Case No. 1302342/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Mr W Akhtar	**AND**	**Ormerod Rutter Chartered Accountants**
Claimant		**Respondents**

HELD AT **Birmingham** **ON** **16 November 2018**

EMPLOYMENT JUDGE Self

Representation

For the Claimant: In Person

For the First Respondent: Mr P Keith - Counsel

JUDGMENT

1. The Claims of race and age discrimination presented by the Claimant have no reasonable prospects of success and are struck out.

WRITTEN REASONS

1. By a Claim Form received on 15 May 2018 the Claimant asserted that he had been discriminated against on the grounds of his race and/or his age. The Claimant sought in his Claim Form £16,000 for injury to feelings and £5,000 for aggravated damages.

2. The Claim Form quoted an advertisement that appeared on the Indeed website from the Respondent who were looking to recruit a number of Document Scanning Administrators on a fixed term contract of probably 12 months. In broad terms the role involved scanning and indexing client files to the accountancy software the Respondent was using. In other words those engaged would do that which was required to allow the Respondent to go paperless in the office.

3. The Claimant applied for the role by way of a CV and a covering letter and received a rejection on 29 January 2018 from Belinda Sinfield in which she stated that "I think your experience is too strong for what we require…" and that she would be happy to discuss things further with the Claimant if he so wished. There was no response from the Claimant for some time thereafter despite his rejection.

4. The Claimant concluded from this that he had been discriminated against because of his age and because of his race.

5. A Response was filed in which the Respondent denied all the allegations and averred that the claim was vexatious and/or had no reasonable prospects of success. The Respondent's solicitors followed up with a letter dated 6 August wherein they made a formal application for the Tribunal to consider whether or not the Claim should be struck out and on 4 September 2018 an Order was made that the strike out and a deposit order would be considered at an Open Preliminary Hearing and Case Management Orders were made in relation to a bundle and witness statements to assist at the hearing.

6. An employment tribunal has the power to strike out all or part of a claim if it is vexatious or has no reasonable prospect of success pursuant to Rule 37 (1) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (hereafter "the Rules".

7. In the event, that a Tribunal finds that any specific allegation or argument in a claim has little reasonable prospects of success it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument (Rule 39 (1) of the Rules).

8. A vexatious claim is one that is not pursued with the expectation of success but to harass the other side or out of some other improper motive (Marler v Robertson (1974) ICR 72. It also encompasses matters that may be described as an abuse of process. The effect of the litigation would be to subject the Respondent to inconvenience, harassment and expense out of all proportion to any gain that might accrue to the Claimant. I say immediately that there was no evidence that this was the motivation behind the Claimant's claims to this Tribunal and I dismiss it.

9. A Claim that has no reasonable prospect of success requires the Tribunal to form a view on the merits of the case and to strike it out if it forms that conclusion. When considering this case I have been mindful of the care that needs to be taken when dealing with discrimination cases. In Anyanwu v South Bank Student Union (2001) ICR 391 the House of Lords highlighted the importance of not striking out discrimination claims, apart from in obvious

cases, as they are normally fact sensitive and require full examination to provide a proper determination.

10. In Ezsias v North Glamorgan NHS Trust (2007) ICR 1126 a whistleblowing claim was held to be similar to discrimination claims and that similar care should be taken in that they involve an investigation as to why and employer took a particular step. Again a strike out would be rare where the central facts are in dispute.

11. In Balls v Downham Market High School and College (2011) there was dicta to the effect that in cases such as this one the Tribunal must first consider whether, on a consideration of all the available material, it can properly conclude that the Claim has no reasonable prospect of success.

12. Where facts have been established at a preliminary hearing or it is considered that there is nothing more to be considered at a trial then an employment judge may be entitled to strike a claim out if the facts show that to be the correct course. I am mindful that the Claimant's case must be taken at its highest. The Claimant did confirm to me at this hearing, however, that I had before me the full amount of information and documents that he wished to put forward and I was satisfied that I had a full picture of the best case the Claimant could put forward.

13. In Ahir v British Airways PLC (2017) EWCA Civ 1392 the Court of Appeal asserted that tribunals should not be deterred from striking out, even in discrimination claims that involve disputes of fact, if they are entirely satisfied that there is no reasonable prospects of the facts necessary to find liability being established provided they are aware of the dangers of reaching that conclusion where the full evidence has not been explored.

14. In Chandhok v Tirkey UKEAT 0190/14 Langstaff J concluded that there could be occasions when a claim can properly be struck out where, as an example, on the pleadings there was no more pleaded than an assertion of a difference in treatment and a difference of protected characteristic. The venerable Madarassy authority was cited by the Judge and I am reminded that in that case when considering the burden of proof at section 136 of the Equality Act that a Claimant has to show more than a difference in status and a difference in treatment to establish a prima facie case of discrimination.

15. When considering this application I had before me a bundle of papers which contained 116 pages, almost half of which were the pleadings and applications to the Tribunal. I had a witness statement from Belinda Sinfield and Lorraine Frankland. The former was the Respondent's recruitment manager and the latter the HR Director. Neither witness was called to give

evidence today as that would not be appropriate and/or necessary at this hearing and so their evidence was not challenged as it would be at a trial. Having said that I took their evidence as indicative of the evidence that they would lead at any final hearing of the matter and it was a clear exposition of the case they would put forward and which supported the Response that had been filed. The Claimant also provided a witness statement. I was satisfied that I had all before me that I would have at the final hearing.

16. In addition, I had two skeleton arguments: one from the Claimant and one from the Respondent's counsel.

17. So far as the age discrimination claim is concerned the Claimant is 37 years old and I clarified the Claimant which particular age group he identified with for his discrimination claim and he indicated that it was in the 37 years old and over category. The Claimant's basis for his claim that he was directly discriminated against because of his age was that only candidates aged between 18 and 36 were invited for a job interview and from that he asserted that no applicants above 37 years of age were considered for the role.

18. It seems to me that there are a number of insuperable problems with a claim based on that premise. The first point is that the Respondent would have no idea as to whether the Claimant was 37 years old at the point of application or at all. His covering letter does not provide the Claimant's age. His resume which he attached to the letter also provides nothing from which his age can be clearly defined. The first job that the Claimant cites is between 2006 and 2007. Under his academic qualifications he states that he attended New East Worcestershire College to undertake a GNVQ that concluded in 1998 and another course that concluded in 2001. If certain assumptions had have been made from that and assuming that those courses were taken at the time when most individuals take them it could possibly have been deduced roughly when the Claimant was born but it certainly would have not have been able to decide whether the Claimant was in or out of the 37 years and above category. Most children are 16 when they take their GCSEs working backwards therefore from the Claimant's GCSE equivalent that would make him born in 1982 which would make him 35 /36 years old and therefore within the favoured group as opposed to the disadvantaged group.

19. The Respondent's contention in any event is that they did not undertake this exercise but it is important where the Claimant has so precisely delineated the age group that was favoured and that which was disadvantaged that there is some cogent evidence that the Respondent would know whether he was in or out of the groups. There is no such evidence.

20. I asked the Claimant whether he really believed that had he applied with the same application form and covering letter but been a year younger he would have been granted an interview. There was no clear Response.

21. Of rather more fundamental importance however was the fact that I had documentation before me that within the same interview process the Respondent had interviewed and then offered on 6 February 2019 the role to an applicant who was born in 1966. The Claimant's date of birth was marked upon her application form. I had before me the letter of offer to that individual.

22. In my view there is clear and cogent evidence that those in the over 37 group were in no way disadvantaged by their age as one of their number was offered one of only 2 positions. It seems to me that means that the claims of both direct and indirect discrimination are fatally flawed.

23. The Claimant has sought support from the letter of rejection that states that his experience was "too strong" but I cannot see that that impinges on age at all. The scanning role was a relatively mundane, repetitive non-customer facing role and the Claimant had obviously undertaken more interesting and senior roles in the past. It was the nature of his previous roles that was being commented upon and that was not linked to his chronological age at all.

24. Taking all these matters into account I can see no basis at all for the Claimant's age discrimination claim and reminding myself of all the warnings set out above about dismissing discrimination claims I am satisfied that the age discrimination claim genuinely does have no reasonable prospect of success taking into account that which I have seen that will not be able to be gainsaid at a final hearing.

25. The Claimant bases his race claim that he was not selected for interview based on having a "non-English" name and that the Respondent wanted candidates from "the white descent". There was an assumption that the Claimant would not have fitted into that department and he asked that an inference be drawn that the failure to short list him for interview was on account of his race.

26. The Respondent disclosed that 7.7% of their work force was from a non-white, English background and that within that they employ 5 employees of Pakistani background. It should be noted that both of these figures would indicate that the Respondent employs as a percentage a greater percentage of non-white English individuals and those of Pakistani origin than the % of the Worcestershire population that come within those categories from the most recent census found before the hearing on-line. There is nothing obviously statistically remiss about the figures provided and evidenced by the Respondent which would be available at trial

27. The Claimant also stated that it was clear that somebody of his ethnic background would not be welcomed in the IT department which was where he would have been based. When asked the Claimant could provide no evidential basis for such a view or any information from which that could have been deduced or concluded As stated his basic case is that once the Respondent saw a "foreign" name he would not be required. From the information provided at this hearing I note that senior to the Claimant within

the IT Department would have been a gentleman by the name of Mohammed Azeem, whose name, if the Claimant were right would have held the same fears and concerns for the Respondent, yet he has been given a reasonably senior role.

28. The Claimant has identified his protected characteristic and it is accepted that the two candidates who were accepted were both white and of British descent. It seems to me that we are precisely in the Madarassey situation where the Claimant has shown a difference in treatment and has shown a difference in status but there is nothing else at all which might serve to shift the burden at all.

29. In those circumstances I do not consider that there is any reasonable prospect of success for the Claimant's race claim either. The Claimant has simply made an assumption that his rejection is linked to his race but does not have a shred of evidence to support that suggestion at all. It is purely speculative. Accordingly, I dismiss the Claimant's claims at this interim stage.

Employment Judge Self

11 February 2019