



EMPLOYMENT TRIBUNALS

Claimant: Ms M Duodu

Respondent: Mitie Limited

Heard at: London South

On: 3 May 2023

Before: Employment Judge Heath

Representation

Claimant: Did not attend

Respondent: Mr A Rozycki (Counsel)

JUDGMENT

1. The claimant's claims of age discrimination, race discrimination and sex discrimination are struck out as having no reasonable prospect of success.
2. The claimant's disability discrimination claims and her annual leave, redundancy pay and unpaid wages claims are not struck out.

REASONS

Introduction

1. This hearing was listed by EJ Reed on 1 November 2022 for the tribunal to consider:
 - a. Clarifying the issues in the case,
 - b. making appropriate case management orders,
 - c. any application for strike out.

The claimant's ET1

2. By an ET1 presented on 22 September 2021, the claimant made various claims. In section 8 of the ET1 form she ticked boxes to suggest she had been discriminated against on the grounds of age, race, disability and sex.

She also claimed a redundancy payment and other financial claims.

3. In sections 8.2, 9.2 and 15 of the ET1 form the claimant provided some detail of her claims.
 - a. **Disability discrimination:** the claimant set out that she was disabled with lupus and other medical conditions. She said that as a result of her disability she needed to shield during the pandemic, and that she had not been paid appropriately. She also indicated that she had a disability in respect of her hand. She said that she was required to input data into a device which she could not do easily because of her hand condition. She also said that during a redundancy consultation she was required to attend meetings in out of the way stores on inconvenient dates without consulting her or her medical team.
 - b. **Age discrimination:** there is nothing in the ET1 beyond the mention of “ageism” once, and a claim for compensation for discrimination on the basis of, among other things, age.
 - c. **Race discrimination:** the claimant makes reference to a claim for compensation in respect of discrimination on the basis of, among other things, race. She describes herself as a “disabled woman of colour”.
 - d. **Sex discrimination:** the claimant makes reference to the environment being “male dominated” and that in January 2020 she was removed from the store she worked in and replaced by men. Again, she claims compensation on the basis of, among other things, “gender” and describes herself as a “disabled woman of colour”.
 - e. **Annual leave and money claims:** the claimant says that she had not been paid sums due to her whilst she was shielding, and has not been paid back pay holiday pay since 2016.

Further information

4. In its Grounds of Response, the respondent requested Further Information in respect of the claimant’s discrimination claims. The requests seem largely geared towards disability discrimination, and not particularly well drafted in respect of the other protected characteristics. However, there was a general request for detail on discrimination on grounds of other protected characteristics alongside a more tailored request in respect of the disability discrimination.
5. On 19 August 2022 the claimant emailed the respondents solicitors setting out her “fundamental claim”. On 21 August 2022 the claimant sent a further email to the respondent’s solicitors setting out some information about her claim. From the two of these emails, the following emerges:
 - a. **Disability discrimination:** the claimant says that no provision or care plan was made for her disability when she joined the respondent on a TUPE transfer. She set out that she requested help whilst shielding during the pandemic, which was not

forthcoming. She said there was “no provision for disabled workers”. She was made to login and input information into a device despite her difficulties. She was branded a liar when providing information about her lupus. She mentioned that she was an old, disabled woman of colour.

- b. The claimant said that the respondent thought she was not suitable to work because she was an old, disabled woman of colour.
- c. **Race discrimination:** the claimant says there was a high turnover of staff from ethnic groups, and that no older women. She said that the respondent thought she was not suitable to work because she was an old, disabled woman of colour.
- d. **Sex discrimination:** the claimant said that “women were not employed right across the board”. No older women from ethnic groups were employed. The workforce was made up of 90% male. She said that the respondent thought she was not suitable to work because she was an old, disabled woman of colour.
- e. **Annual leave and money claims:** the claimant says “My shielding was paid for timeline occurring in Mities jurisdiction”. She says that she had not been paid any holiday pay in her employment with the respondent until 2020. She claims “back paid wages/shielding”.

Case management hearing 30 August 2022

- 6. On 30 August 2022 a case management hearing was held before EJ Truscott KC. The claimant did not attend. The Employment Judge made a case management order that the claimant provide “*further information identified in the respondent’s grounds of resistance in relation to claims of race, sex and age discrimination*”.
- 7. While the claimant complied with other orders in respect of the disability discrimination claim, she did not provide the further information about the other discrimination claims as ordered.

Open preliminary hearing 3 May 2023

- 8. On 31 March 2023 the claimant emailed the tribunal to say:

“Thank you for the correspondence.

I would like a written paper copy of the preliminary hearing.

Due to my current health condition, plus other factors and the constant delay in this case. On seeking instructions, I wish to seek instructions from the court about an out of court action, course of action.

I await the response”.

- 9. The claimant did not attend the hearing, and was telephoned by the clerk. The claimant said that she had recently come out of hospital and was unwell and would not attend the hearing. She did not provide any evidence.

10. The respondent provided evidence in the bundle of the claimant's payslips which, it was suggested, showed that the claimant had included all accrued and unpaid leave outstanding termination, and any sums due to her during her period of shielding.
11. Mr Rozyczi favoured proceeding with the hearing in the claimant's absence. He sought strike out of all claims, and in the alternative either deposit orders or an Unless Order to compel compliance with EJ Truscott KC's order to provide further information.

The law

12. 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;*

13. 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."

14. 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. *Eszias* also made clear that a dispute of fact also covers disputes over reasons why events occurred, including why a decision-maker acted as they did, even when there is no dispute as to what the decision maker did.

15. 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”.

Conclusion

16. I determined that it was in the interests of justice and in accord with the over-riding objective to proceed with the hearing in the claimant's absence.
17. This was the second hearing she has not attended. She did not apply to postpone this hearing and did not support her non-attendance with any evidence. She has not complied with orders of the tribunal to provide Further Information and her email of 31 March 2023 might suggest a degree of lack of commitment to the tribunal process. This claim cannot be allowed simply to drift with little or no engagement from the claimant.
18. A postponement would put the respondent to further expense and further delay. In any event, it is not even clear that this was what the claimant wanted.

Age, race and sex discrimination

19. As set out above, the claimant's pleaded case in her ET1, and expanded on in her emails of 19 and 21 August 2022 is sparse.
20. In respect of age discrimination, it is no more than an assertion that there was ageism in the respondent organisation, and that the respondent thought she was not suitable to work because she was an old, disabled woman of colour. The claimant was ordered to provide further information about her claim and did not do so. She did not attend the hearing to assist in clarifying the issues. It is impossible to tell what less favourable treatment, PCP or harassment is asserted by the claimant beyond these generalisations. Given that the claim, as it stands, is nothing more than these assertions I find that it stands no reasonable prospects of success.
21. In respect of race discrimination, again, the claimant as set out in the ET1 and expanded upon in the subsequent emails consists of little more than generalised assertions. There is nothing indicating what less favourable treatment or provision, criterion or practice or harassment the claimant may have experienced. As there is no semblance of a coherent pleaded race discrimination/harassment case, I find that there is no reasonable prospects of success for this claim.
22. In respect of the sex discrimination claim, once again the pleadings and the emails are largely generalisations. There is one reference to her being removed from one store and replaced with men. Had the claimant attended all engaged with the Case Management orders, it might have been possible to flesh out a case. I considered whether there was sufficient there, given the extremely high bar set for strike out of

discrimination claims, for me to allow this element of the claim through. However, it is a sparse assertion that would need substantial clarification. The claimant has not engaged with any attempt to clarify the claim. In the circumstances, I find that it stands no prospect of success.

Disability discrimination

23. It is possible to discern from the pleadings a claim that a requirement to input data on a handheld device put the claimant, who had a disability in relation to her hand, at a substantial disadvantage in that she found it difficult to use the device. On the face of it there is a reasonable adjustments claim on the pleadings. Whether this claimant succeeds on the merits is another matter. However, there is sufficient there for me to conclude that this claim should not be struck out.
24. Similarly, there is a claim discernible on the pleadings that a requirement to attend redundancy consultation meetings at certain times and locations presented difficulties for the claimant with her medical conditions. Again, there is sufficient there on the pleadings for me to conclude that this claim should not be struck out.
25. I have had some difficulty in divining any further claims. It appears that it might be arguable that there is a claim that the claimant's need to shield arose from a disability, and the respondent not properly paying her during shielding may have been unfavourable treatment. This may well be a generous reading of the pleadings, but is sufficient for me to find that it is not the case that there is no reasonable prospects of this claim succeeding.
26. In the circumstances I do not strike out the disability discrimination claim. I have, however, made an order in respect of this claim which I deal with in a separate document.

Annual leave and money claims

27. The respondent's position is that the evidence of the payslips shows that the claimant has been paid all that she claims. I felt myself being drawn into conducting the sort of "mini-trial" the authorities caution against in considering strike out applications. It may well be that the documents shown to me were authentic and show exactly what the respondent says they show. However, it may be that the claimant has a different perspective and different evidence to give on the issue.
28. In the circumstances I do not strike out the annual leave and money claims. Again, I have made orders in respect of these claims which I deal with in a separate document.

3 May 2023
Date