Neutral Citation Number: [2024] EAT 176

Case No: EA-2023-001102-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14 November 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MISS WANGTIAN XIE **Appellant**

- and –

E'QUIPE JAPAN LTD **Respondent**

- -
- -

OLIVER LAWRENCE (instructed by Irwin Mitchell LLP) for the **Appellant**
KIERAN WILSON (instructed by Nockolds Solicitors) for the **Respondent**

Hearing date: 29 October 2024

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE, RACE DISCRIMINATION

The Employment Tribunal erred in law in striking out a discrimination complaint brought by a litigant in person on the grounds that it had no reasonable prospect of success. Appellate guidance concerning circumstances in which there is a core of disputed fact and on taking the case at its highest considered.

HIS HONOUR JUDGE JAMES TAYLER

The issue

1. The issue in this appeal, once again, is whether an Employment Tribunal erred in law in striking out a discrimination claim brought by a litigant in person because it had no reasonable prospect of success.

2. Appellate guidance has repeatedly been given on the application of the test "no reasonable prospect of success". The guidance assists in the application of the test but does not supplant it.

3. I will not provide yet another analysis of the previous key authorities, which include: **Anyanwu v South Bank Student Union** [2001] ICR 391, **Mechkarov v Citibank NA** [2016] ICR and **Cox v Adecco Group UK&Ireland and others** [2021] ICR 1307.

4. I do need to summarise some of the core components of the guidance relevant to this appeal:

   4.1. Rule 37 of the **Employment Tribunal Rules 2013** ("**ETR**") provides a **discretion** to strike out a claim if it has **no reasonable prospect of success**

   4.2. Strike out is a draconian step to be taken only in clearcut cases

   4.3. There is a public interest in discrimination cases being heard on the merits

   4.4. Care should be taken when an application for strike out is made against a litigant in person

   4.5. That said, there is not an absolute prohibition on strike out in discrimination cases, particularly if the claim is contrary to undisputed documentary evidence

   4.6. Where there is a core of disputed fact strike out is generally inappropriate

   4.7. When assessing strike out the case of the party against whom the application is made should generally be taken at its highest

5. This appeal concerns the last two overlapping, but subtly different, elements of the guidance: a core of disputed fact should generally be resolved at a full hearing; and the case should be taken at its highest.

6. A core of disputed fact can include the reason why a person took a decision: **Ezsias v North**

Glamorgan NHS Trust [2007] EWCA Civ 330, [2007] ICR 1126 and **Zeb v Xerox (UK) Ltd.** UKEAT/0091/15/DM at paragraph 20. That is why strike out is generally inappropriate in a case that turns on the mental processes of an alleged discriminator and/or a person who took a decision, such as a decision to dismiss.

7. Taking a case at its highest generally requires an assumption that the claimant will establish the facts from which it is contended that discrimination should be inferred: **Romanowska v Aspirations Care Ltd** UKEAT/0015/14/SM and **Mechkarov**.

The complaints and application for strike out

8. The respondent applied for strike out. The application was determined at a Preliminary Hearing by Employment Judge Norris on 14 July 2023. A judgment striking out the claim was sent to the parties on 14 August 2023.

9. The respondent is a cosmetics company. The claimant worked as a Beauty Consultant on the respondent's counter in Harrods from 4 March 2022. The claimant was engaged under a zero-hours contract. The claimant describes herself as Chinese.

10. The respondent received a "letter of concern" from Harrods on 28 October 2022 because a complaint had been made by customers who alleged that the claimant had provided poor service and shown a lack of respect when dealing with them on 22 October 2022.

11. As a result of prior case management, the claim was limited to complaints of direct race discrimination that were made against Ms Begum, the respondent's trainer and Ms Isca, the respondent's Area Manager.

12. The Employment Tribunal described the complaints as follows:

> 29. The Claimant says that she was treated less favourably than a person who did not share her nationality would have been treated in not materially different circumstances by:
>
> a. Ms Isca removing the Claimant's November shifts on 1 November 2022;
>
> b. Ms Isca not allowing the Claimant to take a tea break;
>
> c. Ms Isca refusing to help the Claimant make a complaint to Harrods about the incident on 22 October 2022;

d. Ms Isca not allocating the Claimant any shifts in December 2022;

e. Ms Isca and Ms Begum failing the Claimant in her Gankin test;

f. Ms Isca and Ms Begum failing the Claimant in her product knowledge test, resulting in the Claimant's dismissal.

13. At the Preliminary Hearing, Employment Judge Norris suggested to the claimant that it appeared that she was merely asserting a difference of protected characteristic and a difference of treatment. The claimant said that she considered that the "something more" was an "anti-Chinese culture" in which people of Chinese origin were treated less favourably than those of Arab origin, such as the customers who had complained against her. The Employment Tribunal explained how the claimant put this argument:

> 32. However, the Claimant then said she bases her allegations of race discrimination on what she described during the PH as an "anti-Chinese culture" as evidenced, she says, by the following:
>
> a. In or around September 2022, Ms Ramanauskaite told another colleague that "Chinese customers are easy";
>
> b. Ms Isca required a Chinese colleague who was leaving the Respondent to work a shift and refused to change it, which she did not do for two other colleagues, one of whom was white and the other from the Philippines, when they left;
>
> c. When Ms Isca discussed the complaints made against the Claimant by the Arabic and Chinese customers, she spent more time on the complaint made by the Arabic customers and less on the one by Chinese customers;
>
> d. No action was taken against a Japanese colleague against whom a complaint was made by a Chinese customer. That colleague remains employed by the Respondent and is now an Account Manager.

14. The Employment Tribunal noted that the contention of an anti-Chinese culture had not been made prior to the Preliminary Hearing and was not pleaded, but went on to hold:

> Even if the Tribunal allowed the admission of these further particulars into evidence, and **even if the Tribunal was to accept that each of those incidents took place as alleged, it does not appear at all likely that they would, taken together or singly, demonstrate an anti-Chinese culture**. [emphasis added]

15. The Employment Judge's brief self-direction as to the law included the statement "I must take for these purposes the Claimant's case (where based on undisputed facts) at its highest", which

appears to incorrectly conflate the guidance that strike out is inappropriate where there is a core of **disputed** fact and that when considering strike out the case should be considered at its highest. However, on a fair reading of the judgment it is clear that this was an infelicitous expression. Employment Judge Norris stated at paragraph 9 "Where there is a central core of disputed fact in relation to any element of the complaint, I have taken the Claimant's case at its highest".

The first ground of appeal

16. In the first ground of appeal, it is asserted:

> Ground 1
>
> 3. The Tribunal erred by failing to take the Claimant's case at its highest before finding that her claims of direct race discrimination had no reasonable prospects of success. The claims turned on a core of disputed facts that was not susceptible to determination otherwise than by evaluating the evidence at a full hearing. In particular, the Tribunal failed to assume that the following allegations made by the Claimant, and disputed by the Respondent, were correct:
>
> > (i) The allegation that Ms Isca and/or Ms Begum treated the Claimant in the manner alleged because of race (paragraphs 31, 39, 40, 45, and 48);
> >
> > (ii) The allegation that there was an 'anti-Chinese culture' at her place of work (see paragraphs 33 and 35).

17. When the grounds of appeal were sifted by His Honour Judge Auerbach he permitted Ground 1(ii) but not Ground 1(i) to proceed.

18. Ground 1(i) was not permitted to proceed because it asserted that in taking the case at its highest the Employment Tribunal is required to assume that the claim will succeed, because it must be assumed that the claimant will establish that the reason for her treatment was race. That is obviously a bad point. Taking a case at its highest requires an assumption that primary facts will be established, rather than the inference of discrimination it is asserted should be drawn from those facts.

19. Similarly, I am not persuaded that the Employment Tribunal was required to assume that the claimant will establish that there was an anti-Chinese culture. The Employment Tribunal was required, in the circumstances of this case, to assume that the claimant will establish the facts from which it is asserted that the Employment Tribunal should infer discrimination. It was not required to assume that the inference of an anti-Chinese culture will be established.

20. On the face of it, the Employment Tribunal did assume that the factual allegations will be made out but concluded that there were no reasonable prospects of the claimant establishing an anti-Chinese culture on the basis of those facts. The real issue was the approach that the Employment Tribunal adopted to the core issue of disputed fact: why the claimant was treated as she was. While ground one focusses on taking facts at their highest, it also challenged the approach adopted by the Employment Tribunal to the core of disputed fact. The ground includes the contention that the complaint "turned on a core of disputed facts that was not susceptible to determination otherwise than by evaluating the evidence at a full hearing".

21. The principle established in the authorities that strike out is not prohibited in discrimination cases, even where there are disputes of fact, must be seen as a limited exception to the general proposition that strike out is inappropriate in discrimination claims. The exception from this general proposition should not be treated as if it were a rule. This is clear from what Underhill LJ stated in **Ahir v. British Airways Plc** [2017] EWCA Civ 1392:

> 16. There is force in Mr Burns's point. **Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established**, and also **provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context.** Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference toother phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. **Nevertheless, it remains the case that the hurdle is high**, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'. [emphasis added]

22. It is also important to return to the general guidance, rather than merely focusing on the exception. They may be familiar, but the words of Lord Steyn in **Anyanwu v South Bank Students Union** [2001] UKHL/14, [2001] ICR. 391 bear repeating:

> 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**. [emphasis added]

23. Lord Hope gave equally strong guidance:

> I would have been reluctant to strike out these claims, on the view that **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. [emphasis added]

24. These statements must be seen in the context of the great challenges faced by those who bring discrimination claims that turn on a determination of the mental processes of an alleged discriminator.

25. I have concluded that the Employment Judge could not, on a proper application of the guidance from the authorities referred to above, permissibly conclude that there were no reasonable prospects of the claimant establishing discrimination, even if she was able to establish the facts from which she contended an anti-Chinese culture should be inferred. In particular, if the claimant establishes that Ms Isca spent more time on the complaint made by the Arabic customers and less on the one by Chinese customers and that no action was taken against a Japanese colleague against whom a complaint was made by a Chinese customer, these are matters which clearly could be relevant to a shift in the burden of proof and the drawing of an inference of discrimination. Contrary to the respondent's contention I consider the drafting of Ground 1 is sufficiently wide to include this challenge. Ground 1(ii) succeeds.

Ground 2

26. In the second ground of appeal, it is asserted:

> The Tribunal erred by failing to consider whether the claims might require amendment before holding that they had no reasonable prospects of success. The Tribunal ought not to have found that the claims had no reasonable prospects of success for a supposed lack of factual assertions in the pleaded case without considering whether the claim might require an amendment …

27. I do not consider that this ground is made out because Employment Judge Norris, despite noting that the asserted anti-Chinese culture had not been pleaded, did not decide that the assertion

could not be considered, but decided that even on the facts asserted by the claimant there were no reasonable prospects of an anti-Chinese culture being established. I have held the Employment Judge erred in law in so finding, but that was not because of the pleadings. Ground 2 is dismissed.

Ground 5

28. By the only other ground that HHJ Auerbach permitted to proceed, Ground 5, it is asserted:

> The Tribunal erred by erroneously formulating the Claimant's second claim of direct race discrimination as the Claimant not being allowed a tea break … when the less favourable treatment alleged was that the Claimant was told by Ms Isca that she should not have taken her tea break. The Tribunal evaluated the prospects of this claim on the basis of its erroneous formulation despite noting that it did not reflect the Claimant's actual complaint …

29. This ground is made out. The Employment Judge mischaracterised this element of the claimant's case. The claimant asserted that she was blamed for taking her tea break, in that Ms Isca suggested that the dispute with the customers would not have occurred if the claimant had not taken her tea break.

Disposal

30. The appeal is allowed, and the strike out is set aside. The claim shall be remitted to the Employment Tribunal. The respondent should reflect on this judgment before deciding whether to renew an application for strike out and/or a deposit order, having regard to the overriding objective. If such an application is made it should be determined by a different Employment Judge so that the claimant can be confident that the matter will be considered afresh in circumstances in which there would be no saving of time or cost by any such application being determined by the same Employment Tribunal. The factual allegations in this claim are straightforward. It is not one of those cases where the allegations have multiplied so that their determination will take many days of hearing time. There would have been much to be said for the respondent assisting in bringing the matter swiftly to a brief hearing at which their defence could be considered on its merits, thereby allowing the reasonably swift determination of employment disputes that the Employment Tribunals were designed to provide.