EMPLOYMENT TRIBUNALS

Claimant: Mr I Mohamed

Respondent: Acis Group

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 13 April 2022

Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Mr J Barron, Solicitor

JUDGMENT

The claimant's claim for race discrimination is struck out Under rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that it has no reasonable prospect of success

REASONS

Introduction

1. This case came before me at an open preliminary hearing in order to consider, amongst other things, whether the claimants claim for direct race discrimination in respect of his dismissal and the failure of his appeal against dismissal should be struck out on the basis that it has no reasonable prospect of success.

2. At the hearing the claimant represented himself and the respondent was represented by Mr Barron, solicitor. There was a bundle of documents running to 134 pages and the claimant provided a witness statement

which essentially was his response to a previous order for him to particularise new claims which you wish to make and why they were made out of time. There was no specific evidence addressing the strikeout issue which related to claims included in the original claim form.

3. The claimant gave evidence on oath which I shall do with below.

Issues

4. The sole issue in respect of which I needed to make a judgement was the strikeout question.

Law

5. The material parts of the Tribunal Rules are as follows:

> ***"Striking out***
>
> ***37.***—*(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success…*

6. In relation to direct discrimination, for present purposes the following are the key principles.

7. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

8. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

9. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

10. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

11. In **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed.

12. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

13. Finally, turning to the strike out provisions of the Rules, I note that claims of discrimination are rarely struck out where there is a factual dispute between the parties (**Anyanwu v South Bank Student Union** 2001 UKHL 14, and also see **Mechkraov v Citibank NA** 2006 ICR 1121). However, the test is of course whether there is no reasonable prospect of success, even if there are factual disputes.

14. Having said that, I note that I should, when considering strike out, take the claimant's pleaded case at its highest however, I do not lose sight of the fact that in many, indeed almost certainly in most claims of discrimination the Tribunal will need to draw inferences from disputed findings of fact which I am not in a position to, and indeed nor should I, do. Those inference may be critical in many cases.

15. Caution should be exercised if a case has been badly pleaded, for example, by a litigant in person whose first language is not English. Taking the case at its highest may well ignore the possibility that it could have a reasonable prospect of success if properly pleaded. In ***Mbiusa v Cygnet Healthcare Ltd*** UKEAT/0119/18 *(7 March 2019, unreported)* it was held that in view of the lack of clarity as to the claimant's arguments, the proper course of action would be to establish more precisely what the claimant was arguing, if necessary make amendments and then, if still in doubt about chances of success, make a deposit order. At paragraph 21 Judge Eady provided useful guidance about the problem of imprecise pleading, particularly by litigants in person, as follows:

> *"Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person, especially in the case of a complainant whose first language is not English: taking the case at its highest, the ET may still ignore the possibility that it could have a reasonable prospect of success if properly pleaded, see* **Hassan v Tesco Stores Ltd** *UKEAT/0098/16 at para 15. An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where – as Langstaff J observed in* **Hassan** *– the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."*

16. Particular caution needs to be exercised before striking out a discrimination claim without a hearing where, even though the primary facts may not be in dispute, there is nevertheless a dispute about the inferences to be drawn from them. As Simler J explained in ***Zeb v Xerox (UK) Ltd*** UKEAT/0091/15 *(24 February 2016, unreported), 'the* question of what inferences to draw forms part of the critical core of disputed facts in any discrimination case' (para 21), as do the respondent's explanations for alleged less favourable treatment (para 23); accordingly, employment judges need to be alert to the possible inferences that might be drawn and the lines of enquiry that will need to be pursued at a hearing before striking out such claims.

Findings of fact

17. I need make only brief findings of fact.

18. At a closed case management preliminary hearing held on 28 January 2022 the claimant's claims were discussed in some detail.

19. The claimant was employed by the respondent From 22 January 2018 until 11 February 2021 which is the effective date of termination.

20. Early conciliation took place between six April and 14 April 2021. The claim form was presented on 20 April 2021. There are three claims set out in the claim form being unfair dismissal, race discrimination and they claim for "other payments".

21. The claim for race discrimination is put as follows:

> *"I also strongly believe that my race had something to do with it and if it was one of my white colleagues the outcome would have been different"*

22. The "it" referred to in the above quote is the claimant dismissal and the failure of his appeal against that dismissal.

23. At the case management preliminary hearing the judge ordered an open preliminary hearing in order to discuss a number of things including weather the above claim of race discrimination should be struck out as having no reasonable prospect of success. The basis for that order was that the claimant told the tribunal at the closed preliminary hearing that He was not alleging that the dismissing officer and the three panel members who rejected his appeal against dismissal did so on the basis of conscious or unconscious racial prejudice and it was difficult therefore to understand the basis upon which he was alleging that notwithstanding that the decisions were themselves discriminatory because of race.

24. The claimant was ordered to provide a witness statement for today's hearing setting out the basis of his discrimination allegation and to provide copies of any documents relevant to that issue, amongst other things. The

statement provided by the claimant is the document which appears at page 74 of the bundle.

25. At today's hearing the claimant gave evidence under oath and when asked by me to explain why he said the decisions to dismiss him and to reject his appeal against dismissal were discriminatory given what he said at the close preliminary hearing, he said simply that he believed that he had been discriminated against and when pressed further to explain how he reached that conclusion given his concession at the close preliminary hearing the claimant appeared to change his mind and to assert that the four people concerned, that is the dismissing manager and the three person appeal panel were motivated by race.

Discussion and conclusion

26. As is now well known the burden of proof initially rests with the claimant to show facts from which the tribunal could conclude, in the absence of any explanation by the respondent, the discrimination took place. If there are such facts then the burden shifts of the respondent to show that it did not in fact discriminate. But importantly we know from the case of **Madarassy** (see above) that a difference in treatment and a difference in the protected characteristic will not be sufficient to shift the burden of proof, there must be more. This principle was explained to the claimant in the hearing, but he fell back on saying simply that it was his belief that he had been discriminated against, there are no other facts he could rely on and you could not point to any other case dealt with by the respondent in similar circumstances, or indeed any circumstances, with which he could make a comparison.

27. Whilst in general I found the claimant to be genuine and sincere, on the question of the motivation of the disciplinary and appeal panels I find that he changed his mind because it was expeditious to do so given that he was faced with what I consider to be an insurmountable problem, which is the disconnect between his view expressed at the closed preliminary hearing, that the panel members were not motivated by race, and his assertion that their decisions were directly discriminatory because of race. It seems to me that that illogic of his argument had not occurred to the claimant, and when faced with having to answer the question how somebody could discriminate directly if they were not motivated by discrimination to do so, His only response was to row back from his position set out before judge Camp at the closed preliminary hearing. I find that on this point the claimant was being at best disingenuous and that he does not really believe that the dismissing manager and the appeal panel were in fact motivated by race and it seems to me that that is fatal to his claim.

28. When Mr Barron was asking the claimant questions, he put to the claimant’s that the manager who dismissed him, Ms Kelly, was significantly more senior than the manager the claimant had accused of discriminating against him, and, further, the appeal panel consisted of the

Chief Executive Officer and two wholly independent panel members and there is no reason suggested as to why they should have been motivated by the claimant's race. In response the claimant simply fell back on something he said on a number of occasions which was that this was how he felt, this is what he believed but when pressed on what basis he reached that conclusion or felt that way he had no response.

29. In short therefore there are no suggested and surrounding facts or circumstances from which the tribunal could, it seems to me, draw adverse inferences impacting on the decision making of the appeal and disciplinary panels in this case. In fact, there seems no doubt the claimant was guilty of the conduct for which he was dismissed albeit that he says he has an explanation for water place. it seems to me that it was open for the dismissing manager and the appeal panel to not accept the claimant's explanation as sufficient mitigation. That is in effect a question about the band of reasonable responses.

30. Taking the claimant's case at its highest it amounts to no more than an assertion that very senior and independent panel members with no suggested relationship to the claimant's line manager, who is the person he accuses of discriminating against him, and with no other reason suggested by the claimant either directly or from inferences to be drawn from any surrounding facts, nevertheless directly discriminated against the claimant because of race. I find it impossible to accept, particularly given the claimant's concession at the closed preliminary hearing, that any tribunal properly directing itself could find that there was in this case direct race discrimination in the decisions to dismiss the claimant and to not uphold his appeal.

31. For those reasons I consider it appropriate to strike out the claimants claim for race discrimination. The claimant's claim for unfair dismissal remains and shall proceed to a final hearing.

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Employment Judge Brewer

Date: 13 April 2022

JUDGMENT SENT TO THE PARTIES ON

14 April 2022

FOR THE TRIBUNAL OFFICE

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