EMPLOYMENT TRIBUNALS

Claimant: Mr A Hussain

Respondent: The Co-Operative Group Limited

Held At: Birmingham **On** 25 January 2019

Before: EJ Connolly (sitting alone)

Representation

Claimant: Dr R Ibakakombo (Representative)

Respondent: Ms S Bowen (Counsel)

RESERVED JUDGMENT

1. The respondent's application that all or part of the claim be struck out or that the claimant be ordered to pay a deposit is refused.

2. The claim be listed for a preliminary hearing, case management on the next available date with an estimated length of hearing of 2 hours.

REASONS

Introduction

1. On the respondent's application and by Notice dated 15 November 2018, REJ Findlay ordered that there be a preliminary hearing to determine

1.1 whether to strike out all or part of the claim because it has no reasonable prospect of success and/or

1.2 whether to order the claimant to pay a deposit if it seemed any of the contentions put forward by the claimant have little reasonable prospect of success.

2. The respondent produced an agreed bundle running to some 179 pages; the claimant produced some 5 pages of written submissions and I heard evidence from the claimant as to means. There was insufficient time to deliberate and give a Judgment and Reasons within the 3 hour time estimate and so Judgment was reserved.

The Claim

3. It seems to me that, in order to determine whether any part of a claim or the allegations in a claim have no or little reasonable prospect of success, it is prudent to identify those claims / complaints as clearly as possible.

4. This is a claim of direct race discrimination or victimisation. The claimant identifies his ethnic origin as Pakistani-Kashmiri. He identifies his protected act as another tribunal claim against the respondent (Claim No.1300932/2017) which was ongoing at the time of the events of which he complains and, indeed, is still ongoing.

5. The claimant is employed by the respondent as a warehouse operative at their distribution centre in Coventry. He was redeployed to a part time clerical role in 2011. The reason for this is not clear to me but, certainly from 28 March 2018, the claimant has had medical restrictions as to the type of work he was able to carry out (p88). He has been absent from work since 29 April 2018 when he left early because of symptoms of work-related stress. The claimant alleges that the respondent discriminated against him or, alternatively, victimised him in 16 particular respects (summarised in the Claim Form on p22 of the bundle). At this stage, these 16 complaints / allegations can be categorised into 6 broad groups and, having listened to how the claimant puts them as well as read the claim form as a whole, it seems to me that they can be framed as follows:

5.1 between 2 March 2018 and 29 April 2018, Mr Marski and/or Ms Hayes failed to accede to the claimant's request to increase his working hours or give reasons why they did not agree to increased hours

5.2 the respondent failed to deal with the claimant's written grievances of 8 or 28 March 2018 as grievances under the grievance procedure or provide reasons for its decision in this regard

5.3 trained the claimant in 30-35% of the role he was undertaking in the operations room when the remainder of the staff working there were trained in the full role

5.4 Mr Marski and/or Mr Darcy failed to acknowledge or deal with the issues raised in the claimant's correspondence dated 20 and 26 April 2018 as grievances under the grievance procedure or give reasons for their failure

5.5 failed to inform the claimant that a new system was being introduced in the operations room with effect from 29 April 2018, train him in that system, provide him with a password or allocate him work that day

5.6 Ms Hayes failed to deal with the claimant's concerns or grievances contained in his letters dated 1 May 2018 or 18 June 2018 or generate or provide him with statements from individuals as requested in the latter.

The Application

6. The respondent's application is, in essence, that it can demonstrate from the contemporaneous documents that it did not 'fail' in the manner alleged by the claimant and/or that there was good reason for it to conduct itself the way it did such that there is no or no adequate evidence of discrimination or victimisation. Dealing with each group above, the respondent says as follows:

6.1 the claimant requested an increase to his working hours by email on 2 March as a means of compromising his ongoing tribunal claim. He was advised to submit a flexible working request form, which he did on 7 April. The respondent contends that, properly read, his complaint is limited to the period after 7 April. The respondent would have 3 months to consider a flexible working request; the claimant was absent from 29 April (just over 3 weeks after submitting the request) and there was a mediation style meeting on 11 May to consider this and a number of the issues the claimant had raised;

6.2 by 4 May 2018, the claimant had agreed to Ms Hayes suggestion that there be a mediation style meeting to deal generally with the issues he was raising; that meeting took place on 11 May; at no time did the claimant object to the matter being dealt with in this way or allege that it amounted to discrimination or victimisation save that, at the end of the 11 May meeting he said '*I'm not satisfied with this meeting I didn't expect this meeting. I want all the managers involved'*

6.3 the claimant, wilfully or otherwise, has misunderstood discussions with the respondent to the effect that he is fit to do 30-35% of the role as distinct from what he is trained to do (see p77); the claimant has undertaken some training which he himself accepted he struggled with because of his medical restrictions (see p61); he has completed a form where he has indicated he is only competent to do a limited amount of the role (p63)

6.4 the issues raised in the April letters were addressed in the mediation meeting on 11 May as agreed/understood by 4 May

6.5 training on the new system was provided to employees in batches; the claimant was not trained but neither were others who comprised 4.5% of the workforce and appear, from their names, to be of various ethnic origins

6.6 the issues raised by the letter on 1 May formed part of the issues which it was agreed / understood on 4 May would be discussed on 11 May; the claimant's letter of 18 June is a response to the letter summarising the 11 May meeting, and, although requesting documents and statements addressing all of the issues the claimant has raised, it did not require a response, particularly as the claimant was absent.

7. The claimant made various points in reply. Those that I found most relevant were that, in order to determine precisely what happened and why it happened, a tribunal would have to conduct a detailed examination of the facts. It would have to resolve some facts which were in dispute (for example, as to the extent of his training or medical capability) and would have to examine the reason why the respondent acted or failed to act as it did (for example, in adopting one type of process, mediation, rather than another, grievance). The claimant alleged that it was significant that all the other employees who worked with him on the same shift in the operations room had been fully trained on both the old and the new systems, that he was the only one who was not so trained and that he was the only one of Pakistani-Kashmiri origin and who had an outstanding tribunal claim. In the claimant's submission these were all matters of evidence and inference which could only properly be determined at a full hearing.

The Relevant Law

8. Rules 37 and 39 of the Tribunal Procedure Rules provide me with the power to strike out all or part of a claim or make a deposit order. The relevant parts provide as follows:

> 37 Striking Out
> (1) *At an stage of the proceedings…on the application of a party, a tribunal may strike out all or part of a claim…on any of the following grounds -*
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success*
>
> 39 Deposit orders
> (1) *Where at a preliminary hearing (under rule 53) the Tribunal considers that **a**ny 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.*

9. It is well established that it is inappropriate to strike out claims, and discrimination claims in particular, where there are central disputes of fact: *Anyanwu v South Bank Student Union and another [2001] UKHL 14; [2001] 1 WLR 638*

10. In my view, this applies as much to disputes about why something happened as to what happened. As is made clear in *Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, EAT*, there is much for a tribunal to consider when deciding what inferences of discrimination may be drawn; HHJ Shanks observed as follows:

- *it is very unusual to find direct evidence of discrimination*
- *normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question*
- *it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances*
- *the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference*
- *assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities*

- *where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations*
- *the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment*
- *if it is necessary to resort to the burden of proof in this context, S.136 EqA provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.*

11. In relation to deposit orders, in *Tree v South East Coast Ambulance Service NHS Foundation Trust UKEAT/0043/17 §18-24* HHJ Eady QC summarised the relevant caselaw and principles as follows:

*In J**ansen van Rensberg v Royal London Borough of Kingston-upon-Thames UKEAT/0096/07,** a case determined under the previous ET Rules, the EAT (The Honourable Mr Justice Elias (as he then was) presiding), observed:*

"27. ... the test of little prospect of success ... is plainly not as rigorous as the test that the claim has no reasonable prospect of success ... It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

*See, to similar effect under the 2013 Rules, **Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14** at paragraph 33.*

*19. The effect of a Deposit Order is also plainly different to that of a Strike-out Order under Rule 37: it does not dispose of the claim, or any part of the claim; it does not, of itself, summarily determine the claim. That said, a Deposit Order remains an important and significant deterrent to the pursuit of a claim: if not paid, the effect of a Deposit Order will be the same as a Strike-out, as Rule 39(4) takes effect. This potential outcome led Simler J, in **Hemdan v Ishmail** [2017] ICR 486 EAT, to characterise a Deposit Order as being "rather like a sword of Damocles hanging over the paying party" (paragraph 10). She then went on to observe that "Such orders have the potential to restrict rights of access to a fair trial" (paragraph 16). See, to similar effect, **Sharma v New College Nottingham** UKEAT/0287/11 paragraph 21, where The Honourable Mr Justice Wilkie referred to a Deposit Order being "potentially fatal" and thus comparable to a Strike-out Order.*

20. Where there is, thus, a risk that the making of a Deposit Order will result in the striking out of a claim, I can see that similar considerations will arise in the ET's exercise of its judicial discretion as for the making of a Strike-out Order under Rule 37(1), specifically, as to whether such an Order should be made given the factual disputes arising on the claim. The particular risks that can arise in this regard have been the subject of considerable appellate guidance in respect of discrimination claims, albeit in strike-out cases

but potentially of relevance in respect of Deposit Orders for the reasons I have already referenced; see the well-known injunctions against the making out of Strike-out Orders in discrimination cases, as laid down, for example, in ***Anyanwu v South Bank Students' Union*** *[2001] IRLR 305 HL per Lord Steyn at paragraph 24 and per Lord Hope at paragraph 37.*

21. In making these points, however, I bear in mind - as will an ET exercising its discretion in this regard - that the potential risk of a Deposit Order resulting in the summary disposal of a claim should be mitigated by the express requirement - see Rule 39(2) - that the ET 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". An ET will, thus, need to show that it has taken into account the party's ability to pay and a Deposit Order should not be used as a backdoor means of striking out a claim, so as to prevent the party in question seeking justice at all; see ***Hemdan*** *at paragraph 11.*

22. Although an ET will thus wish to proceed with caution before making a Deposit Order, it can be a legitimate course where it enables the ET to discourage the pursuit of claims identified as having little reasonable prospect of success at an early stage, thus avoiding unnecessary wasted time and resource on the part of the parties and, of course, by the ET itself.

23. Moreover, the broader scope for a Deposit Order - as compared to the striking out of a claim - gives the ET a wide discretion not restricted to considering purely legal questions: it is entitled to have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it; see ***Wright*** *at paragraph 34.*

24. That said, and returning to the warnings provided in cases such as ***Anyanwu*** *and* ***Ezsias v North Glamorgan NHS Trust*** *[2007] ICR 1126:*

"... a mini-trial of the facts is to be avoided, just as it is to be avoided on a strikeout application, because it defeats the object of the exercise. ... If there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested." (That is per Simler J, at paragraph 13 of *Hemdan v Ishmail****)***

12. I find that summary particularly helpful and I also find the last part, which I have highlighted in bold, particularly apposite in this case.

Conclusions

13. It may already be evident from the above but, overall, I take the view that the respondent's application requires a detailed analysis of sometimes disputed or unclear facts, or the identification of who may or may not be an appropriate comparator, or the drawing of an inference as to why something was done or not done that is inherently unsuited to this type of application which is determined without the benefit of witness evidence. I could not safely say at this stage that any of the claims or allegations had no or little reasonable prospect of success.

14. It is appropriate to explain that overall conclusion by reference to the groups of allegations above. Groups 2, 4 and 6 largely revolve around the respondent's decision to proceed via mediation in response to the issues raised by the claimant as opposed to proceeding under the formal grievance procedure and the reason why they chose to take this course. The respondent says it was a course to which the claimant agreed and cannot therefore be because of his race or other tribunal claim. It is not clear to me the extent to which the claimant did agree or understood that it was a choice between one process or another and /or whether he expressed any disquiet in this regard. On the one hand, there may well be a good reason why the respondent adopted this course. On the other hand, the claimant could, for example, argue that a different course was required when he expressed his dissatisfaction at the end of the mediation and wrote 2 further items of correspondence. He could argue that the respondent ignored his correspondence and an inference may be drawn from that. I cannot safely adjudicate on the likelihood of establishing the reason why the respondent acted as it did in these circumstances on the documents alone.

15. The allegations in groups 3 and 5 concern the extent to which the claimant was trained for his role and the extent to which he was incapable of his role by reason of medical restrictions. In relation to group 3, I have simply found it impossible to clearly understand what the documents show without the assistance of witness evidence. The respondent took me to p61 which refers to the tasks which the claimant felt 'competent' to do and p77 which referred to a a previous meeting at which there had apparently been a discussion of the claimant being 'able' to do roughly 30-35% of his role. The claimant insisted he was not able to do the tasks which were not marked on p63 because he had not been fully trained not because he was physically unable. No one was able to clearly explain a document which appeared at p122 and involved a different assessment of the tasks which the claimant was able to do and whether that inability was due to medical restriction and whether he could do the task if given training. This was a factual dispute the strengths and weakness of which I could not assess without further information as to the nature and extent of the claimant's disability, the extent of his training and what the claimant and respondent understood at various meetings when ability and competence were discussed. In relation to group 5, it is accepted that the claimant was not trained; the respondents say he was part of a small group of apparently disparate races who were yet to be trained; the claimant says it is significant that everyone else who did his type of work on his shift had been trained except for him. The identity of the relevant comparators, their race / ethnicity, how the batches were identified for training etc is, again, something which I cannot assess without further evidence.

16. The group of allegations in group 1 seemed to me to be the weakest at this stage on the face of the documents. The claimant had no 'right' to have his contractual hours increased; no 'right' to an answer within a specified time frame; there was clearly a process by which this was raised 'informally' and then became a 'formal' request under a designated procedure. That said, I do not know why the respondent designated the 'flexible working request' process as the relevant process under which his request would fall to be considered. I do not know what was done about the claimant's request in the 3 weeks from 7 April 2017 until his absence on 29 April 2017. On balance, I took the view that I did not have enough information to find that the claim in this regard had no or little reasonable prospect of success.

17. I accepted the respondent's submission that there are aspects of these claims that need to be clarified. In my judgment, that is a matter for case management not the draconian sanction of strike out or deposit order. I have therefore listed the matter for a preliminary hearing, case management.

Employment Judge Connolly

Signed on 20 February 2019