



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms G Harris

**Respondent:** The Secretary of State for Justice

**Heard at: London South (remotely by CVP)**

**On: 19 September 2023**

**Before: Employment Judge Heath**

## **Representation**

Claimant: In person

Respondent: Miss Harris (Counsel)

# RESERVED JUDGMENT

1. The claimant's claim of indirect age discrimination is not struck out.
2. The claimant's claim of indirect age discrimination is not made subject to a deposit order

# REASONS

## **Introduction**

1. A public preliminary hearing was held on 18 September 2023 to consider a number of matters, including the respondent's application to strike out the claimant's age discrimination claim, or in the alternative for it to be made subject to a deposit order.

## **The claim and the application**

2. The claim appears in paragraph 27 of EJ Evans's case management summary of 12 July 2023:

*“So far as age discrimination is concerned, the claimant says that the regrading of Approved Premises Managers who are Senior Probation Officers from grade 6 to grade 5 indirectly discriminated against her because of her age”.*

3. In paragraph 2 of the Issues section of the case management summary, the issues in this claim are set out. The PCP is *“From March 2017 re-grading Approved Premises Managers who were Senior Probation Officers from grade 6 to grade 5”*. The particular disadvantage is expressed as follows:

*“Did the PCP put people over the age of 50 at a particular disadvantage when compared with people under the age of 50, in that they had a shorter period to work until retirement and consequently the effect of the re-grading from March 2017 had a more significant effect on their pension in retirement”.*

## **The law**

4. Rule 37 of the ET Rules provides:-

*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;*

5. In *Mechkarov v Citibank NA* [2016] ICR 1121 the EAT summarised the principles that emerge from the authorities in dealing with applications for strike out of discrimination claims:

*“(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.”*

6. The guidance in *Mechkarov* followed from a line of authorities including *Anyanwu v South Bank Students' Union* [2001] IRLR 305 and *Eszias v North Glamorgan NHS Trust* [2007] IRLR 603. *Chandok v Tirkey* [2015] ICR 527 shows that there is not a *“blanket ban on strikeout application succeeding in discrimination claims”*. They may be struck out in appropriate circumstances, such as a time-barred jurisdiction where no evidence is advanced that it would be just and equitable to extend time, or where the claim is no more than an assertion of the difference in treatment and a differencing protected characteristic.

7. In *Ahir v British Airways plc* [2017] EWCA 1392 the Court of Appeal held that tribunal's should *“not be deterred from striking out claims,*

*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 in reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context”.*

8. Rule 39 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.*

*(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

9. In the case of *Hemdam v Ishmail* [2017] IRLR 228 the Court of Appeal gave guidance to tribunals on the approach to deposit orders. The guidance included:-

- a. The test for ordering a deposit is different to that for striking out under Rule 37(1)(a).
- b. The purpose of the order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and creating a risk of cost. It is not to make access to justice difficult or to effect a strike out through the back door.
- c. When determining whether to make a deposit order a tribunal is given a broad discretion, is not restricted to considering purely legal questions, and is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and reach a provisional view as to the credibility of the assertions being put forward.
- d. Before making a deposit order there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence.
- e. A mini trial on the facts is not appropriate.

## **Conclusions**

10. Miss Harris (the respondent’s counsel, not the claimant) submitted that the PCP did not put people over 50 at a disadvantage compared to others under 50, and that the reason why she remained at grade 5 had nothing to do

with her age. She submits that the PCP was plainly a proportionate means of achieving a legitimate aim.

11. Whether the PCP puts a person of Ms Harris's age at a disadvantage is a matter of evidence. The way the case is expressed in the Issues within the case management summary is that people over 50 had a shorter period to work until retirement. Evidence will have to be adduced to examine how that shorter period affects people of that age group. It does not stand to reason that it has any impact adverse or otherwise.

12. In the circumstances I conclude that it is not appropriate to strike out the claim or to make it the subject of a deposit.

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Employment Judge **Heath**

21 September 2023\_\_\_\_\_