CASE NO: 2601365/2021

EMPLOYMENT TRIBUNALS
At a Preliminary Hearing

Claimant: Mr R Champayne

Respondent: Luxfer Gas Cylinders Ltd

Heard at: Cloud Video Platform

Region: Midlands East – Nottingham Employment Tribunal

On: 11 May 2022

Before: Employment Judge R Broughton (sitting alone)

Representation
Claimant: In Person
Respondent: Mr Kellaway – legal representative

JUDGMENT AT AN OPEN PRELIMINARY HEARING

The judgment of the Employment Tribunal is that;

- The application to strike out the claim of direct race discrimination pursuant to rule 37 is refused..

- The claim of direct race discrimination has little reasonable prospect of success and under rule 39 the claimant is required to pay a deposit to pursue that complaint.

REASONS

The Background

1. The claimant applied for a job with the respondent as an HR Advisor on 18 May 2021. His application was rejected. The claimant who identifies as black and Jamaican, complains that this was an act of direct race discrimination.

2. There was a previous closed preliminary hearing before Employment Judge Britton on 25 October 2021 when it was clarified that the claim was brought pursuant to section 13 Equality Act 2010 (EqA) **only.** Employment Judge Britton considered whether to make a deposit however decided not to do so. The claimant referred at this hearing to having an actual comparator, namely Ms Croft who had applied for a similar role with the respondent and been successful and as set out in the record of that hearing the claimant informed Employment Judge Britton that ; *"their history in terms of a number of assignments in short term engagements is comparable and that his depth of experience is greater than hers*" (para 4).

3. Following that hearing the respondent wrote to the Tribunal on 29 October 2021 applying for an order under rule 37 or 39 on two main grounds;

   a. The CV of Ms Croft (attached with their application) demonstrated that she was not a suitable comparator in that there was a material difference in their circumstances

   b. The respondent was not aware that the claimant was Jamaican.

4. The claimant responded on 30 October 2021 setting out the reasons why he considers Ms Croft to be a suitable comparator and asking that if the tribunal determine that Ms Croft is not a suitable comparator that he would want to bring a claim of indirect discrimination.

5. The case was been listed for a two-day hearing to commence today, this was converted into today's 1 day preliminary hearing to determine;

   a. Any application to amend the claim

   b. Whether any part of the claimant's claim has no reasonable prospect of success and if so whether, pursuant to rule 37 all or any part of the claim should be struck out;

   c. Whether any specific allegation or argument forming part of the claimant's claim has little reasonable prospect of success and if so whether, pursuant to rule 39 the claimant should be ordered to pay a deposit (and if so how much) as a condition of continuing to advance any such specific allegation or argument.

Hearing

6. I was assisted today by a bundle prepared by the respondent and which the claimant at the outset confirmed contained all the documents he wished to rely on although he did raise that he had requested copies of the CVs of all the applicants for the HR Advisor role but the respondent had refused to disclose them.

7. The bundle numbered 62 pages.

8. The references to page numbers in this judgment are to pages in the bundle.

The claim the Application to Amend

9. I first discussed with the parties the claim itself.

10. The claimant confirmed that he was still asserting that Ms Croft was an appropriate actual comparator but that if the tribunal were to determine she was not, then he would want to rely on a hypothetical comparator. Mr Kellaway acknowledged that if the tribunal were to find that there was no actual comparator it would be incumbent on the tribunal to consider in any event, how a hypothetical comparator would have been treated : ***Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting 2002 ICR.***

11. We then turned to the indirect discrimination claim. The claimant confirmed that he had, since submitting the application, given this further consideration and was not pursuing it. That application is withdrawn.

12. The record of the preliminary hearing with Employment Judge Britton referred to the claimant as identifying as Jamaican but also referred to his comparator being white. I took the claimant to section 9 of the EqA and sought to clarify how he defines his race, he confirmed that it was;

    a. His colour – he defines this as black

    b. National origins – he defines this as Jamaican

13. The claimant relies on the above together or in the alternative.

14. His claim is that he was not progressed to the next stage in the selection process for the job, because he is black and/or Jamaican. He relies on Ms Croft (who is white and he believes English) as an actual comparator or in the alternative a hypothetical comparator.

15. Ms Croft had worked with him in the past and he believes she had similar HR experience to him when she applied for a similar HR Advisor role with the respondent and was successful, while he did not make it to the interview stage. When he made enquiries about the reason, his case is that he was given different explanations; the first via the agency, was about the length of the periods he had worked on assignments in the past, as set out in his CV however on a later occasion, Ms Anderson told him directly that it was because of his HR experience. He believes his experience to have been comparable with Ms Crofts.

16. The respondents have since disclosed the CV of Ms Slater, the successful candidate (who is white) and while the respondent's case is that she has more experience than the claimant, the claimant points to the fact that she is only qualified to CIPD level 3, while he has CIPD level 5.

17. Neither party had prepared written submissions.

The Issues

18. The only issues to be determined by me today are whether the claim of discrimination should be struck out under rule 37 (1)(c) and/or a Deposit Order made under Rule 39.

Legal Principles

Direct Discrimination

19. Section 13 Equality Act 2010 provides that:

"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".

20. It is for a claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (**Wong v Igen Ltd [2005] ICR 931**).

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

21. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

22. Rule 37 provides as follows:

"At any stage of the proceedings, either on its own initiative or on the application of a party, the 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.***
> ***(b)*** *…*

23. A strike out is the ultimate sanction and for it to appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"

24. **Cox v Adecco and others [2021] UKEAT/0339/10/AT**: When considering whether to strike out a tribunal must;

a. *Consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established (stage 1)*

b. *Having identified any established grounds (s), the tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the rule (stage 2)*

25. The approach to be followed by a tribunal when faced with an application to strike out a *discrimination* claim was summarised by the EAT in **Mechkarov v Citibank NA [2016] ICR 1121 as;**

a. *Only in the clearest case should a discrimination case be struck out*

b. *Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence*

c. *The claimant's case must ordinarily be taken at its highest*

d. *If the claimant's case is conclusively disproved by or it is 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it may be struck out*

e. *A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts*

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

26. Different considerations apply, however, in relation to Deposit Orders made under Rule 39 of the Regulations. Rule 39 provides as follows:

"(1) Where at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

27. Whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.

Case law – direct discrimination

28. ***Laing v Manchester City Council and anor 2006 ICR 1519, EAT***, Mr Justice Elias suggested that a claimant can establish a prima facie case of direct discrimination by showing that he or she has been less favourably treated than an appropriate comparator. He considered that at the first stage 'the onus lies

on the employee to show potentially less favourable treatment from which an inference of discrimination could properly be drawn'. This will typically involve identifying an actual comparator treated differently or, in the absence of such a comparator, a hypothetical one who would have been treated more favourably. *'it is only if the claimant succeeds in establishing that less favourable treatment that the onus switches to the employer to show an adequate, in the sense of non-discriminatory, reason for the difference in treatment'.*

29. In ***Network Rail Infrastructure Ltd v Griffiths-Henry 2006 IRLR 865, EAT*** Elias P considered that there would be a prima facie case of discrimination if a black employee was at least as well qualified as a white employee and only the white employee was promoted if they were the only two candidates for promotion. The case becomes weaker where there are a number of candidates and the unsuccessful black candidate is rejected along with a number of equally well-qualified white candidates, since there is then no distinction between all the unsuccessful candidates.

30. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*** Lord Scott commented that the fact that there is a material difference does not prevent the 'comparator' from having some evidential value for the claimant that is capable of supporting the requisite inference of discrimination.

31. Lord Justice Mummery in ***Madarassy v Nomura International plc 2007 ICR 867, CA*****,** '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*.'

32. ***Veolia Environmental Services UK v Gumbs EAT 0487/12*** His Honour Judge Hand QC ;

"*The statutory provisions as to the reversal of the burden of proof and the jurisprudence which has grown up around them exclude actual consideration of the substance of the explanation, but if the fact that there have been a number of inconsistent explanations or reasons put forward is to be excluded from consideration as to whether the burden of providing a non-discriminatory explanation should pass to the employer (and the claimant's case, therefore, fail at that stage) then the employment tribunal has been put into a strange position in contrast to other courts and tribunals that have to make factual findings. We can see no basis for excluding from consideration the fact that there have been a number of differing and inconsistent reasons advanced for particular behaviour. Therefore, in this appeal we do not accept that the employment tribunal erred by taking into account that there had been differing and inconsistent explanations advanced by the employer when deciding that the burden of proof had been reversed. It is the fact of the inconsistency that is being included, not the explanations themselves.'*

Submissions

33. I was assisted by brief oral submissions from both parties and I took them fully into account.

34. I summarise the submissions as follows

Respondent's Submission's

35. There were two mains strands to the respondent's submissions;

36. The first was that Mrs Croft is not a suitable comparator;

    a. *She had 6 roles and the claimant had 12 roles in an 8 year period*

    b. *Ms Croft is more experienced; 97 months in HR roles as compared to the claimant's 21 months*

37. Ms Slater is also not a suitable comparator; she had only 3 past employers in a 7 year period.

38. Mr Kellaway also made reference to the range of ethnicities of those interviewed for the role. However, as equality and diversity questionnaires were not sent out by the respondent, he had no breakdown of what the ethnicities/race of the candidates were nor any information about their respective experience and qualification etc. The respondent must rely on the oral evidence of Ms Anderson to provide that information.

39. The respondent was not aware of the claimant's race. The claimant did not disclose his race in his CV. Ms Croft had worked for a company called Confetti in the past at the same time as the claimant but only for a week and never worked with him. Ms Crofts it is submitted, was not involved in the recruitment exercise. Ms Croft left the respondent's employment on 20 May 2021, a day or two after the decision was taken not to progress the claimant through to the next stage of the recruitment process.

Claimant's submissions

40. The claimant submits that he was in essence as experienced as Ms Croft and Ms Slater. While he had CIPD level 5, Ms Slater had only level 3 and thus he was more qualified than her.

41. Ms Croft according to her CV did have longer assignments than the claimant but he submits, Ms Anderson had told him a different reason for not selecting him, that it was his experience and he disputes that he is less experienced than Ms Crofts.

42. Ms Croft had worked with the claimant in the past and would have known who he was and he understands that there was only Ms Anderson and Ms Croft in the HR department and therefore asserts that Ms Croft would have had some involvement in the process. Further, he was a LinkedIn contact of Ms Anderson's and submits she therefore knew him and of his race.

Conclusion and Analysis

43. I provided my decision ex-tempore to the parties at the hearing.

44. The claimant's case must at this preliminary stage be put at its highest.

45. It is not disputed that he applied for this role and was rejected without an interview.

46. Ms Croft was selected for a similar HR Advisor role with this respondent during a previous recruitment process and was successful.

47. The claimant asserts that his experience and qualification match the job description and Ms Crofts.

48. The claimant points to being treated less favourably than Ms Crofts (who is white and English).

49. The respondent argues Ms Croft is not a suitable comparator in that she had more experience but also her CV and a screenshot from LinkedIn [p.52] shows that she had worked for past companies longer than the claimant. On looking at the respective CV's of the claimant and Ms Croft, the claimant accepted that whereas it appeared Ms Croft had worked in her last 4 assignments for no less than 1 year and in most cases for over 2 years, the time he had spent in his HR roles since August 2018 was no more than 6 months and in one case for 1 month. The claimant's HR career history on the basis of those CVs therefore does appear less impressive, at least in respect of the length of past engagements.

50. The claimant, however, argues that he had comparable experience, and it was experience Ms Anderson gave as the reason for not selecting him when he contacted her directly.

51. Further, although not an actual comparator, Ms Slater who was offered the role, may have had more experience, but she did not have the qualifications which he claimant had and which the job description [p.53] stated was required. The fact that there is a material difference does not prevent Ms Slater from having some evidential value that is capable of supporting an inference of discrimination: (***Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*****)**

52. In terms of whether there is "something more" than mere less favourable treatment in support of his claim (***Madarassy v Nomura International plc 2007 ICR 867, CA*****)** the ET1 complains that Ms Anderson gave different reasons for her decision:(***Veolia Environmental Services UK v Gumbs EAT 0487/12***) .

53. I conclude on balance, that the claimant's case, taken at its highest, cannot be said to have 'no' reasonable prospect of success.

54. There are however weaknesses in the case; while a tribunal would need to hear oral evidence to resolve the dispute over relative experience, Ms Croft was not one of the candidates for the role the claimant had actually applied for and Ms Croft does have a more impressive CV, in terms of at least longevity in past roles.

55. Further, Ms Slater appears to have less formal qualifications but may well not be a suitable comparator given the potential disparity in not only qualifications but experience.

56. Therefore, in the absence of an actual comparator, it will be for the Tribunal to consider whether it is appropriate to construct a hypothetical comparator.

57. Further, the '*something more'* in this case is 'thin', it relies on different reasons given for the treatment however, those reasons are not necessarily inconsistent with each other and the issue raised about the time the claimant has spent in previous roles, is not without substance.

58. This is a case where I consider that while it cannot be said that there is no reasonable prospect of success, there are however serious weakness in the case as presented by the claimant, such that I determine that it has little reasonable prospect of success and I consider it appropriate and in accordance with rule 2 to exercise my discretion to make a Deposit Order under rule 39.

Financial means

59. The claimant gave sworn evidence about his financial means, which was not challenged by the respondent, although the respondent was invited to cross examine the claimant.

60. The claimant is employed earning £22,000 but is on universal credit. He has rent and significant child maintenance payments to pay. He has no savings and his evidence was after his monthly outgoings, which he went through with me, he has no disposable income.

61. Taking into account that Deposit Orders are to discourage claims with little merit while not making it difficult to access justice; the claimant is ordered to pay **£20** to pursue his claim of direct discrimination.

62. Case management orders were made and are set out in a separate order.

Employment Judge R Broughton

Date: 11 May 2022