EMPLOYMENT TRIBUNALS

Claimant: Mr G Oluokun
Respondent: MWA Projects Limited

Heard at: London Central (by CVP)

On: 30/10/2023
Before: Employment Judge Mr J S Burns

Representation
Claimant: In person
Respondent: Ms R Hutchinson (litigation executive)

JUDGMENT

1. The Claimant's application dated 12/10/2023 to amend his claim is refused.
2. The claim for a redundancy payment is dismissed on withdrawal by the Claimant.
3. The direct discrimination claim is struck out.
4. The Respondent's application for a deposit order/strike out in relation to the remaining claims (namely those in sub-paragraphs 2, 3 and 4 of paragraph 44 of the Case Summary dated 9/8/23) is dismissed.

REASONS

Introduction

1. The Claimant was employed from 22/6/22 to 3/2/23 on which latter date he was summarily dismissed, the Respondent says for gross misconduct.

2. The Claimant presented his ET1 on 14/5/23. He ticked boxes indicating that he claimed unfair dismissal, age, race and disability discrimination, a redundancy payment, notice pay, holiday pay, and arrears of pay. In box 8.2 of his ET1 he stated that he had been assigned to work on "*planned preventative maintenance*" and he complained that while on sick leave following an accident at work he had been dismissed. In section 15 of the ET1 he stated "*I experience all sorts of discrimination direct/indirect, victimisation harassment and bullying especially Charles Mayhew (facilities operation manager)"* but provided no particulars of this.

3. A case management PH was held by EJ Peer on 9/8/23 during which the ordinary unfair dismissal claim was withdrawn.

4. EJ Peer accepted that the Claimant had identified in his ET1 various claims as set out in the "Issues" section in paragraph 44 of the Case Summary of 9/8/23. These included claims that/for (i) the dismissal was directly discriminatory because of race and/or disability

and/or age (ii) notice pay (iii) holiday pay (iv) unauthorised deductions and (v) a redundancy payment.

5. EJ Peer pointed out that the claim form was sparse and lacking in detail and that in several instances the ET1 lacked any reference at all to matters which the Claimant raised during the hearing. The Clamant was told that "If an allegation is raised which is not in a claim form a claimant must apply to amend the claim if they wish to pursue that allegation in proceedings before the Employment Tribunal".

6. Paragraphs 36 to 42 of the case summary record possible new/extended claims for race/age/disability discrimination (going beyond the extant direct claim relating to the dismissal only) and in each case EJ Peer instructed as follows: "*If the claimant wants to raise these allegations of …discrimination, he will need to apply to amend his claim form setting out in writing what type of …discrimination he is claiming and set out the factual allegations in relation to each type of discrimination claimed".*

7. In the event the Claimant has not applied to amend in this regard so the claim under the Equality Act 2010 is limited to the extant direct claim relating to the dismissal only.

8. On 27/9/23 the Respondent applied to strike out the claims on the grounds that "*they are scandalous or vexatious or have no reasonable prospect of success".*

9. On 4/10/23 a second PH was held at which the Claimant was ordered to serve on the Respondent his formal application to amend his claim form, and todays OPH was listed "*To determine (i) whether the Claimant's application(s) to amend his Claim Form ET1 should be granted; (ii) whether the Respondent's application to strike out some or all of the Claimant's claims should be granted; and (iii) whether the Respondent's application for the making of a deposit order should be granted*"

<u>The amendment application</u>

10. The Claimant lodged his formal application to amend dated 12/10/23.

11. This document seeks to add a claim of automatic unfair dismissal contrary to section 100(1)(a) ERA 1996, which appears to have been suggested to the Claimant by EJ Peer. The Claimant's narrative provided to support this application asserts, for the first time, that he had been designated to carry out health and safety duties, and was dismissed for carrying them out. This is at odds with his initial claim in which he stated that he "*was assigned to work on preventative planned maintenance"* and that he was dismissed because the Respondent wanted to "*cover itself"* and had a "*mean and uncaring*" attitude to his sickness absence following an accident at work.

12. In any event the new narrative, even taking it at its highest, would not make out a valid section 100(1)(a) claim because it does not suggest that the dismissal was because (ie motivated by) the Claimant having carried out health and safety duties or proposing to do

so. Instead it contains complaints that he was exposed to health and safety risks during his work. Even if that was so, it is not enough to make out a section 100(1)(a) claim.

13. The Claimant has also applied to add a "*wrongful dismissal/notice pay claim*". In his ET1 he ticked the "notice pay" box in section 8.1 and that was included in the extant claims in EJ Peer's issues summary. So the Claimant does not need to amend to include a claim to a notice payment.

14. However as per paragraph 29 of the case summary "*The claimant affirmed that he was saying that the extension of the probation period was said to be a breach of contract. If the claimant wishes to pursue an allegation that the respondent extended his probation period in breach of contract, he needs to apply to amend his claim to include that allegation."*

15. The Claimant agreed today that the claim he was applying to add was that the Respondent was in breach of contract by extending the Claimant's probation period prior to dismissal. The Claimant was due to end his 6 months' probation on 21/12/22 but in a Zoom meeting at 10m on 20/12/22 his manager orally extended the probation.

16. The Claimant's contract was produced during the hearing today and the relevant section reads as follows: "*The first 6 months of your employment shall be a probationary period and your employment may be terminated during this period at any time by you or by us with one week's prior notice in writing. We may, at our discretion, extend this period for up to a further 3 months. During the probationary period we will monitor your performance and suitability for continued employment."*

17. Hence the contract permitted an extension to the Claimant's probation period and the claim that this was a breach is hopeless.

18. I accept that the Claimant is a litigant-in-person and is not knowledgeable about employment law. I have noted the explanation he has provided for the omission of these claims in his original ET1. However, the amendments would be substantive and require new allegations and issues to be introduced. The section 100(1)(a) claim seeks to change the original narrative. The prejudice to the Respondent in having to meet new but weak/hopeless claims at this late stage would outweigh the prejudice to the Claimant in been deprived of claims which would appear likely to fail in any event. I have considered the Selkent principles. I disallow the amendments.

19. I turn to the merits of the extant claims as set out in the Issues section of the case summary:

The strike/out deposit application

The Direct discrimination claim.

The law:

20. A Tribunal may strike out a claim under Rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds that it is "scandalous or vexatious or has no reasonable prospect of success".

21. As a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. See Ezsias v North Glamorgan NHS Trust [2007] IRLR 603. Hence it is only in an exceptional case that it will be appropriate to strike out a claim on this ground, where the issue to be decided is dependent

on conflicting evidence; However, the question is whether the claims have a realistic as opposed to a fanciful prospect of success.

22. Discrimination claims can and should be struck out where the allegations are implausible and there are no facts indicative of unlawful discrimination; see for example ABN AMRO Management Services Ltd v Hogben [2009] UKEAT/0266/09/DM at p. 15;

23. Where there is no meaningful dispute on the facts, there is no good reason why discrimination complaints should proceed to a futile hearing. See Anyanwu v South Bank Student's Union [2001] IRLR 305 at p.39

24. In respect of discrimination claims, it is open to the Tribunal to conclude that there is no material which could possibly give rise to an inference of discrimination where none has been identified. Per Mr Justice Langstaff in Chandhok and anor v Tirkey UKEAT/0190/14 at p. 20

25. Some factual disputes does not bar strike-out. Per Mr Justice Mitting in Patel v Lloyds Pharmacy Ltd UKEAT/0418/12 at p.19-20:- "*Neither Anywanwu nor Maurice Kay LJ's observations (in Eszias) however, require an Employment Judge to refrain from striking out a hopeless case merely because there are unresolved factual issues within it. In such a case I believe that the correct approach is that which I have adopted, namely to take the Claimant's case at its reasonable highest and then to decide whether it can succeed. There is a further possibility that discrimination cases are, by their nature, so sensitive and for the individuals concerned and society as a whole, so important, that they should be allowed to proceed simply because on the Micawber principle something might turn up... In my judgment...in a case that otherwise has no reasonable prospect of success it cannot be right to allow it to proceed simply on the basis that "something might turn up." That is the position here. It is theoretically possible that in response to skilled cross- examination (the Respondent's witnesses) might fall over themselves and admit to discrimination for an inadmissible reason. If there is a proposition that such a possibility requires a case to proceed then every...discrimination case that turns to any extent upon the oral evidence, in response to cross-examination, of employer's witnesses must be allowed to proceed. I do not believe that there is such a principle*."

26. The threshold for striking out a discrimination claim before trial and particularly before disclosure is high. Discrimination claims should not be struck out except in the most obvious and plainest cases (Anyanwu v South Bank Students Union [2001] IRLR 305).

27. However in a proper case of discrimination a claim can be stuck out Jeffrey v Department of the Environment [2002] IRLR 688. The need for caution does not mean that the power should not be exercised at all: As Moses LJ observed when giving permission to appeal in the Methuen case: *"It would be quite wrong as a matter of principle, it seems to me, that claimants should be allowed to pursue hopeless cases merely because there are many discrimination cases which are sensitive to the facts, and the whole area requires sensitivity, delicacy and therefore caution before access is deprived to the tribunals on an interlocutory basis."* Community Law Clinic Solicitors Limited & Others v Mr S Methuen [2012] EWCA Civ 571 at [6].

28. In Ahir v British Airways plc [2017] EWCA Civ 1392, the Court of Appeal said that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary

to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored.

Applying these principles to the instant Direct Discrimination claim:

29. I told the Claimant that his particulars of claim did not seem to show any link between his age/race and claimed disability and the dismissal. The Claimant said he had not had a chance to provide particulars of this.

30. However the Claimant was questioned at length about his claims by EJ Peer and told that his particulars of claim were sparse and lacking in detail (paragraph 20 of the case summary).

31. At paragraph 35 EJ Peer wrote this "*The respondent's position is that the discrimination claims are not particularised sufficiently on the claim form. The claim form does not include any specific allegations of discrimination. It is important to examine a claim form carefully to consider what is being alleged even where this may not be expressly stated and particularly so for litigants in person but it is not open to the Tribunal to construct or invent a claim for a claimant. It is critical that the Tribunal that decides a claim at a final hearing understands what allegations are raised and being run at the hearing and it is only right and fair that the respondent understands what allegations it has to face. The claim form links a reference to 'discrimination direct and indirect victimisation harassment' to the decision to terminate the contract. The claim form refers to discrimination after a reference to informing persons about the alleged accident and 'cover themselves'. At neither point is any protected characteristic referenced. There is no reference to 'adjustments' on the claim form. Taking the claim form at its highest, it remains difficult to discern what the allegations of discrimination are other than that the dismissal was discrimination*."

32. EJ Peer invited and encouraged the Claimant to apply to amend his claims.

33. The Respondent's strike out application sent to the Claimant on 27/9/22 stated *"In the Claimant's ET1, he did not provide any basis in his pleaded case, on which he contends his dismissal was discrimination on the grounds of age, race, or disability. ….The Respondent was unable to provide a substantive response to the allegations in its ET3 Response and remains unable to do so following a Preliminary Hearing on 9 August 2023."*

34. The claims were further discussed at a second case management hearing on 4/10/23 at which the Claimant was given leave to serve an amended claim by 13/10/23. As already noted the draft amendment served was silent as to the discrimination claims.

35. Thus the Claimant has been told clearly on several occasions that his existing claims which were identified in August were lacking in sufficient detail to disclose a cause of action, and that the Respondent was applying to strike them out for this reason. He has had a

reasonable opportunity before today to explain and particularise his discrimination claims. In order to try to meet the Respondent's application, he could and should have provided further details before today either by his amendment application or by providing voluntary particulars. He has brought the claims and has the onus to ensure that they are coherent and raise at least a prima facie case.

36. However, I asked the Claimant again today to tell me about any fact or matter which would constitute evidence that the dismissal was because of any protected characteristic. His answer was that he was the only Black African engineer employed by the Respondent at the time, that he was the oldest engineer and that he had had an operation in 2014 for some problem with his right eye and may have to have cataract treatment on the same eye at some stage. He also said that when working for the Respondent he had had to do so in dangerous conditions- for example on slippery roofs- and without proper rest breaks or PPE.

37. These matters, which merely describe the Claimant and his claimed poor working conditions before dismissal, do not constitute any link to the cause of dismissal and do not amount to prima facie evidence that it was directly discriminatory.

38. I take the direct discrimination claim at its highest but it is claim is a mere assertion. On a fair reading of the ET1 the Claimant's dismissal complaint is all about the fact that he was dismissed unfairly when on sick leave following a claimed accident at work, and seems to have nothing to do with any protected characteristic. The Respondent has provided a full non-discriminatory explanation for the dismissal. The claim has no reasonable prospect of success and must be struck out.

<u>The claim for Notice pay, Holiday Pay and Unauthorised deductions from earnings</u>

39. These matters are in dispute and if not settled will have to be resolved at trial. It is not appropriate to either deposit or strike-out them out.

Employment Judge J S Burns
1/12/2023
For Secretary of the Tribunal
Date sent to parties: 01/12/2023