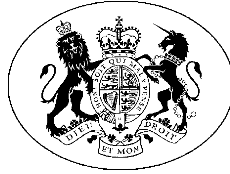

EMPLOYMENT TRIBUNALS

Claimant: **Mr O Oyekenu**

Respondents: **(1) BP Exploration Operating Company Limited**
(2) BJSS Limited
(3) The Bridge (IT Recruitment) Limited

Heard at: **Reading Employment Tribunal (in public, by CVP)**

On: **9 November 2022**

Before: **Employment Judge Gordon Walker**

Representation
Claimant: represented himself
Respondents: Mr N Roberts (counsel for the first respondent)
Mr E Nuttman (solicitor for the second respondent)
Ms R Kight (counsel for the third respondent)

RESERVED JUDGMENT

1. The respondents' applications to strike out the claims pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 are dismissed.

REASONS

Introduction

1. The claimant is a software developer. The first respondent is part of the BP group (a global energy company). The second respondent is an IT service management company. The third respondent is an IT recruitment company.

2. The claimant was supplied to work for the first respondent. The placement commenced on 10 March 2021 and was terminated on 23 March 2021. The respondents assert that the placement was terminated on grounds of performance. The claimant says that this (and other alleged acts and/or failures to act by the respondents) were direct race discrimination and/or harassment related to race.

3. On 22 May 2021 the claimant brought a claim against the respondents of race discrimination, and a claim of breach of contract (for notice pay) against the second respondent.

4. The respondents defend the claims. The respondents applied for the claims to be struck out pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013.

Claims and issues

5. At a case management preliminary hearing on 30 March 2022, Employment Judge Welch listed an open preliminary hearing on 9 November 2022 to consider, amongst other things, the respondent's applications for strike out.

Procedure, documents and parties' submissions

6. There was a bundle of 239 pages for the preliminary hearing.

7. At the outset of the hearing of 9 November 2022, the claimant's claims were clarified, and I heard the claimant's application to amend his claims of direct race discrimination against the first and second respondents. The outcome of that application to amend, and the subsequent agreed list of issues, is set out in my case management order dated 15 November 2022. I had regard to that list of issues when considering the prospects of success of the claims, for the purposes of the strike out and deposit order applications.

8. I then heard from the parties on the applications to strike out. In reaching my conclusions I considered:

    a. The parties oral submissions;

    b. The written submissions, which speak for themselves, namely: the skeleton arguments from the first and third respondents, and the written applications and the claimant's responses at pages 96-128;

    c. The documents referred to by the parties in their written and/or oral submissions.

9. The main thrust of the respondents' submissions on the strike out of the discrimination claims was that the claimant's claims were just a bare assertion of race discrimination, in the context of a very short period of work, and with contemporaneous written evidence of performance concerns. It was said that the claimant had had three attempts to explain the basis for his assertion of race discrimination (in his claim form, further particulars, and response to the respondents' applications) but he had not done so. The first respondent also relied on the case of ***Ministry of Defence v Kemeh*** [2014] ICR 625 in support of its submission that it was not liable for the acts or omissions of Mr Chris Flynn pursuant to section 109 of the Equality Act.

10. The second respondent submitted that there was no contract of employment between the second respondent and the claimant and no contractual entitlement to notice. Therefore, the breach of contract claim had no reasonable prospect of success.

11. In his written replies to the applications, the claimant said, amongst other things, that:

    a. Mr Obi of the first respondent, who the claimant describes as African, was involved in the decision to recruit the claimant but not in the decision to terminate the claimant's placement, which was a decision reached by individuals described as white Caucasian (page 125 of the bundle);
    b. Mr Bilal, described by the claimant as non-Caucasian, of the first respondent, was also excluded from decisions about the termination of the claimant's engagement (page 127);
    c. There was an implied contract of employment between the claimant and second respondent (page 109).

The law

12. The respondents apply to strike out the claims pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013, which states:

37.— Striking out

(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.

13. Discrimination claims should not be struck out except in the very clearest of circumstances: ***Anyanwu v South Bank Students' Union*** [2001] IRLR 305:

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest." (Lord Steyn at paragraph 24)

" … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence." (Lord Hope of Craighead at paragraph 37)

14. Choundhury P (as he then was) in ***Malik v Birmingham City Council*** (unreported) 21 May 2019 provided a summary of the relevant legal principles (at paragraphs 30-33). I also set out below paragraphs 59-60 as they are relevant to the respondents' principal submission, that the claimant only makes a bare assertion of discrimination:

30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391 . The applicable principles were summarised more recently by the Court of Appeal in the case of Mechkarov v Citibank N.A [2016] ICR 1121 , which is referred to in one of the cases before me, HMRC v Mabaso UKEAT/0143/17.

31. In Mechkarov , it was said that the proper approach to be taken in a strike out application in a discrimination case is that:

(1) only in the clearest case should a discrimination claim be struck out;
(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
(3) the Claimant's case must ordinarily be taken at its highest;
(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and
(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In Community Law Clinics Solicitors Ltd & Ors v Methuen UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that " the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."

33. A similar point was made in the case of ABN Amro Management Services Ltd & Anor v Hogben UKEAT/0266/09, where it was stated that, " If a case has indeed no reasonable prospect of success, it ought to be struck out." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in Meek v City of Birmingham District Council [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out.

…

59. Part of the submission today was that in accordance with the Madarassy case, there needs to be "something more" than the mere difference in treatment and a difference in status for there to be a prima facie *case of discrimination. One needs to take some care when multiple allegations are made not to treat each one in isolation and to say that for that allegation, there is nothing more than a difference in status and a difference in treatment. The fact that there are multiple instances of alleged differential treatment might (depending on circumstances), when taken together, amount to the 'something more' that could establish a* prima facie *case.*

60. If an employee with a protected characteristic is repeatedly treated in a different way from his colleagues without that protected characteristic, that might give rise to a prima facie *case. Whether or not it does so will depend on the particular circumstances.*

15. In ***Cox v Adecco*** [2021] ICR 1307 HHJ Tayler analysed the case law, including the above guidance from ***Malik****,* and provided a summary of the general propositions (at paragraph 28):

(1) No one gains by truly hopeless cases being pursued to a hearing.
(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.
(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.
(4) The claimant's case must ordinarily be taken at its highest.
(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.
(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.
(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.
(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

16. In ***Chandhok v Tirkey*** [2015] ICR 527 Langstaff P (as he then was) stated at paragraph 20:

This stops short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions when a claim can properly be struck out—where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ in Madarassy v Nomura International plc [2007] ICR 867 , para 56):

> *"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."*

Or claims may have been brought so repetitively concerning the same essential circumstances that a further claim (or response) is an abuse. There may well be other examples, too: but the general approach remains that the exercise of a discretion to strike out a claim should be sparing and cautious. Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision.

17. In ***Ministry of Defence v Kemeh*** [2014] ICR 625 the Court of Appeal held that a contract worker was not an agent within the meaning of section 109 Equality Act 2010.

Conclusions

18. The respondents' main submission has force. I have seen evidence of significant performance concerns being raised about the claimant (pages 169-170) which could readily explain the termination of his employment and other alleged detriments relating to his performance management. The claimant asserts that all detriments were race discrimination, but he has provided very little explanation as to why he thinks the alleged detriments were because of, or related to, his race.

19. I have had regard to paragraph 20 of ***Chandhok****,* but I also considered paragraphs 59-60 of ***Malik***. I find that the claimant's claims of race discrimination are not just a bare assertion of difference in status and difference in treatment. I take the claimant's case at its highest. The claimant's assertions about Mr Obi and Mr Bilal, and his allegation of repeated differential treatment from colleagues who do not share his protected characteristic, might give rise to a *prima facie* case. Whilst there is evidence of poor performance, the claimant says that this was part of the discriminatory treatment. The correct conclusions and inferences to be drawn from this evidence are a matter for the final hearing. This is an example of a fact sensitive issue in this case which makes it unsuitable for strike out.

20. The first respondent says that Mr Flynn is a contract worker and therefore the first respondent is not liable for his actions pursuant to section 109 of the Equality Act 2010. The first respondent may be right about that. But this is a factual issue to be determined at the final hearing. The first respondent

submitted that there was no factual issue in dispute as the claimant did not disagree with Mr Flynn's status in his reply to their application. However, I have regard to the fact that the claimant is a litigant in person, and he may not have any direct knowledge of Mr Flynn's status.

21. The claimant appears to accept that there is no written contract of employment between himself and the second respondent. This may prove fatal to his claim for notice pay. The assertion that 12 months' notice is due is unconvincing in the absence of any express term to that effect. However, the claimant may be able to establish an implied contract of employment with the second respondent. That is an issue which is appropriate for determination at the final hearing. If there is such a contract, there may be a valid claim for notice pay, even if it is at a lower level than the pleaded claim for 12 months.

22. I dismiss the respondents' applications to strike out the claims pursuant to rule 37(1)(a), because:

    a. Striking out a claim of discrimination is a draconian step which is only to be taken in the clearest of cases. This is not one of those cases, because:

        i. The claimant's claims of race discrimination, when taken at their highest, are not simply a bare assertion of difference in status and difference in treatment; and

        ii. There are factual issues to be determined at the final hearing, such as the claimant's performance and Mr Flynn's status.

    b. Taking the claimant's case at its highest there may be an implied contract of employment with the second respondent which may give rise to a claim for notice pay.
    c. at this level having regard to the claimant's evidence of his ability to pay. The claimant is a high earner in reasonably stable employment, with substantial equity in his house. I do not make the order at the highest level as I have taken into account the claimant's high monthly outgoings.

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Employment Judge Gordon Walker

Date: 16 November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21 November 2022

FOR EMPLOYMENT TRIBUNALS