



# EMPLOYMENT TRIBUNALS

## Claimant

Mr A Kambaji

## Respondents

(1) Pertemps Recruitment Partnership Limited  
(2) Gist Limited

**Heard at:** Watford

**On:** 24 April 2017

**Before:** Employment Judge Manley

## Representation

**For the Claimant:** In person  
**For the First Respondent:** Ms J Jones, counsel  
**For the Second Respondent:** Ms G Leadbetter, counsel

Interpreter : Ms C Coleshill

## PRELIMINARY HEARING JUDGMENT

- 1 The second respondent is removed from these proceedings. No ACAS early conciliation has been undertaken with respect to it and it cannot be liable for any of the discrimination alleged.
2. The claim is amended to include comments alleged to have been made which could amount to acts of discrimination but were not referred to in the claim form. The issues are now as set out below.
3. I cannot say, at this stage, that any of the complaints of race discrimination and/or harassment are out of time or have no reasonable prospect of success and I do not strike those complaints out.
2. The complaints of race discrimination and harassment have little reasonable prospect of success and I have decided to make an order that a deposit be paid as a condition of those allegations or arguments proceeding. That deposit of £200 (two hundred pounds) must be paid by **15 May 2017** and details of payment are set out in a separate order which accompanies this judgment.

## REASONS

### Introduction and issues

1. By a claim form presented on 12 January 2017 the claimant, who describes himself as Black, brought complaints of race discrimination and/or harassment. That claim form had some details of the discrimination complaints and the claimant provided more information today including comments he alleges were made but were not included on the claim form. I allowed an amendment to the claim form for those comments to be added to the alleged discriminatory acts.
2. The claim is one of race discrimination and/or harassment. What the claimant alleges falls to be determined under Section 13 (direct) and/or section 26 (harassment) Equality Act 2010. Those provisions have a time limit of three months to bring a complaint to the tribunal which may be extended by the operation of the early conciliation procedure. The time limit runs from the date of last act if there are acts extending over a period. If the claim is out of time, the tribunal may consider a complaint brought outside the time limit if it considers it just and equitable to do so.
3. The first question related to the second respondent, Gist Limited. The claimant worked as an agency worker at Gist's warehouse. However, there was no ACAS early conciliation certificate for that respondent. This is a mandatory process and the claimant appeared to accept that he had not referred the matter to ACAS. I raised with the second respondent's representative the question of whether I should use my power under Rule 34 of schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 to add a party. I can only do so where there are issues between that party and the existing parties falling within the jurisdiction and it is in the interests of justice to add them.
4. The allegations of discriminatory treatment are referred to in the claim form. There the claimant refers to two incidents involving a work colleague of eastern European origin, Mr Sofrag, one in July and one in September 2016. The claimant had also raised a complaint about Mr Sofrag with Mr Coulson of the first respondent by letter of 26 July 2016 which was shown to me. In that letter the claimant mentions harassment and Equality Act 2010. He specifically refers to an incident in the canteen on 25 July where he alleged that Mr Sofrag said "*If you eat you go home*". He made no mention in that letter of race or colour.
5. In the claim form, the claimant made reference to that canteen incident and another incident in September 2016 when he alleged Mr Sofrag "*was following behind my trolley. He brutally pushed the trolley which was full backed with dollies. When I asked him why he was pushing the trolley he told me I was blocking the passage*".
6. There was no mention in the claim form of anything that would indicate race discrimination and I asked the claimant about that. He then said that, on two occasions, Mr Sofrag had made direct references to him as a Black

man. The first was in early July when speaking to a woman colleague but speaking about the claimant and the second was during the canteen incident on 25 July 2016. It appears that it was the first time these allegations had been expressly made.

### **The relevant rules**

7. The relevant rules for my consideration of strike out and/or whether to make an order for a deposit are at rules 37 and 39. These read as follows:-

#### **Striking out**

**37.**—(1) *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;*

*(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

*(c) for non-compliance with any of these Rules or with an order of the Tribunal;*

*(d) that it has not been actively pursued;*

*(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

*(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

*(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.*

#### **Deposit orders**

**39.**—(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.*

*(3) The Tribunal’s reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*

*(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.*

*(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

*(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*

*(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.*

*(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.*

8. It is clear from the wording above that the test for whether to strike out any part of a claim (or response) is a high one. The case of Anyanwu v South Bank Students Union [2001] IRLR 395 reminds me that only the “*most obvious and plainest cases*” should be struck out as an abuse of process and of the fact sensitive nature of discrimination cases. Similarly, North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 the Court of Appeal stated that it “*would only be in an exceptional case that an application to an employment tribunal will be struck out when the central facts are in dispute*”. My task is to consider, therefore, most commonly on the basis of undisputed facts (or those yet to be proved but which seem likely to have occurred), whether any part of the claimant’s case, when put at its highest, cannot hope to succeed. If that is my conclusion, I may decide to strike out that part of the claim.
9. The consideration under rule 39 of whether to make a deposit, is a lower test. The question is whether any parts of the claim have little reasonable prospect of success. Again, I must bear in mind that I have not heard evidence but may consider where the burden of proof lies. I have a wider discretion here. I should also make reasonable enquiries into the paying party’s means and have regard to that information. In this case, the claimant informed me that he was in receipt of job seekers allowance and housing benefit and he was looking for work.
10. The first respondent’s representative submits that the claimant’s complaint about the July incident is out of time and it is not part of an act extending over a period because the claimant did not work with Mr Sofrag between July and September. It will be the first respondent’s case that, the matter having been investigated by the first respondent, the claimant and Mr Sofrag shook hands and agreed to put matters behind them. She also submits that there is no evidence of race discrimination or harassment. On the face of the claim form, it is submitted, there is only evidence of a disagreement between workers. She submits that I should strike the claim out or make a deposit order. The claimant believes the matter should proceed against both respondents.

### **Conclusions**

11. I considered the claims as set out on the claim form and now clarified and added to by the claimant. It is quite clear that there are no issues involving

the second respondent except that one or more of its managers may have been aware that the first respondent was investigating matters raised by the claimant. No ACAS early conciliation certificate has been provided and the second respondent should be removed from the proceedings.

12. I do not accept that I can determine the time limitation point at this hearing. I consider that the claimant has a chance of showing there was an act extending over a period as both allegations concern the same individual, Mr Sofrag. The first respondent may yet succeed on this jurisdictional point but I cannot determine it today.
13. Similarly, and particularly with the additional information provided today, I am not in position to find that the claim has no reasonable prospect of success. That will be a matter for the full merits hearing.
14. However, I am concerned that the claimant only mentioned today the allegation that Mr Sofrag made a direct reference to his skin colour and he will need to explain why that information has been provided so late. On the information provided in the claim form and considering the letter written to the respondent, any allegation of race discrimination and/or harassment is difficult to sustain. Because the claimant has now made further allegations, I do find that his claim has little reasonable prospect of success.
15. Having taken the claimant's ability to pay into account, and realising that his means are limited, I have decided that these are allegations or arguments where a small deposit should be paid before the claim, and the allegations contained within it, are allowed to be determined at a hearing.

## **CASE MANAGEMENT DISCUSSION SUMMARY**

### ***Listing the Hearing***

1. The claim is now listed for listed for the final hearing for **three** days on **Tuesday 26 to Thursday 28 September 2017** at Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford, Hertfordshire WD17 1HU to start at 10am or so soon thereafter. The allocation of three days is considered sufficient for all evidence to be heard, for submissions, for tribunal deliberations and the giving of judgment and to deal with remedy if appropriate. It is expected that there will be 3/4 witnesses for the respondent and the claimant will give evidence. The witness evidence and submissions must be completed within the first two days with submissions, tribunal deliberations, the giving of judgment and remedy (if needed) in the remaining time.

### ***The issues***

2. Has the claimant shown that any of the allegations below are made out?

- 1) Mr Sofrag referring to the claimant as a black man when talking to a female colleague in the claimant's presence around 3 July 2016;
  - 2) Mr Sofrag coming up behind the claimant in the canteen and calling him a black man and then saying "if you eat you go home" on 25 July 2016;
  - 3) Mr Sofrag pushing his trolley aggressively on 25 September 2016.
3. If so, was that less favourable treatment because of the claimant's race or colour and/or unwanted conduct related to the claimant's race or colour which had the purpose or effect of violating his dignity or creating an intimidating etc environment for him?
  4. Can the respondent show there was no discrimination?
  5. Are the July allegations in time or are do they amount to acts extending over a period? If they are not in time, is it just and equitable to extend time?

### **Judicial mediation**

I raised with the parties the possibility of this case being considered for an offer of judicial mediation. The parties wished to consider this suggestion after they have considered the guidance note sent with this summary and will inform the tribunal by **3 July 2017** of their willingness or otherwise to participate, if so offered by the regional employment judge.

## **ORDERS**

### **Made pursuant to the Employment Tribunal Rules 2013**

1. The claimant will send a schedule of all losses claimed in these proceedings to the respondent by **19 June 2017**.
2. The respondent will send a list of relevant documents with copies to the claimant by **5 June 2017**.
3. The claimant will send any additional relevant documents to the respondent by **19 June 2017**.
4. The respondent will prepare a joint bundle of documents and send one copy to the claimant by **3 July 2017**.
4. The parties shall prepare witness statements for all witnesses who will attend the tribunal. Those statements should contain facts relevant to the issues to be determined. Witness statements should be typed and arranged in paragraphs in chronological order. Where possible the witness statements should refer to pages in the joint bundle of documents. Generally, witness statements do not need to be longer than between 10-20 pages. The claimant shall send a copy of his own witness statement (and any others he has prepared) to the respondent by **24 July 2017**.

6. The respondent shall send copies of its witness statement to the claimant by **21 August 2017**.
7. The respondent shall prepare a short neutral chronology for use at the hearing.

**CONSEQUENCES OF NON-COMPLIANCE**

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under section 7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or hold a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Dated: 25 April 2017

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Employment Judge Manley

Sent to the parties on: 26 April 2017

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For the Secretary to the Tribunals