EMPLOYMENT TRIBUNALS

Claimant: Mr U Ashraf

Respondent: Splendid Hospitality Group LLP

Heard at: Watford (over Cloud Video Platform) **On:** 30 January 2024

Before: Employment Judge Dick

Representation
Claimant: In person
Respondent: Mr Paul Livingston (counsel)

RESERVED JUDGMENT

1. The following parts of the claim are struck out under Employment Tribunal Rule 37(1)(a) because they have no reasonable prospect of success:

    a. The parts of the harassment claim labelled below as [7], [8], [11], [15] and [16].

    b. The part of the breach of contract claim seeking reimbursement for professional subscriptions.

RESERVED DECISIONS AND REASONS

2. As will be seen in the reasons below, although I declined to order strike out of most of the claims, I did make a deposit order. That, and other case management orders (dealing with amendment amongst other things), are set out in a separate document issued at the same time as this one, which also details what happened at the hearing.

Law – Strike Out

3. So far as is relevant, rule 37 provides that the Tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospects of success. In *Cox* v *Adecco* [2021] ICR 1307 the EAT set out the applicable law (from para 21 and summarised at para 28). In a discrimination claim (i.e. such as here) striking out is a draconian step only to be taken in the clearest of cases (or in the most obvious cases, as the House of Lords phrased it in *Anyanwu and anor* v *South Bank Student Union and anor* 2001 ICR 391, because discrimination claims are generally fact-sensitive, and it is a matter of public interest that they should be fully examined to make a proper determination). Where core issues of fact turn to any extent on oral evidence they should not be decided without hearing evidence. The claimant's case should be taken at its highest but may be struck out if conclusively disproved by, or totally and inexplicably inconsistent with, undisputed documents. But there is no absolute bar on striking out such claims – the time and resources of the Employment Tribunal ought not be taken up by having to hear evidence in cases that are bound to fail. The *Cox* case also gave guidance on dealing with claims by litigants in person which are poorly pleaded or in which the claims and issues are not clear. In short, there must be a reasonable attempt at identifying the claims and the issues before considering strike-out.

4. It will of course also be relevant to the consideration whether the claim has no reasonable prospect of success that in this case the "reverse burden" provisions of s 136 Equality Act 2010 ("EqA") will apply – if there are "facts from which the [Tribunal] could decide, in the absence of any other explanation", that there was discrimination, the Tribunal "must hold" that there was discrimination unless the respondent proves that there was not. As Mr Livingston for the respondent points out, that will not relieve the claimant of the burden of proving the facts referred to in s 136. As the Court of Appeal made clear in *Madarassy* v *Nomura International Plc* [2007] I.C.R. 867, the burden does not shift to the respondent simply upon the claimant establishing the facts of a difference in status and a difference in treatment. That would indicate only a *possibility* of discrimination (para 56); there would not be, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. In *HHJ Kaul KC* v *Ministry of Justice and others* [2023] EAT 41 the EAT observed that the power to strike out is not limited to claims that cannot succeed as a matter of law, but again stressed the need for caution when it came to issues of fact. The EAT went on to say:

> [20] The need for caution applies equally to questions of inference as questions of primary fact. In cases where the 'reason why' question is the premise for success (including various discrimination claims […]), a court needs to think carefully before curtailing its opportunity to discover, examine and evaluate the primary facts, since those are the processes that equip it to decide which inferences relevant to the reason why question can fairly be drawn. […]
>
> [21] But, all this notwithstanding, the power to strike out a claim because on one or more critical factual issues it has no reasonable prospect of success, remains. […]

Law – Deposit Orders

5. By rule 39, if at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make a deposit order. In deciding whether there is little reasonable prospect of success, the Tribunal is not restricted to consideration of purely legal issues – it is entitled to have regard to the likelihood of the paying party being able to establish the essential facts and in doing so to reach a provisional view of the credibility of the assertions put forward (*Arthur* v *Hertfordshire Partnership University NHS Foundation Trust* EAT 0121/19). Even if the grounds for making the order are made out, the Tribunal still has a discretion whether to make the order. The observations of the EAT in *Cox* v *Adecco* about the need to identify the claims and issues before strike-out apply equally to deposit orders.

6. A deposit order requires the "paying party" to pay a deposit (not exceeding £1000) as a condition of continuing to advance the allegation/argument. The £ 1000 limit applies to each individual aspect of a claim (or response) that is judged to have little reasonable prospect of success, though in a case where more than one sum is specified the Tribunal must consider proportionality (*Wright* v *Nipponkoa Insurance (Europe) Ltd* EAT 0113/14). Before making a deposit order the Tribunal is required to make reasonable enquiries into the paying party's ability to pay. The consequences of the order are as follows. If the party does not pay by the specified time, the allegation/argument will be struck out. If the paying party does pay and the Tribunal ultimately decides the allegation/argument against the paying party for substantially the same reasons given in the deposit order, then: (i) the paying party will be treated as having acted unreasonably (and therefore be liable to pay the other side's costs) unless the contrary is shown and (ii) the deposit will be paid to the other side.

Decisions and Reasons

7. I begin with a summary of the claims (as amended following the claimant's application at the hearing). The claimant "C" worked for the respondent "R" as a "senior cluster accountant" between 3 May 2022 and 18 November 2022. His claims for harassment related to race concern the actions of two colleagues whom I will refer to by their initials SP and NM. The particular acts relied upon are as follows; all are in 2022. The numbers in square brackets are incident numbers in column 1 of the claimant's spreadsheet. The numerals in round brackets correspond to the original acts identified in EJ Davison's case summary. I have summarised the acts briefly; for full detail, refer to the claimant's spreadsheet.

    a. [1] 26 April – NM made comments in C's interview suggesting that as he had worked for another company for 21 years he would find it difficult to work for R; she was aggressive towards C, making clear she did not wish him to join.
    b. [2] (i) 12 May – SP told C that the following day might be his last day of service and said that he would interview C again and would need a copy of his CV to do so.

c. [3] ~22 May – NM told C not to contact another member of staff for help unless it was very important.
d. [4] (iv) ~ July – NM told C he should know this when he asked a straightforward question.
e. [5] ~ July – SP used undermining language such as telling C to use his common sense in front of others.
f. [6] 3 Aug – NM made fun of C.
g. [7] ~4 Aug – C was overworked as a result of SP's decision to allow another employee to reduce his working hours and work from home.
h. [8] 16 Aug – remarks were made by NM and SP in a meeting about having to work long hours, the buck stopping with C etc.
i. [9] 17 Aug – SP told C in front of others that Emma was not happy with him as he had not completed the balance sheet reconciliations.
j. [10] ~17 Aug – NM raised her voice aggressively at C.
k. [11] 1 Sept – Another employee told C that NM puts pressure on him.
l. [12] ~ Sept – SP made fun of C's hair loss.
m. [13] (iii) 14 Sept – During a conversation about workload, NM laughed at C. C explained that he was having vertigo and raised the prospect of resigning; he was told by NM that was "his call". NM suggested the meeting should go ahead regardless of C's illness, not taking his concerns seriously. NM later said: "right how much have you got done, I am vexed, Haha, you should be taking responsibility, the buck stops with you right".
n. [14] (ii) 16 Sept – SP told C in front of others that NM did not care if C stayed or went; SP made other upsetting comments to C.
o. [15] 28 Sept – despite having informed NM that he would be doing bereavement counselling, C worked through lunch at the same time as doing the counselling.
p. [16] Date unspecified – C felt overworked; took over another colleague's work but was also given work from a different colleague.

8. It am grateful for the helpful written submissions of Mr Livingston for the respondent and although I do not explicitly refer to every authority that he cited, I have taken full account of the submissions. Regarding the harassment claim, this is not a case where the respondent suggests that the claimant will be unable to prove the facts as I have set them out above. Rather, Mr Livingston, accepting that the claimant's case should be taken at its highest, argues simply that even if the claimant succeeds in proving every fact he asserts – and for the purposes of this application I assume that he will – then he still would have no prospect of succeeding. So in that sense, the respondent's submissions do not rest on disputed facts.

9. In its initial written arguments the respondent relied upon two particular strands. Firstly, says the respondent, the allegations consist for the most part of harmless comments which could not amount to harassment. The claimant would have to prove (subject to the provisions of s 136 EqA which I refer to above) that the things said had the purpose or effect of violating his dignity or creating an intimidating, hostile degrading, humiliating or offensive environment for him (s 26 EqA). This is a relatively high threshold, as was made clear in *Richmond Pharmacology Ltd* v *Dhaliwal* [2009] IRLR 336. I accept that many, if not all, of the comments taken on their face and in isolation might reasonably be said to be unlikely to have the relevant purpose or effect. However that

overlooks two points in my judgment. First, the Tribunal would not be confined to considering each in isolation (subject to time limits) – it would be artificial to overlook, for example, the purpose/effect of the first seven comments, when looking at the eighth. Second, and most significant, what was actually said will be an important factor, but not the only one – tone and context are likely to be just as important and it seems to me that such matters are clearly going to be dependent on how the evidence comes out. This is just the sort of fact-sensitive consideration that the authorities counsel against removing from the Tribunal's consideration by way of strike-out.

10. The second point relied upon by the respondent, one on which Mr Livingston understandably focussed his arguments, relates to the claimant's prospect of establishing that the actions and comments were related to race. It is an issue of fact in that it amounts to an argument about what inference a Tribunal could properly draw in the absence of any explicit mention of race by the people whose behaviour the claimant complains about. In other words, this is a case where the 'reason why' question is the premise for success (see *Kaul* above). I therefore consider that I do have to treat the application for strike out with some caution. It is right to say that the claimant does not elaborate in any of the written documents *how* he says the respondent's treatment of him was related to his race, beyond asserting on the spreadsheet that various named white and black members of staff were not treated in the same way (the claimant defines his race as British Pakistani). (I also note that this approach is somewhat inconsistent with the claimant referring, in the detailed grounds which accompany the claim form, to poor treatment and overworking of other staff, whom he does not assert share his race. That inconsistency in my judgment is again one of those matters which is classically one to be resolved at trial rather than at this stage.) Following the case of *Cox* (above) I asked the claimant for more detail about the point during the course of submissions. He described how they (i.e. SP and NM, whom he said were of Indian heritage) spoke to others more respectfully (to paraphrase) and said that SP would talk about his (SP's) "Pakistani friends" in a manner which distinguished them from his other friends; from the way he was spoken to, the claimant says, he strongly felt it was to do with his race. While I consider that the claimant may have some difficulty establishing a case on this basis, I would not go so far as to say he has no reasonable prospect of doing so. Should he prove the facts listed in paragraph 7 above, and should the Tribunal accept what he says as I have recorded it a couple of sentences previously, it seems to me that he may have established something more than a difference in characteristic and a difference in treatment such that a Tribunal could decide, in the absence of any other explanation, that there was harassment related to race. For those reasons, I decline to strike out points [1] to [6], [9], [10] and [12] to [14]. This is not one of those "most obvious" cases where this part of the claim should be struck out. Regarding [12] in particular, while this might more straightforwardly be put as harassment related to sex, this was not a point taken by Mr Livingston and even if it had been I would have concluded that it would be open to the claimant to argue that all the poor treatment had to do with race, whatever was explicitly said.

11. I also conclude that points [1] to [6] and [9], [10] and [12] to [14] do not cross the threshold for making a deposit order. The case might not be strong even on its face, but I do not consider that it (quite) has little reasonable prospect of

success, for the reasons set out in the previous paragraph. There are matters of fact to be resolved, which have some reasonable prospect of being resolved in the claimant's favour, even if those matters of fact are to be inferred from primary facts which, for the purposes only of this application, are not in dispute.

12. I come to different conclusions, however, on points [7], [8], [15] and [16]. Although in his spreadsheet the claimant has referred to these as harassment claims (amongst other things), it is clear from the spreadsheet that the real basis for his complaint here is that pressure was being put on him to work long hours. Even considering the context of the rest of the claims, it is difficult to see how such conduct could have the purpose or effect required by s 26. Further, given what the claimant says about how other members of staff were also overworked, in my judgment he has no reasonable prospect of establishing any difference in treatment, nor of showing that there was something more that could lead a Tribunal to conclude that the respondent's conduct was related to race, even taking into account the warnings in the authorities against striking out claims such as these. On that basis, I strike out points [7], [8], [15] and [16]. I also strike out [11] – another employee telling the claimant that NM puts pressure on him may be evidence supportive of the rest of claims but it cannot in my judgment amount to an act of harassment on its own.

13. The claimant also claims for the following by way of breach of the employment contract:
    a. Pay for overtime which he worked (set out in the second tab of his spreadsheet), which he says AM and SP were aware of and NM had (at least on one occasion) verbally requested.
    b. Reimbursement for his ACCA and MAAT professional subscriptions.

14. So far as (a) is concerned, the respondent says simply that the claimant had no contractual right to be paid overtime unless it was authorised in writing, as his written contract made clear. (As indeed it did – a copy is in the hearing bundle: "Overtime must be agreed in advance and confirmed in writing by your Manager prior to being worked.") The claimant made clear during the course of submission that he does not argue that he did get written authorisation. I have considered whether there is some prospect of the claimant being able to argue that, on the basis of his manager asking him to do the overtime, he might be able to establish that there was a variation made to his contract, notwithstanding the clear words in the written contract. In my judgment there is not *no* reasonable prospect of him doing so, although there is *little* reasonable prospect of him doing so. On that basis the threshold for making a deposit order is met and in this case I exercise my discretion in favour of making one. The claimant has the means to meet such an order (see below) and should this part of his claim be struck out as a result of failure to pay, the bulk of his claim would still remain and so such an order would be proportionate.

15. So far as means are concerned, I asked the claimant about his financial situation during the course of submissions rather than on oath – that seemed to me to amount to reasonable enquiries within the meaning of rule 39. He and his wife are in work with a combined annual income before tax well exceeding £ 50,000, though the claimant was engaged in contract work which he expected to end in April. They have a mortgage and the usual bills to pay, some credit card debt, no significant savings and no other significant assets. The claimant

also financially supports his mother. In all the circumstances I consider that the appropriate amount for the deposit order would be £ 400, to be paid within 21 days.

16. Regarding (b), it is clear that the claimant's written contract makes no provision for payment of his professional subscriptions (or, rather, for repayment of them in the event of his employment ending). The claimant has not produced or referred to any evidence (using the word in widest sense) that any such provision was agreed to either verbally or in writing. The claimant therefore has no reasonable prospect of proving a claim for breach of contract on this point, (nor indeed of proving any other sort of separate claim for recovery of the subscriptions). This part of the claim will therefore be struck out. Although, without deciding on the issue, it might still be possible for the claimant to argue that, were he to succeed in his discrimination claim, part of the remedy should be reimbursement for some or all of the subscriptions, it cannot be a separate claim in its own right.

Employment Judge Dick

22. 2. 2024

SENT TO THE PARTIES ON
27 February 2024
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FOR THE TRIBUNAL OFFICE