EMPLOYMENT TRIBUNALS

Claimant: **Mr J Odiase**
Respondent: **World of Books Ltd**

PRELIMINARY HEARING

Heard at: **Birmingham Employment Tribunal (by CVP)**

On: **29 November 2023**
Before: **Employment Hughes**

Appearances
For the claimant: Mr L Lennard, Lay Representative (not for profit)
For the respondent: Mr R Wayman, Counsel; Ms A Richardson, Solicitor; and Ms B Morgan, Trainee Solicitor

JUDGMENT

1 The claimant's claim for unauthorised deductions from wages is struck out because it is misconceived in law, and has no reasonable prospect of success.

2 The remaining claims of direct race discrimination and direct sex discrimination are not struck out on the grounds of no reasonable prospect of success and I do not make a deposit order because I do not find they have little reasonable prospect of success.

3 I decline to exercise my discretion to decide at this preliminary hearing that the claimant's complaints of discrimination have been brought within time or as to whether time should be extended to allow those complaints to succeed. Those jurisdictional points are best dealt with by the Employment Tribunal at the trial of these claims.

REASONS

Background and issues

1 This case was listed for three hour public preliminary hearing which came before me on **29 November 2023** via CVP. The purpose of the preliminary hearing was to consider whether the claimant's claims should be struck out as having no reasonable prospect of success or in the alternative whether they have little reasonable prospect of success such that a deposit order should be made as a condition of the claimant continuing with his claims. I also had a discretion to decide at this preliminary hearing whether the claimant's complaints of discrimination were brought within time or whether time should be extended to allow those complaints to succeed.

2 The respondent sent an electronic copy of the preliminary bundle. I was also provided with copies of both parties' submissions and case law from the respondent. The claimant referred to case law in the submissions produced by his representative and, after hearing oral

submissions, there was a break to allow the respondent's representative and I to consider those cases. After the break I heard further oral submissions and then gave judgment. I am producing written reasons because I think these will be necessary for the Employment Tribunal sitting on the trial of these claims and because the claimant's representative asked for them. This judgment and reasons should be included in the trial bundle. It should be noted that the claimant was unable to attend the hearing because he had to go to the Crown Court to support his children who were, as I understand it, witnesses in a trial. He had produced a written statement for this hearing which had not been ordered. Unfortunately it did not deal with his means, which was something I invited oral representations about in connection with whether to exercise my discretion to make a deposit order (if the threshold was met) and, if so, how much to order. I heard oral submissions on this point.

3 The final hearing is listed to take place at Birmingham Employment Tribunal on **5, 6, 7 February 2024**. The case will be heard by an Employment Judge and two non-legal members. The hearing will start at 10.00 am. The parties must arrive by 9.30 am. The proposed timetable is set out in the Order of Employment Judge Noons made on 19 May 2023. Sometimes hearings start late, are moved to a different address, or are cancelled at short notice. The parties will be told if this happens. Neither party told me that three days was insufficient for the case to be heard.

4 During the telephone hearing before Employment Judge Noons, it was recorded that the parties were interested in judicial mediation. The Regional Employment Judge decided this was not appropriate until after this hearing. The claimant is still interested. The respondent no longer requests judicial mediation. The parties can of course seek to resolve the matter through ACAS. The case management directions do not require amendment, and the respondent's representative agrees that such statistical information as is available will be included in the respondent's witness statements. The remaining directions are set out in the Order of Employment Judge Noons.

5 Judge Noons summarised the claims and issues in her case management Order, and I shall briefly extracts of her summary here.

6 The claimant was employed by the respondent, an online retailer of second books, CDs and DVDs, as a wholesale senior operative, from May 2019 until 12 December 2022. Early conciliation started on 15 November 2022 and ended on 17 November 2022. The claim form was presented on 18 November 2022.

7 The claim is about deductions of pay and direct race and sex discrimination. The claimant is Black and of African descent. The respondent's defence is that they were entitled to deduct overpayments from the claimant's salary and that there has been no less favourable treatment of the claimant on grounds of his race or sex. The respondent also says that the alleged acts of discrimination are out of time.

8 The claimant relies upon a continuing act saying that the discrimination continued up to October 2022. When asked to clarify what the continuing act was Mr Lennard referred to the claimant's grievance of 9 October 2022, but then confirmed that the claimant was not saying that the way the respondent dealt with his grievance was an act of discrimination.

9 The continuing act the claimant eventually relied upon was that for every day that the claimant was not promoted this was a continuing act of discrimination. The respondent's case is that the non-appointment of the claimant to a more senior role is a discrete act and not a continuing act. Therefore, the last act of discrimination complained of is March 2022 some 8 months before the claim was issued. The respondent also argues that the claimant never applied for a promotion therefore there is no less favourable treatment at all.

10 It was confirmed that the complaint relating to underpayment of bonus is relevant only as background and is not a separate complaint of direct discrimination and that the complaint about the allegation of theft is also background.

11 In relation to the unlawful deduction from wages claim, although Mr Lennard accepted on the claimant's behalf that Section 14 of the Employment Rights Act 1996 allows employers to recoup over payment of salary, he told Judge Noons that the recoupment should have been no more than 10% of the claimant's salary. The Judge recorded: "It appears that Mr Lennard may be confusing the provisions of Section 18 of the Employment Rights Act 1996 (which relate to retail workers and therefore do not apply to the claimant) with the provisions of section 14 of the Employment Rights Act 1996". I shall return to this point after summarising the submissions of both parties.

12 Judge Noons recorded that there is no dispute that the respondent overpaid the claimant in May 2022 and there is no dispute that the only monies the respondent deducted from the claimant's salary related to this overpayment. She expressed the view that this complaint seemed unlikely to succeed as a matter of law. The complaint was not withdrawn so it was dealt with by me at this hearing.

13 Judge Noons stated in her Order: "Whilst I am mindful of the need to avoid a preliminary hearing becoming a mini trial of the issues, given how the claimant puts his case I have, of my own volition, decided to order a public preliminary hearing to consider whether the claimant's claims should be struck out as having no reasonable prospect of success or in the alternative whether they stand little reasonable prospect of success such that the claimant should be ordered to pay a deposit as a condition of continuing with these claims. I leave it to the discretion of the Tribunal hearing the preliminary hearing whether or not they consider it appropriate to also consider whether the claimant's complaints of discrimination have been brought within time or whether this issue is more appropriate to be dealt with at the final hearing."

14 The complaints were identified as follows:

14.1 Unlawful deduction from wages relates to recoupment of overpayment of salary from May 2022 in that the deductions were over 1/10th of his monthly gross pay which the claimant says amounts to an unlawful deduction from wages.

14.2 Direct race discrimination about the following:

14.2.1 Not being promoted in February and in March 2022;
14.2.2 Being excluded from Pizza at work on 3 December 2021.

14.3 Direct sex discrimination about not being promoted in February and March 2022;

Submissions and conclusions

Submissions on unlawful deduction from wages

15 The respondent's representative submitted that the claimant (along with hundreds of others) was mistakenly paid his salary for May 2022 twice. His case was that the error, which would have been obvious to all concerned, was swiftly picked up, the affected staff notified, and arrangements made to recoup the overpayment. A five month repayment plan was ultimately imposed when agreement could not be reached with the claimant. The respondent's argument was that the claim is misconceived and cannot succeed as a matter of law, and that what the Claimant is really saying is that he believes that the deductions were unfair because he believes that he should have been given longer to repay. Mr Wayman also submitted that the claimant's contract of employment contains an express clause entitling the Respondent to deduct overpayments of salary, and that the suggestion by the claimant's representative at the previous

hearing that the deductions should have been no more than 10% of his salary appeared, as EJ Noons pointed out, to be a misreading of s18 ERA 1996.

16 The claimant's representative's written submissions stated that if the deductions are over and above one-tenth of the monthly gross pay, then the deduction is unlawful. The submissions also stated that: "the claimant vigorously contends that he was treated less favourably on grounds of race or ethnic origin in that the monthly sum figure of his monthly salary deducted, was in excess of that required to be deductible".

17 When he made oral submissions, I asked the claimant's representative questions about the unauthorised deductions claim. When he addressed me orally, Mr Lennard confirmed that it was not in dispute that the money was owed and was the result of a mistaken overpayment. He fairly accepted that the 10% appears only in s18 ERA 1996 which relates to deductions from retail workers in respect of cash and stock deficits, and therefore does not apply to the claimant. In addition, Mr Lennard accepted the proposition that factually this would be a very weak race discrimination claim because it resulted from a payroll error by an external payroll provider which resulted in over 400 staff being paid twice for May.

Conclusions on the unlawful deductions from wages claim

17 It is not in dispute that a) the Respondent overpaid the Claimant in May 2022, and b) the only deductions from the Claimant's salary related to that overpayment. Therefore there was no unauthorised deduction from the claimant's wages. By section 14(1) of the Employment Rights Act ('ERA') 1996 a deduction from wages in respect of an overpayment of wages is not an unauthorised deduction for the purposes of s13 ERA 1996. S18 ERA does not apply to the claimant because he was not a retail worker. I therefore conclude this claim is misconceived and has no reasonable prospect of success.

18 If this allegation had been put as a race discrimination claim, I would have struck it out as having no reasonable prospect of success because this is not a case where the claimant was singled out – the error applied to over 400 people and the respondent made arrangements to inform them and agree arrangements for repayment. Sensibly, it appears that the claimant does not pursue this as a race discrimination claim. This does mean the last discriminatory act complained of was in March 2022.

Discrimination claims

19 The respondent's representative submitted that the claimant's remaining claims for direct discrimination relate to less favourable treatment alleged to have taken place between December 2021 and March 2022. By s123 Equality Act ('EqA') 2010 the claims are therefore out of time. The continuing act did not relate to the grievance dated 9 October 2022 because there was no allegation of discrimination relating to the handling of that grievance. The respondent's case is that the assertion that there was an ongoing discriminatory failure to promote the Claimant which amounted to a continuing act is wrong as a matter of law by reference to Amies v Inner London Education Authority [1977] I.C.R. 308, in which the Employment Appeal Tribunal ('EAT') held that a failure to appoint an applicant to a position was an act which had continuing consequences, rather than a continuing act. The respondents' argued that: the last act of less favourable treatment alleged took place in March 2022; the claims are well out of time; and it would not be just and equitable to extend time. Counsel for the respondent invited me to dismiss the discrimination claims for want of jurisdiction.

20 In the alternative, the respondent submitted that the discrimination claims should be struck out under Rule 37(1)(b) as having no reasonable prospect of success. The respondent acknowledged that discrimination claims are 'often highly fact-sensitive' and 'should as a general rule be decided only after hearing the evidence' by reference to Anyanwu v South Bank Student Union [2001] 1 W.L.R. 638, but submitted that this case is an exception to that general

rule. The submissions then addressed evidential matters relating to the "pizza meal" direct race discrimination allegation in December 2021, and the two allegations of direct sex and race discrimination regarding "promotions" in February and March 2022.

21 The respondent submitted (in the alternative) that the discrimination allegations have little reasonable prospect of success and the claimant should be ordered to pay a deposit of £1000 per allegation in order to continue advancing them.

22 In oral submissions, Mr Wayman of Counsel, drew a distinction between Amies in which there was a one-off act with continuing consequences, and Anyanwu, which did concern a continuing course of conduct. He also addressed the case of Rihal v London Borough of Ealing, which the claimant's representative had raised in oral submissions, saying that in that case the claimant had applied for a number of promotions, and had been overlooked in favour of white colleagues who had fewer qualifications and less experience. By contrast, this was a case where the claimant had applied for no promotions. He also accepted that absent evidence about the claimant's means, £1000 per allegation might be excessive. Finally, he said that the claimant's submissions did not seek a just and equitable extension but, when I pointed it out to him, accepted that the witness statement did.

23 In his written submissions, the claimant's representative reminded me that I should avoid carrying out a mini trial and as the substance of this claim relates to discrimination and it should be determined by a Judge sitting with Non Legal members, because of their industrial experience. I was referred to the case of Malik v Birmingham City Council UKEAT/0027/19: which states: "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" by reference to Anyanwu v South Bank Students Union. The written submissions also made reference to linked acts of discrimination extending over a period of time by reference to Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*;* and Cast v Croydon College [1998] IRLR 318.

24 Mr Lennard submitted that only the "most obvious and plainest" discrimination cases should be struck out and that such claims are generally fact-sensitive; and should not be struck out without an examination of the merits by reference to Anyanwu v South Bank Students Union [2001] UKHL 14, [2001] I.C.R 391.

25 As to the making of a deposit order, in the written submissions the claimant made reference to Tree v South East Coastal Services Ambulance NHS Trust UKEAT/00431/17, in which HHJ Eady QC accepted that the way the claim was being put was not clear from the pleadings, but made it clear that deposit orders should not be used as an alternative to case management orders which are the proper means of clarifying an unclear case. I was not persuaded by the relevance of that authority to this case, because Judge Noons had already properly clarified the allegations.

26 In oral submissions, Mr Lennard said that he accepts what Amies says, but relies on Rihal heavily because the claimant was not given the opportunity to be considered for a Team Leader vacancy, when he was already acting up in that role. He disputed the proposition that the role in March 2022 was advertised. Mr Lennard also submitted that any deposit order should be of the order of £80 to £100, but that an order should not be made, because the allegations do not have little reasonable prospect of success.

Conclusions on the discrimination claims and the time point

27 It is very clear from the papers that there are core disputes of fact over the discrimination allegations. They cannot be resolved by hearing and testing the evidence. Therefore they cannot be resolved by me today. I do not consider that it can be said there is little reasonable prospect of success, still less that there is no reasonable prospect of success. I therefore do not strike out the claims or make a deposit order in respect of them. The Amies case may well apply, in

which there would be no continuing course of discriminatory conduct but, in my judgement, that is a decision which the full Employment Tribunal must decide in February next year, as is the question of whether, if there is no continuing course of discriminatory conduct, it is just and equitable to allow the cases to proceed.

Employment Judge Hughes on 11 December 2023

Useful information

1. **Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

2. **Recording and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

3. All judgments and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

4. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here: *https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/*

5. The Employment Tribunals Rules of Procedure are here: *https://www.gov.uk/government/publications/employment-tribunal-procedure-rules*

6. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: *https://www.gov.uk/appeal-employment-appeal-tribunal*