whether, taking the claimant's case at its reasonable highest, there is no significant chance of the trial tribunal, properly directing itself in law, deciding the claim in the claimant's favour. Subject to one proviso, in applying this test I must assume that the facts are as alleged by the claimant. The one proviso or qualification is that I do not make that assumption in relation to any allegation of fact made by the claimant so implausible that I think there is no significant chance of any tribunal, properly directing itself, accepting the allegation as true.

21. I also note that assuming the facts will fall in the claimant's favour is not the same as assuming the rightness of the claimant's bald assertions and beliefs, unsupported by any facts – e.g. "there was less favourable treatment" or "any less favourable treatment was because of race and/or age". Similarly, a claimant cannot avoid his case being struck out as having no real prospects of success because something might conceivably turn up between the strike-out hearing and trial that would turn what looks like a hopeless case into a meritorious one. For anything like that to work as a defence to a strike-out application, there would have to be some basis for thinking that such a thing is at all likely to happen – some basis, that is, beyond the claimant's conviction that it will. That is particular so in a case like this one where there has already been extensive disclosure of documents.

22. Striking out a tribunal claim, particularly one such as this one involving complaints of discrimination, is an exceptional thing to do and that before I will do so the respondents have to cross a very high threshold indeed. Equally, however, the overriding objective is not served by permitting claims that are bound to fail to continue. Doing so benefits no one, least of all the claimant.

23. So far as concerns the law relating to discrimination, my starting point – and almost my end point – is the wording of the relevant parts of the Equality Act 2010 ("EqA"): sections 13, 19, 23, 123, and 136.

24. For any direct discrimination complaint to succeed, there must be less favourable treatment and not merely unfavourable treatment, i.e. there must be some basis in the evidence for saying that a relevant real or hypothetical comparator (under EqA section 23) would have been treated more favourably.

25. So far as concerns the burden of proof, a succinct summary of how [the predecessor to] EqA section 136 operates is provided by Elias J [as he then was] in Islington Borough Council v Ladele [2009] ICR 387 EAT at paragraph 40(3), which we adopt. One is looking, first, for "*facts from which the court could decide, in the absence of any other explanation*" that unlawful discrimination has taken place. Although the threshold to cross before the burden of proof is reversed is a relatively low one – "*facts from which the court could decide*" – unexplained or inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status[1] and/or incompetence are not, by themselves, such "*facts*"; unlawful discrimination is not to be inferred just from such things – see: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33; Chief Constable of Kent Police v Bowler [2017] UKEAT 0214_16_2203. Further, section 136 involves the tribunal looking for facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred. See South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23.

26. I start with direct age discrimination.

27. There is nothing in the facts of this case suggestive of age discrimination – at least not against the claimant's age group. Given this, at any trial, one of the first questions the tribunal would ask the claimant is: what is the basis for his assertion that the rejection of his application had anything to do with his age?

28. The claimant was given the option of putting in a witness statement for this hearing, but he did not take it. He told me things during the course of submissions. That is not, of course, the same as producing evidence. Be that as it may, what he told me that was relevant to the direct age discrimination amounted to no more than this: friends[2] of his who work for Rolls Royce have told him that their recruits over the last few years are predominantly younger people and that some younger people who were recruited lacked experience the claimant considers relevant. The example he gave was someone who had previously worked as a motor mechanic.

29. Even if I assume all the factual assertions the claimant made during submissions are true, if I ask myself whether there is any significant chance at

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[1] i.e. the claimant can point to someone in a similar situation who was treated more favourably and who is different in terms of the particular protected characteristic that is relevant, e.g. is a different age, race, sex etc.

[2] Between giving my decision on the main application and dealing with costs, I learned that the claimant's wife works for Rolls Royce; it may be she is the source, or a source, of his information.

all of a tribunal at trial finding there was direct age discrimination, I am afraid the only sensible answer is: no.

30. To find that there was age discrimination, the tribunal at any trial would have to decide the following:

    30.1 that the woman who rejected the application even knew of and thought about the claimant's age;

    30.2 that for no apparent reason either she decided to reject older candidates or she was secretly instructed to reject older candidates;

    30.3 that despite making an ageist decision in relation to the claimant, she did not (seemingly; based simply on the percentage of successful applicants in each age group) make similarly ageist decisions in relation to his age group and in fact to an extent favoured older candidates;

    30.4 that a younger candidate with a similar CV to the claimant, i.e. who had a similar dearth of relevant recent experience, would have been more favourably treated;

    30.5 that the obvious reason for rejecting his application, namely that he had not worked in a remotely similar role for nearly 25 years, was not in fact the reason.

31. I am afraid it is inconceivable that all these decisions would be made.

32. The position in relation to race discrimination is similar. The only relevant difference is that I do not have before me the same kind of breakdown of the race of applicants as I have of their age. (I note that it may be difficult to provide that kind of breakdown in relation to skin colour – the basis of the claimant's claim[3]).

33. The sole basis of the claimant's claim that his skin colour led to his application being rejected, or that it was a factor, is again what he was told by friends: they estimate that of the 300 or so people recruited in the last few years by the first respondent[4], perhaps 10 are black. Even if I assume that this vague, anecdotal piece of evidence is accurate, 10 out of 300 is 3 percent and, as first respondent's counsel pointed out, that may well not be a disproportionately small percentage of black applicants for jobs in the first respondent in Derby.

34. Putting that to one side, this claim has most of the same problems that the direct age discrimination complaint has. For example, there is no reason to think that the person from the first respondent dealing with the job

[3] This is not a case about the claimant not being white / European. He does not assert that, for example, South Asian job applicants are disadvantaged.

[4] I think what the claimant was talking about was the numbers of people recruited to work in Derby in the broad area of work he was applying to work in.

application was conscious of the claimant's race, which was not clear from the materials that she had before her.

35. The main thing that makes this complaint hopeless, though, is the idea that a white man who had had no relevant work experience since 1992 would have been put through to the next round, given the number of applicants overall. The bottom line is that even if there was evidence that some of the respondents' other recruitment decisions were motivated by racial bias (and there is none that I am aware of), in relation to this particular recruitment decision, the respondent was acting exactly as one would expect any company to behave. Unfortunately for the claimant, no company in the respondent's position of having hundreds of applicants to choose from is going to give this kind of job to someone who has been working in wholly unrelated fields for nearly 25 years, whatever their race. Even if his claim had no other weaknesses, that would be an insurmountable hurdle. It is an insurmountable hurdle because it means there was no less favourable treatment in accordance with EqA sections 13 and 23.

36. As I said during the course of the hearing, I do not automatically strike out cases just because I think they have no reasonable prospect of success; but I would have to have a pretty good reason for allowing a claim I thought was bound to fail to continue. In this case, no obvious candidate as a reason presents itself. I therefore do strike out these two direct discrimination complaints on the grounds that they have no reasonable prospect of success.

37. Turning to the question of amendments, the law is again set out in first respondent's counsel's skeleton argument. I note the Selkent guidance, the fact that time limits are an important but not necessarily determinative factor, that all the circumstances must be taken into account, and that I have to apply the overriding objective set out in rule 2.

38. Because I am also dealing with strike-out issues, it is appropriate for me to take into account the prospects of success of any complaint the claimant is proposing to add by way of amendment. There would be no point in me giving permission to amend to add a complaint only to strike that complaint out as having no reasonable prospects of success.

39. In relation to time limits, and in particular whether to extend time on a "*just and equitable basis*" under EqA section 123, I remind myself that: all the circumstances must be taken into account, usually including (suitably adapted so they make sense in an employment law context) the factors (a) to (f) set out in section 33(3) of the Limitation Act 1980; an important, but not necessarily determinative, factor is likely to be the balance of prejudice; time limits are there to be obeyed; it is for the claimant to persuade the tribunal that it is just and equitable to extend time; if the claimant is ignorant of time limits this does not in and of itself justify extending time. I have sought to apply the law in relation to this as summarised in paragraphs 9 to

16 of the EAT's decision in Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283.

40. In relation to indirect discrimination, the first question is whether any such claim is made in the claim form. The short answer to that question is: no. There is no mention in it of anything that looks anything like a PCP. Any reasonable person looking at the claim form would see a complaint of direct discrimination and of direct discrimination only.

41. The claimant therefore needs to amend in order to pursue an indirect discrimination claim. As to whether permission should be given to amend, the first thing I look at is time limits. Evidence is usually essential on time limits issues. As already mentioned, the claimant was given the opportunity to put in evidence, but chose not to do so. Again, he said various things in submissions, which is not the same as giving evidence. I nevertheless take into account what he told me, at least to some extent. Even in his submissions, though, there was no coherent explanation of why the indirect discrimination complaint was not set out in his claim form, beyond him telling me that he is not a lawyer.

42. The majority of claimants in employment tribunals are not professionally represented. The tribunal does not expect people who are not professionally represented to set out their claims as a lawyer would. We do not, for example, expect them to state "the respondent applied [such and such] a provision, criterion or practice to me", or anything of that kind. However, the claimant, and anyone in his position, with his level of intelligence and sophistication, is quite capable of articulating what the claim is about. For example, if it was always his case that his qualification was not treated by the respondent as equivalent to an NVQ Level 3, and that that was unfair because people his age are unlikely to have NVQs, which didn't exist when they were in their teens and early twenties, he could and should have put that in the claim form, but did not.

43. In short, the only explanation the claimant has provided – him not being a lawyer – does not explain why there is nothing in the claim form which is at all suggestive of an indirect discrimination complaint. The burden of showing it would be just and equitable to extend time is on proof is on him and he simply has not discharged it.

44. Another reason why I refuse permission to amend to add an indirect discrimination complaint based on a PCP relating to having to have recent relevant experience is that such a complaint is just incomprehensible. There is no correlation between being over 50, or over 55, and lacking recent experience. Further, a PCP to the effect that a candidate must have recent relevant experience is, on any sensible view, a proportionate means of achieving a legitimate aim.

45. In relation to the other proposed PCP – about attaching greater weight to NVQs than to older qualifications – there doesn't seem to be any objective

basis at all for the claimant's suggestion that any such PCP was applied to him, nor that it was it was applied to anyone else. The data about the age of who was successful and unsuccessful in this recruitment round, in particular the relatively high success rate of the over 55s (albeit there were few candidates in this category), strongly suggest that no such PCP was applied. Further, as already mentioned, it plainly wasn't the application of any such PCP that disadvantaged him in terms of his application, but the fact that his last relevant work experience was in 1992.

46. Accordingly, I refuse permission to amend to add any indirect discrimination complaint.

47. Finally, I turn to the three claims, or proposed claims, about the rejection of three of the claimant's other applications for jobs with Rolls Royce, in 2012, 2014, and early 2016.

48. Again, these claims are clearly not in the claim form. The claim form particulars begin with a reference to one specific recruitment round, that in December 2016. The only thing they say about the other recruitment rounds is a single sentence: "*... I applied for over 20 jobs between 2012 and 2016 (4 as fitters) within the Rolls Royce and Alexander Mann, all has been rejected without an interview. ...*". The claimant is not making a claim about these other three jobs in that claim form any more than he is making a claim about the other 16-plus jobs he apparently applied for. Reading this part of the claim form fairly and reasonably, what he is doing is providing background information relevant to his claim about, and solely about, the recruitment process in December 2016.

49. Although I accept there is some ambiguity in this respect in the written record of the preliminary hearing on 10 May 2017 before Employment Judge Dyal – the "*Case Management Summary*" – it seems to me that if he had been intending to give the claimant permission to amend, he would have said so; and he does not say so. Had the Judge suggested he was giving the claimant permission to amend, I am quite sure there would have been objections and argument and so. There was nothing of that kind recorded in the Case Management Summary.

50. What I am left with, then, is an out of time application to add complaints that would have been very significantly out of time even had they been included in the original Claim Form, in circumstances where the claimant has put forward nothing of substance to explain why he did not make a claim earlier, and where it is clear that there is significant prejudice to the respondent in terms of evidence. For example, in terms of prejudice: even if the people then working for the second respondent who made the relevant recruitment decisions in 2012, 2014 and early 2016 were still available and could be found to give evidence, there is no way they are going to remember now why one individual's – the claimant's – applications were rejected; I can see that almost all of the paperwork relating to those previous recruitment rounds no longer exists.

51. Whatever the merits of those other three claims, I would refuse permission to amend for these reasons. And if, contrary to my earlier decision, those claims are already in the claim form, I would dismiss them on the basis that they were presented well out of time and that I am not satisfied it would be just and equitable to extend time.

52. Considerable reinforcement to my decision to reject those 2012, 2014 and 2016 claims on the basis of time limits and the other factors I have just mentioned is provided by the fact that the claimant has no more basis for saying that the decisions to reject his applications on previous occasions were any more to do with his age or race than the decision in December 2014 was.

53. What that means, regrettably from his point of view, is that the whole of Mr Taylor's claim has been dismissed.

[The respondents applied for costs and after hearing submissions I gave the following decision on the costs applications.]

54. After I gave my decision in the respondents' favour on the preliminary issues, they both made costs applications. Those costs applications were made mainly or entirely on the basis of my decision that the claimant's complaints had no reasonable prospect of success. Because of that decision, the threshold for making a costs order in the Rules is clearly crossed. The question for me is essentially whether it would be in accordance with the overriding objective to make a costs order.

55. By the narrowest of margins, I have decided not to make one. The main reasons for this decision are:

    55.1 first, although the claimant is in employment, I accept that money is very tight and in practice he has no significant disposable income at the end of each month;

    55.2 secondly, I accept that the claimant made this claim in good faith, genuinely convinced that the respondents' recruitment was discriminatory;

    55.3 thirdly, the second respondent sent no costs warning letter at all;

    55.4 fourthly, the first respondent's only costs warning letter contained a very tight deadline for the claimant to decide whether or not to continue with his claim and that deadline expired before the preliminary hearing to deal with case management that took place in May. It is not a criticism of the first respondent or its lawyers, but I would probably have been more sympathetic to the costs application it made today had it made clear to the claimant in writing <u>after</u> the preliminary hearing that it would be seeking to strike out his claim at this preliminary hearing and that if that application was successful, an application for costs would automatically follow on the basis set out in

the original costs warning letter, and if the claimant had been given more time to take advice and to think about the situation.

56. The claimant should consider himself very lucky. This was a strong costs application and he has missed having a costs order made against him by a whisker.

Employment Judge Camp

3 August 2017

SENT TO THE PARTIES ON
19.8.17
....

..S.Cresswell...
FOR THE TRIBUNAL OFFICE