EMPLOYMENT TRIBUNALS

Heard at: London South Employment Tribunal **On:** 04 May 2023

Claimant: Svetoslav Mitev

Respondent: **Mitie Limited**

Before: Employment Judge Ramsden

Representation:

Claimant **Mr Svetoslav Mitev**

Respondent **Mitie Limited**

JUDGMENT ON PRELIMINARY ISSUES

1. The Respondent's application to strike-out the Claimant's complaint that he was harassed by the Respondent in a manner related to his race by the Respondent's referring to the UK's decision to leave the European Union as "Brexit", including the creation by the Respondent of a "Brexit" email address and a "Brexit" team, reason of race claims of race discrimination, is granted.
2. The Respondent's application to strike-out the Claimant's other claims of race discrimination is refused.
3. The Respondent's application for a deposit order to be made against the Claimant in respect of his claim of indirect race discrimination is granted.
4. The Respondent's application for one or more deposit orders to be made against the Claimant in respect of his claim of other claims of race discrimination is refused.
5. The Claimant's remaining claims will proceed to a hearing on starting on **6 February 2024**.

REASONS

6. These written reasons are provided at the request of both parties following oral reasons given earlier today.

Background

7. Mr Mitev worked for the Respondent as a Security Officer from 14 May 2009 until her dismissal on 27 May 2022. He has brought various complaints against the R espondent, presented in two separate claim forms dated 20 October 2021 and 6 July 2022. Those claims are of:

    a) unfair dismissal;

    b) automatically unfair dismissal for making one or more protected disclosures;

    c) detriment at work for making one or more protected disclosures;

    d) direct race discrimination;

    e) indirect race discrimination;

    f) harassment related to race;

    g) victimisation; and

    h) unauthorised deduction of wages.

8. The issues to be decided in the substantive hearing to determine the Claimant's claims were set out in the Case Management Orders of **5 December 2022**.

9. The essence of the Claimant's claims are that the Respondent discriminated against him, and subjected him to detrimental treatment, due to:

    a) his Bulgarian nationality and status as an EU citizen, and

    b) the fact that he made various qualifying disclosures about the Respondent's breaches of Covid regulations and health and safety obligations,

    including by dismissing him and failing to pay him company sick pay to which he was entitled.

10. More specifically, the Claimant alleges:

    a) **Direct race discrimination** (contrary to section 13 of the Equality Act 2010) – that the Respondent treated him less favourably than it treated British citizens who were its employees, or less favourably than the Respondent would have treated another employee in materially the same circumstances of the Claimant (save for their race), by: (i) repeatedly requesting documentation concerning the Claimant's right to live and work in the UK, and/or (ii) requiring him to complete an unnecessary application process to do with these rights.

    b) **Indirect race discrimination** (contrary to section 19 of the Equality Act) – that the Respondent, by requesting documentation from EU employees concerning their right to live and work in the UK, applied a provision, criterion or practice to the Claimant which put him and other EU employees at a particular disadvantage when compared with non-EU employees. The Claimant argues that this provision, criterion or practice was not a proportionate means of achieving a legitimate aim.

c) **Harassment related to race** (contrary to section 26 of the Equality Act) – that the Respondent engaged in unwanted conduct related to the Claimant's race, which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, by: (i) repeatedly requesting documentation concerning the Claimant's right to live and work in the UK, (ii) requesting him to complete an unnecessary application process to do with these rights, and/or (iii) referring to the UK's decision to leave the European Union as "Brexit", including the creation by the Respondent of a "Brexit" email address and a "Brexit" team.

d) **Victimisation related to the Claimant's allegations that the Respondent had breached the Equality Act** (contrary to section 27 of the Equality Act) – that, in response to the Claimant's: (i) complaint in an email of 26 May 2021 and/or an email of 23 June 2021 about the less favourable treatment of EU citizens by the Respondent, and/or (ii) grievance of 21 June 2021, the Respondent engaged with the Claimant by emails and other forms of contact concerning his right to live and work in the UK, and in so doing, subjected him to detriment.

These claims are collectively referred to as the **Race Discrimination Claims**.

11. The Respondent denies these claims, and says that the Claimant was dismissed for misconduct.

12. The preliminary matters to be decided today are whether the Respondent's applications for:

a) An order to strike-out of the Claimant's Race Discrimination Claims on the basis that they have no reasonable prospects of success under Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 (the **ET Rules**); or in the alternative

b) An order that continuing with the Race Discrimination Claims be subject to the payment of a deposit by the Claimant, pursuant to Rule 39 of the ET Rules, on the basis that the claims have little reasonable prospects of success.

The hearing

13. The Respondent was represented in the hearing by Counsel, Mr Finn, and the Claimant presented his own case.

14. The Respondent served hearing bundle of 142 pages at 19:34 on 3 May – the day before the hearing - and informed the Tribunal and the Claimant that they wished to call a witness, Mrs Xavier Heywood. The Respondent served Mrs Heywood's two-page witness statement at 07:12 on the morning of the hearing.

15. At 08:33 on the morning of the hearing, the Claimant made an application for postponement on 3 grounds:

1. The lateness of the bundle – the Claimant said that he was not given enough time to prepare for the hearing,
2. The bundle did not contain documents and emails which the Claimant considered important, and
3. The lateness of the service of the Respondent's witness statement.

16. This application was withdrawn in the hearing, when it was agreed that the Claimant's 14-page witness statement and accompanying 17-page bundle, served at 09:47 on the morning of the hearing, would also be admitted, and on the understanding that the Claimant could refer to the additional documents he served with that statement, which were already in the Respondent and Tribunal's possession, having previously been circulated by the Claimant for another purpose. The hearing then proceeded.

17. Evidence was given by Mrs Xavier Heywood, Senior Operations Manager of the Respondent on its behalf, and by the Claimant on his behalf.

18. The evidence of Mrs Heywood centred upon the Respondent's belief that its actions which the Claimant alleges were discriminatory on the ground of his race were motivated by a desire on the part of the Respondent to comply with the law. Mrs Heywood did not provide advice to the Respondent on the legal requirements, but acted as a conduit between the team that did and the Claimant in relation to the matters giving rise to the Race Discrimination Claims.

19. The Claimant's evidence focused on questioning the truthfulness of the Respondent's position. He asserts that the Respondent's actions were not motivated by a desire to comply with the law, but by discrimination on the grounds of nationality.

Law

Strike-out

20. Rule 37 of the ET Rules provides:

"*(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;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

21. The effect of a strike-out is to terminate the claim or the part of the claim. It is a draconian jurisdiction, and the relevant case authorities underlie its exceptional nature. This is particularly so where the substantive case features allegations of unlawful discrimination, as it is "a matter of high public interest" that such cases are heard (as per Lord Steyn in *Anyanwu v South Bank Students' Union* [2001] IRLR 305).

22. The application here is made under Rule 37(1)(a), and Mr Finn clarified that the Respondent's argument is based on third category in that rule, that each of the Race Discrimination Claims "has no reasonable prospect of success".

23. Plainly, on the wording of the Rule, the threshold for the Respondent to persuade me that the Race Discrimination Claims have 'no reasonable prospect of success' is a high one, and the EAT has cautioned against doing so (in *Mbuisa v Cygnet Healthcare Ltd* EAT 0119/18) where the Claimant is a litigant in person whose first language is not English, and who is not does not come from a background such that he is accustomed to articulating complex arguments in written form – these features apply to the Claimant here.

24. Furthermore, the cases of *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330 and *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] IRLR 755 indicate that it would be wrong to make a strike-out order where there is a dispute on the facts that needs to be determined at trial.

25. As HHJ Eady put it in *Mbuisa* at [20]: "S*uch an exceptional case might arise where it is* ***instantly demonstrable that the central facts in the claim are untrue*** *or* ***there is no real substance in the factual assertions being made****, but the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents, see* Ukegheson v London Borough of Haringey *[2015] ICR 1285 at para 21 per Langstaff J at para 4*" (my emphasis).

26. Mitting J summarised the law in *Mechkarov v Citibank NA* UKEAT/0041/16, [2016] ICR 1121 as follows at [14]:

"*(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.*"

27. However, taking the claimant's case its highest does not mean that there is no burden on the claimant at this stage – Lord Justice Underhill in the Court of Appeal case of *Ahir v British Airways* [2017] EWCA Civ 1392 at [19] observed that "*where there is an ostensibly innocent sequence of events leading to the act complained*

of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it."

Deposit orders

28. Rule 39 of the ET Rules provides:

"*(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*" (my emphasis).

29. By contrast with a strike-out order, the effect of a deposit order is that the party subject to it is required to pay the deposit value by a specified date in order to continue to pursue their claim or response (or any allegation or argument in their claim or response). Consequently it is a less extreme measure, and (assuming the deposit amount is set appropriately) prompts the party who is the subject of the order to engage with the merits of that claim or response (or part of their claim or response) so as to decide whether to pay the deposit and maintain it, or to see it struck out (Rule 39(4)).

30. Any order to pay a deposit must be one that is capable of being complied with, and so the value of any order (not exceed £1,000) must be such that the party that is the subject of the order is able to pay it, and therefore Rule 39(2) requires the Tribunal to make reasonable enquiries into the paying party's ability to pay the deposit and have regard to that information when deciding the amount of the deposit.

31. That does not necessarily mean any deposit order should be for a nominal amount - it should also be high enough "to bring home... the limitations of the claim" (*O'Keefe v Cardiff and Vale University Local Health Board* ET Case No.1602248/15).

32. In addition to the "pause for thought before paying" effect of a deposit order, it has some consequences for the paying party if the deposit is paid and that claim/part of it is then decided against them at the substantive hearing. Rule 39(5) sets those out.

"*(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76 [When a costs order or a preparation time order may or shall be made], unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded."

33. Here, the Respondent asks me to consider making a deposit order in respect of each of the Race Discrimination Claims, and so it is appropriate for me to consider not only the propriety of each individual deposit order sought, but also whether the total sum awarded is proportionate (*Wright v Nipponkoa Insurance (Europe) Ltd* EAT 0113/14).

34. A conclusion that any of the claims has "little reasonable prospects of success" does not mean the requested deposit orders must be granted – it simply means the Tribunal's discretion to do so is engaged. Caution must still be exercised, particularly given the public interest in having discrimination allegations aired, given the potential for a deposit order to terminate a claim, but this should be considered alongside the need for case management and for the parties to focus on the real issues in the case. The purpose of a deposit order is not to restrict access to justice but to further the overriding objective – in this instance, to deal with this case in a way which is proportionate to the importance of the issues, and to save expense.

Indirect discrimination

35. Section 19 of the Equality Act 2010 defines indirect discrimination in the following terms:

"*(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Application to the Race Discrimination Claims here

Strike-out

36. The claims that are the subject of the application to strike-out, or in the alternative, an application for a deposit order, are claims of unlawful discrimination, and so strike-out should only be ordered in exceptional circumstances.

37. The binding authorities cited above emphasize that where there are core issues of fact in dispute, they should not be decided without hearing relevant oral evidence. As the allegations of direct race discrimination, indirect race discrimination, victimisation and the first two of the three allegations of harassment, all concern disputed facts – a point underlined by the fact that the Respondent felt the need for witness evidence to be heard in this hearing – I do not consider them suitable for strike-out. A fuller examination of that and all other evidence relevant to those claims should be made at the substantive hearing. This is particularly so given that the Claimant in this case is a litigant-in-person, whose first language is not English, and who is not accustomed to making arguments of complex law in this forum. The application to strike-out those claims is refused.

38. The third allegation of harassment, that described in the Case Management Order of 5 December 2022 as "referring to the UK's decision to leave the European Union as "Brexit", including the creation by the Respondent of a "Brexit" email address and a "Brexit" team", does not involve any disputed facts. It is a claim that I conclude has no reasonable prospect of success for several reasons:

    a) "Brexit" is a term used in common parlance to refer to the withdrawal of the United Kingdom from the European Union on 31 January 2020.

    b) I struggle to see, even taking the Claimant's case at its reasonable highest, how a claim that using the term "Brexit", or the name of this team or email account, can be taken to reasonably have had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him has any reasonable prospect of success. The Claimant's offence seems to flow instead from the approach that team took to his right to work in the UK post-Brexit.

    c) The naming of the team and email address appears to flow from the Respondent having identified a group of personnel expected to advise on the right to work requirements regarding the c1,300 EU employees it employed at the time of the UK's exit from the European Union.

    I do not consider he has shown that that claim has any prospect of success, and strike-out is awarded in respect of it.

<u>Deposit orders</u>

39. While the relevant test to make a deposit order requires the Respondent to discharge a lesser burden – that the claims have "little reasonable prospect of success" as opposed to "no reasonable prospect of success" for strike-out - the factual disputes affecting all the Race Discrimination Claims with the exception of the third harassment claim invite caution before making such orders, especially

given the public interest in discrimination allegations being fully heard and examined.

40. The Respondent has said that the claims have no reasonable prospect of success, or alternatively, little reasonable prospect of success, because it acted at all times to ensure compliance with the law and guidance surrounding the right of EU nationals to work in the UK post-Brexit, however, the cases on unlawful discrimination emphasise that the proper determination of facts is always vital in our pluralistic society, as 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 in *Anyanwu*). Furthermore, the Claimant's case is that it is the *repeated* requests for documentation, and the insistence on an *apparently voluntary* process being gone through, that comprise some of the acts complained of, and these warrant examination, as the Respondent's evidence has, in my view, not discharged the burden to demonstrate that these claims have little reasonable prospect of success.

41. The one claim where I consider a deposit order appropriate is that of indirect discrimination. It is far from clear how the provision, criterion or practice (**PCP**) of "requesting documentation from EU employees concerning their right to live and work in the UK" is capable of amounting to indirect race discrimination. As cited above, the definition of indirect discrimination is set out in section 19 of the Equality Act 2010, and sub-section (2)(a) of that section requires that the employer applies, or would apply, the PCP to a group which includes both people sharing the Claimant's protected characteristic and people who do not.

42. The protected characteristic asserted by the Claimant here appears to be his EU nationality, but the Claimant and the Respondent agree the PCP of "requesting documentation from EU employees concerning their right to live and work in the UK" was only applied to EU employees.

43. Consequently, I have serious doubts that this claim works as an indirect discrimination claim, as the PCP appears to be race-based, therefore suggesting direct race discrimination.

44. Furthermore, the Respondent has already articulated an obviously meritorious argument of justification – that it is obliged in law to make enquiries about the right to work in the UK of its employees.

45. These present formidable obstacles to the Claimant's indirect race discrimination claim.

46. However, with some refinement in the way the Claimant defines his race for these purposes, the claim may have better than little reasonable prospects of success, and therefore I do not consider this claim should be struck-out, but it is suitable for a deposit order.

47. After enquiring of the Claimant's means, I understand that he is in employment with an irregular income, but that he does have and expect to continue to have

until winter fuel bills apply, disposable income in the order of £500-£600. I therefore consider a deposit order of £100 appropriate for the allegation of indirect race discrimination.

Conclusions

48. For all of the above reasons the Respondent's application succeeds as regards:

    a) Strike-out of the Claimant's claim of harassment related to race by the Respondent's reference to the UK's decision to leave the European Union as "Brexit", and its creation of a "Brexit" email address and a "Brexit" team; and

    b) A deposit order, in the sum of £100, in respect of the Claimant's indirect race discrimination claim.

    The Respondent's application fails in all other respects.

Employment Judge Ramsden

Date **4 May 2023**

JUDGMENT & REASONS SENT TO THE PARTIES ON

Date **27 May 2023**

FOR THE TRIBUNAL OFFICE

EMPLOYMENT TRIBUNALS

Claimant	S Mitev		
Respondent	Mitie Limited		
Heard at	London South	**On**	4 May 2023
Before	Employment Judge Ramsden		
Representation			
Claimant	In Person		
Respondent	Mr T Finn, Counsel		

ORDERS

1. The Claimant's claim of harassment related to race by the Respondent's reference to the UK's decision to leave the European Union as "Brexit", and its creation of a "Brexit" email address and a "Brexit" team is struck-out.

2. The Employment Judge considers that the Claimant's allegations or arguments of indirect race discrimination have little reasonable prospect of success. The Claimant is ORDERED to pay a deposit of £100 not later than 21 days from the date this Order is sent as a condition of being permitted to continue to advance that allegation. The Judge has had regard to the information available as to the Claimant's ability to comply with the order in determining the amount of the deposit.

Employment Judge Ramsden
Date **4 May 2023**
JUDGMENT AND REASONS SENT TO THE PARTIES ON
Date **27 May 2023**

FOR THE TRIBUNAL OFFICE