



EMPLOYMENT TRIBUNALS

Claimant: Mr M Mubin
Respondent: Wm Morrison Supermarkets Plc
Date 16 October 2020
Employment Judge Dr EP Morgan

Appearances

Claimant: In Person
Respondent: M N Singer (Counsel)

JUDGMENT

1. The Claimant's application to amend his claim is dismissed.
2. The claims of direct discrimination on the grounds of the protected characteristic of disability and religion or belief are dismissed as having no reasonable prospect of success.

REASONS

The Claim

1. Whilst not contained within his original grounds of Claim, the Claimant was employed by the Respondent for a 4 week period in July 2017. It is clear from the documents provided to the Tribunal by the Claimant that a number of complaints were made against the Claimant at that time. These culminated in a local management decision to terminate the Claimant's employment on grounds of unsatisfactory performance. The documents provided by the Claimant indicate that he at that time considered the process unfair. He compiled a number of documents detailing his thoughts on the matter. For reasons which will be apparent in what follows, whilst the Claimant's own notes from that period indicate a certain robust approach and ability to express concerns, he did not record any suggestion that the complaints, or management response to them, were on account of any

protected characteristic. As confirmed to the Tribunal during the course of the hearing today, the Claimant was aware of the time limit for bringing a claim of discrimination in the Employment Tribunal, within a 'short time' of his departure from the Respondent in July 2017.

2. Upon the basis of the documents before the Tribunal, the next interaction between the Claimant and the Respondent took the form of an application for the position of Technical Systems Manager. This application was lodged with the Respondent on 15 July 2020. On 27 July 2020, the Respondent confirmed the Claimant had been unsuccessful. In doing so, the Respondent referred to candidates of greater qualification or experience to the Claimant. The Claimant has no knowledge of the detail or qualifications of the other candidates. Nonetheless, he contends the response is 'factually' incorrect.
3. As clarified with the Claimant today, the claim relates to a single allegation, namely: a failure to appoint the Claimant to the substantive post for which he had applied. In this respect, the Claimant suggests that this failure was due to an act of direct discrimination on the grounds of race, disability, or religion or belief. During the hearing, and at the request of the Tribunal, the Claimant clarified the reference to race to refer to his nationality and ethnicity which he describes as "Pakistani Asian". In relation to the protected characteristic of disability, the Claimant relies upon two impairments: dyslexia and stammer.

Response

4. The Respondent has filed detailed grounds of resistance. In the course of that document, it is expressly stated that the application form completed and filed by the Claimant neither requested nor contained any mention of race, disability, religion or belief. The Claimant acknowledges this to be the case.

Applications

5. For the purpose of today's hearing, the Tribunal had been provided with a bundle of 92 pages.
6. By email of 9 September 2020, the Respondent has applied for the claim and/or aspects of it to be struck out as having no reasonable prospect of success, and/or invites the Tribunal to direct that the Claimant should be required to make payment of a deposit.
7. In response to that application and by email of 14 September 2020, the Claimant provided further context to this claim [p32]. It is clear from the terms of that document that the Claimant wished to draw heavily upon the events which culminated in the termination of his employment in 2017. Put simply, the Claimant contends that the decision to terminate his employment in July 2017 was due to the conduct of two managers; one of whom has now left the company and the other has been relocated from site. These individuals, he said, were hostile to him at that time. He considers that other managers have drawn upon the managerial decisions made at

that time as part of the evaluation of his more recent application. It is accepted on behalf of the Respondent that it has, as with any other employer, considered the prior employment relationship as but one point of reference when evaluating the merits of a potentially returning employee. However, the Respondents confirm that the decisions made were formulated by other managers not previously involved in the Claimant's management; those managers now having moved on.

8. Significantly, in the course of this same email, the Claimant suggested that he was unaware of his ability to bring a claim during 2017. However, during the course of the hearing, the Claimant was able to confirm to the Tribunal that he was aware of the potential to bring a claim in 2017 and indeed, the existence of a time limit in which to do so. However, by email of 12 October 2020, the Claimant made formal application to amend his claim. The email extends to over 3 pages. In the course of the email he states:

"As per point 2.2, I would like to amend my claim to cover from July 2017, I feel I am justified in this request...."

9. In the text which follows, the Claimant refers to a lack of support and harassment; actions he considered were "orchestrated by the HR Manager'...on site". He states:

"My termination from Morrisons was for a [sic] numerous different reasons and not one relating to my performance or conduct and definitely not for the reasons claimed by the respondents..."

10. The accompanying documentation includes the notes compiled by the Claimant at the relevant time: [78-81]

Application to Amend

11. In advancing his application, the Claimant invited the Tribunal to conclude that the events of July 2017 and July 2020 were part of a series; with the repetition of the same negative view of the Claimant. He invited the Tribunal to conclude that this was, in effect, history repeating itself. In this respect, and somewhat anecdotally, the Claimant suggested that he had made other applications to the Respondent in the intervening period. However, no further details were provided. Further, and whilst conceding that his former managers had left the site, he maintained that the same HR professional remained. The Claimant made clear, however, that the failure to issue any claim during 2017 was due to a positive decision on his part; being aware at that time of the time limit in which to do so.
12. For his part, Mr Singer reminded the Tribunal of the potential assistance provided by the list adumbrated under section 33 of the Limitation Act 1980. He reminded the Tribunal of the adverse impact of the passage of time upon the memories of the Respondent's managers; and indeed, the fact that one of the key individuals referred to by the Claimant had left the Respondent's employment some time ago; albeit after the Claimant's own departure in July 2017. Mr Singer further submitted that if the application was granted,

it would have resulted in the Claimant being afforded a period of 10 times that intended in which to bring claims in this jurisdiction.

13. During the hearing, I gave a short judgment dismissing the application to amend. I identified the reasons for doing so. As indicated to the parties, the decision to dismiss the application was founded upon the following:
 - 13.1 The proposed amendment would materially alter the nature and scope of the present proceedings; shifting the focus away from a single application process in July 2020 to a much wider inquiry predominantly by reference to the events which the Claimant alleges occurred in June and July 2017. As such, the application cannot be seen as giving rise to some relabelling or similar exercise; nor as a limited modification of the claim which is currently pursued. Rather, it would have the effect of relegating the only allegation presently before the Tribunal from the primary basis of claim, to that of a peripheral issue flowing from managerial decisions made 3 years earlier;
 - 13.2 Section 123 of the Equality Act 2010 makes clear that events may be seen as part of a series if a number of factors are present. These include but are not limited to such matters as the pursuit of a common policy, the involvement of the same decision makers, participation in similar decisions, or, processes and proximity in time;
 - 13.3 It is, however, important to distinguish between those acts which may be continuing and those which may be considered to have continuing consequences. The fact that an act committed in July 2017 may have enduring consequences for the Claimant does not mean that it is a continuing act;
 - 13.4 Where, as here, the Claimant seeks to persuade the Tribunal that acts extend over a significant period of time, it is necessary for the Tribunal to consider not only the acts in question and their potential relationship to each other, but also the nature, duration and extent of any intervening periods;
 - 13.5 Having considered these matters, the Tribunal is satisfied that the alleged events of June-July 2017 and July 2020 cannot be considered as components of a series of actions; with the result that the primary limitation period for lodging any claim in respect of the matters said to have occurred in June-July 2017 was (save for any early conciliation period) October 2017 (i.e. some 3 years prior the application made by the Claimant);
 - 13.6 Whilst not determinative, the Tribunal is satisfied that the Claimant was aware of the ability to advance a claim of discrimination in 2017 and chose not to do so. The Tribunal is unable to accept the assertion made within the Claimant's correspondence and contradicted by the Claimant's concession before the Tribunal that he was aware of the limitation period shortly after he ceased to be employed by the Respondent in July 2017;
 - 13.7 The Claimant's decision not to embark upon proceedings in 2017 was an informed choice made at a time when he was familiar with the time limit in which to bring a claim. Whilst the Claimant's own contemporaneous

documentation provides detailed evidence of what he perceived to be unfair treatment, he did not at that time ascribe his situation to any discriminatory purpose;

- 13.8 As in all cases of discrimination, the primary focus of the Tribunal will be upon the deliberative processes of the relevant decision maker. In the view of the Tribunal, it is of some significance that the Claimant considered the authors of his mistreatment in June-July 2017 to be two managers. On the Claimant's own position, one of those managers has moved site, whilst another has left the Respondent's organisation altogether. Mr Singer submitted that this raises the issue of real prejudice to the Respondent in its ability to defend any allegations concerning the events of June-July 2017. The Tribunal is satisfied that this would be so; especially where the allegations are said to have occurred within what was, on any view, an extremely brief period of employment; expressed in weeks, not months or years; and
- 13.9 At the time of lodging his claim with the Tribunal, the Claimant has chosen to formulate his claim in clear and precise terms. His primary position is quite simple: he ought to have been given the post for which he applied. This assertion is made upon the basis that he was the stellar candidate. He has no knowledge of the other candidates. However, he attributes his lack of success to a protected characteristic.
14. Having considered each of these matters, and giving due regard to the interests of justice and the overriding objective, it would not be appropriate to grant the application to amend. To do so would be to permit matters to be laid before the Employment Tribunal significantly outside the primary limitation period and in circumstances which would visit considerable prejudice upon the Respondent.

Strike out

15. Rule 37 of the Employment Tribunal Rules, permits the Tribunal at any stage of the proceedings to strike out a claim, or part of a claim, where, inter alia, it has no reasonable prospect of success. In support of the Respondent's application, Mr Singer has referred to a number of decisions including **A v B [2010] EWCA Civ.** From these authorities, the Tribunal is able to derive the following principles:
- 15.1 There is a public interest in ensuring that claims of discrimination are heard;
- 15.2 It will be in exceptional circumstances that a claim of discrimination will be susceptible to strike out on the grounds that it enjoys no reasonable prospect of success;
- 15.3 It is not enough, however, for a claimant to point to a general sense of dissatisfaction in the manner he perceives he has been treated, or, some general notion of unfairness; and

- 15.4 The claim form must be seen as the presentation of a legal claim; not a starting point in the hope that something further might arise in due course.
16. Acknowledging the demands of these principles, the Tribunal is required to consider whether there is anything exceptional within the circumstances of this case which enable it to conclude that the whole or part of the Claim may be struck out? The short answer to this question is: 'yes'. It is to be found in an aspect of the factual history which is not disputed and, indeed, is common ground. It is raised by paragraph 14 of the Grounds of Resistance and relates to the information required of the Claimant within the application process. The Claimant accepts that he was not required to identify within the application form upon which he relies as the basis of this claim, any information concerning his race, disability, religion or belief. This being so, there cannot be said to be any factual basis for the assertion that the relevant decision maker within the Respondent had regard to matters of disability, religion or belief when determining the outcome of his application.
17. As to the issue of race, the Claimant's name could *potentially* have communicated the possibility of the protected characteristic of race, though not inevitably so.
18. Given this position, and this exceptional feature of common ground in this case, the Tribunal is satisfied that the claims of direct discrimination on the ground of disability and/or religion or belief do not have any reasonable prospect of success and ought to be struck out on that basis.

Deposit Order

19. The remaining claim is one of direct discrimination on the ground of the Claimant's race, namely: his status as a "Pakistani-Asian". Rule 39 of the Employment Tribunal rules invests the Tribunal with a discretion to direct the payment of a deposit as a precondition of pursuing a claim. The Tribunal may do so where it is satisfied that the claim, or any issue within it, has little prospect of success.
20. In the view of the Tribunal, the claim of direct race discrimination may properly be classified as having little prospect of success. Leaving aside the issue as to whether the protected characteristic of race was capable of being communicated by the application form, the Claimant was not short-listed nor called for interview. In many cases, this may be attributable to the fact that other candidates were considered to have greater prospects than the Claimant. The Claimant is unable to identify the qualification or expertise of the other applicants, or, the candidate who was ultimately appointed. More fundamentally, however, as the Claimant himself accepts, it is self-evident that any employer will as part of its consideration of an application from a previous employee, consider the circumstances in which the candidate's prior employment with that employer came to an end. Insofar as subsequent decision makers have regard to earlier employment records but were not party to the events of the previous employment, they will be entitled to take at face value the content of those records. The Claimant does not dispute that this is the case. In the view of the Tribunal,

these are the inevitable realities of recruitment practice. Further, it is no part of the Claimant's case that he has, in the intervening period between July 2017 and July 2020, amassed additional qualifications so as to enhance his profile or eligibility for employment. Instead, the Claimant states that his application in July 2020 was for a post which was junior to the post previously held by with the Respondent. Whether or not this is the case, as the Claimant accepts, the records (including those of the Claimant himself) point to concerns around his technical performance at that time; concerns which prompted the Claimant to suggest in his application to amend that he was in need of support at that time but did not receive any.

21. Having considered all of these matters, the Tribunal is satisfied that the claim of direct discrimination on the grounds of race contrary to section 13 of the Equality Act 2010 has little prospect of success; such that it is appropriate to direct the payment of a deposit.
22. On behalf of the Respondent, Mr Singer submitted that this was a single issue case. He sought a single deposit on the grounds that the claim is founded upon speculation; not fact.
23. The Claimant resists the application. He seeks to persuade the Tribunal that the claim should be permitted to proceed to a full tribunal and is only capable of determination at that time. With regard to the payment of a deposit, he reminds the Tribunal that the level of any deposit should not be set so as to preclude the Claimant from pursuing the claim in question.
24. The Claimant was invited by the Tribunal to provide details as to his present means. He confirmed that he had been employed since leaving the Respondent in July 2017. He later clarified that this was in a self-employed capacity; incorporating his business during 2019. In answer to suitably phrased questions from Mr Singer, the Claimant indicated that he had no assets, or income and his wife was working as a community health worker on a 'modest' salary. The Claimant denied that he had either claimed, or was eligible for, any of the governmental financial relief incentives which had been introduced in response to the pandemic. The Claimant also denied that he was in receipt of any form of state benefit. Whilst he confirmed his home was the subject of mortgage, he had exercised his right to secure payment holiday.
25. The account given by the Claimant indicated that he was without income or assets. His only means of support was, it was said, from his family. The Claimant was more than reticent in disclosing the precise form of the financial support he received from his family, its frequency or scale; with the result that the Tribunal was left in the position of being unable to deduce the precise level of his disposable income. It is not able to accept however, that the Claimant has no financial means available to him.
26. The Claimant is, of course, correct in reminding the Tribunal that the level of any deposit should not operate so as to prevent the Claimant from advancing the claim or participating in the proceedings. The Claimant has indicated that he has the benefit of family support which takes the form of

financial payments. The Claimant did not suggest that those supporting him were themselves of limited resources. Furthermore, the Claimant had chosen to incorporate his business during 2019. He indicated that he had not received any additional contracts during the pandemic but has nonetheless, not chosen to make any claim for benefits; this despite the fact that he has 4 children of school age.

27. The totality of the Claimant's evidence on the issue of his means was, in the view of the Tribunal, unreliable and incomplete. Doing the best it can, the Tribunal has come to the view that the Claimant has available to him (whether directly or indirectly) some financial means by which to meet the payment of a deposit order. Accordingly, the Tribunal is satisfied that the appropriate deposit is one of £750.

Employment Judge Morgan
16 October 2020