Case Number: 2300457/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mr J White		**Transport for London**

PRELIMINARY HEARING

HELD AT **London South** **ON** **Friday, 5th October 2018**

Regional Employment Judge Hildebrand (Sitting alone)

Appearances
For Claimant: **In Person**
For Respondent: **Ms M Tutin, Counsel**

RESERVED JUDGMENT

The judgment of the Tribunal in this case is that: -

The claimant's claim is struck out on the grounds that it stands no reasonable prospect of success

REASONS

1. This open preliminary hearing was listed by Employment Judge Baron on 30 August 2018 to determine whether to strike out the claims and /or make a deposit order on the grounds that the claims have little reasonable prospect of success pursuant to rule 37(1)(a) and 39(1) of the Employment Tribunal Rules of Procedure and also to clarify the claims being made by the Claimant.

2. The background to the hearing was clearly set out by the Respondent's Counsel in the skeleton argument. On 2 November 2017 the Claimant attended a customer services course. Mr Andrews also attended the course. The facilitator asked everybody to put their mobile phones away so they were not distracted by them during the course. The Claimant put his phone in his pocket but kept an earpiece in his ear. Mr Andrews

noticed this earpiece and signalled to the Claimant to remove it. The Claimant refused to do so. In the break Mr Andrews asked the Claimant to remove it again and the Claimant continued to refuse to do so. Mr Andrews is a supervisor.

3. Before the course took place, the Claimant had volunteered to work on a rest day. The Claimant had been informed that his working on his rest day was approved. A draft roster was apparently sent out which suggested that the Claimant was not working that day. The Claimant was informed by Mr Andrews that the rest day had not yet been approved. The error was corrected shortly thereafter on 6 November 2017.

4. There was a fact-finding meeting in relation to the issue which had arisen on the course on 9 November 2017. The Claimant submitted a grievance regarding the earpiece issue and the confusion over his work rest day, as a result which the fact-finding was suspended pending the outcome of the grievance. The grievance meeting took place on 12 February 2018 when the Claimant returned from sick leave. At this meeting the Claimant suggested for the first time that Mr Andrews actions were racially motivated. His grievance was not upheld. In this preliminary hearing the Claimant contended that he had never been informed that no further action would be taken in relation to the fact-finding.

5. From these basic facts the Claimant makes a number of claims. He claims that when Mr Andrews asked him to remove his earpiece during the course on 2 November 2017 that was an act of direct race discrimination. He further alleges that when Mr Andrews informed him that his work rest day had not been approved on 3 November 2017 this was also an act of direct race discrimination. Finally, he considers that the invitation to the fact-finding meeting on 9 November 2017 to consider whether there was a disciplinary case to answer was also an act of direct race discrimination.

6. The Claimant relies on actual comparators. He says that Mr Andrews did not ask another colleague to remove an earpiece which she was wearing during the course. The Claimant has made clear that the comparator in relation to the course was also from an ethnic minority. When I explained that this made it impossible to use that individual as a comparator he suggested he would use a hypothetical comparator who was white. He said it was self-evident that such a comparator would not have been asked to remove an earpiece.

7. I find that proposition difficult to accept. An individual with the same racial characteristic as the Claimant was not treated in the way that he was treated. This suggests that race was not a component in the treatment he received. It is difficult to see how the case is made if there was a

hypothetical comparator that that individual would be treated differently on the grounds of race.

8. In relation to the work rest day there were five other Revenue Protection Inspectors who did not have their work rest day cancelled, as the Claimant believed, by Mr Andrews. Four of those five individuals are black or minority ethnic individuals. They did not therefore help as comparators and again it is difficult to see how the differential treatment can be said on the basis of this evidence to derive from a difference of race.

9. The Respondent also submitted that in the event that an explanation is required the instruction to remove the earpiece was given because Mr Andrews believed it looked like the Claimant was not paying attention to the speaker on the course.

10. In relation to the roster the Respondent will say that it was issued in draft form and once the mistake was identified the error was corrected. Calling the Claimant to a fact-finding investigation following a refusal to follow a reasonable management instruction is, in the Respondent's submission, part of a usual and proper process.

11. The Respondent's case is that the Claimant has not advanced any basis why he considers that his treatment if proven was less favourable than the way in which an actual comparator would have been treated and/or because of his race. The Claimant lacks the something more for which a Tribunal could conclude that any difference in treatment was because of his race.

12. In relation to the Claimant's victimisation claim the Respondent submits that the Claimant has not identified the protected acts or alleged detriments despite numerous requests form the Respondent for clarification.

13. The Respondent submitted that the Claimant's claims stood little or no prospect of success. In the event that the Tribunal finds no prospect of success they should be struck out and in the event they find little they should be subject to a deposit order.

14. I heard at length from the Claimant. He said that he wore an earpiece to keep in contact with his children who fell ill from time to time and he had been wearing this since 2014. When he arrived at the training course Mr Andrews was there and the Claimant was wearing the earpiece. Nothing had been said about it. A colleague was wearing an earpiece at the point when Mr Andrews beckoned to him to remove his. He accepted that the female wearing an earpiece was black. She was not an actual comparator. Hypothetically, if she had been Caucasian she would not have been challenged. The Claimant referred to the case of ***Petrofac***

Offshore Management Ltd v Wilson ETATS/0013/11. There was no policy regarding wearing an earpiece. Mr Andrews was not reasonable, and the Claimant had given his explanation to him.

15. In relation to the work rest day he was informed on 30 October by Mr Dubois that this had been granted. On 3 November an e-mail from Mr Andrews cancelled the work rest day. Mr Andrews is a supervisor and not a manager. Five others were on the same duty at different locations. It could not be an error that only he was cancelled. The five are not comparators. Their ethnicity is four black and one white. The Claimant thought Mr Andrews was discriminating against him in every way he could. The Claimant referred to the case of ***Deer v The University of Oxford UKEAT/0283/10***. This is a case about a supervisor declining to give a reference to a former student. It is a case about whether inferences of knowledge can be made.

16. The threshold for striking out the claim for having no reasonable prospects of success is high, particularly in respect of discrimination claims. The Respondent referred to the case of ***Ahir v British Airways Plc A2-2016-1846*** in relation to the fact that Tribunal should not be deterred from striking out claims even where there is dispute of fact provided there are satisfying there is indeed no reasonable prospect of the facts necessary to liability being established. In the context of deposit, the test is less rigorous. Reference is made by the Respondent to **Van Rensburg v The Royal Borough of Kingston-upon-Thames & others UKEAT/0096/07,** where it was held that on consideration of a deposit application the tribunal was entitled to have regard to the likelihood of disputed facts being established.

17. I accept that striking out is a significant sanction only to be applied in circumstances where it is clear the claim stands no prospect of success. I also note that I should consider whether there is a possibility that amendment might cure any deficiency in the claim.

Conclusion on deposit and strike out on the earpiece claim

18. On the basis of the information presently supplied by the Claimant I cannot see how the earpiece claim stands any prospect of success. Another individual wearing an earpiece is of the same ethnicity as the Claimant and was not asked to remove it. I do not see how in those circumstances the Claimant could construct a hypothetical comparator of a different ethnicity to persuade a tribunal that the difference in treatment was on the grounds of race. I find that proposition unsustainable. In terms of the analysis the actual comparator already occupies the space where the hypothetical comparator is asked to go. To take an actual comparator of the same ethnicity as the Claimant and substitute a hypothetical comparator of a different ethnicity is an entirely artificial exercise. I do not see how an amendment could cure the deficiency at

the heart of this claim. I can therefore see no reasonable prospect of success for this claim and it is therefore struck out.

The work day rest issue

19. Here there are 5 individuals who were not informed that their work rest day was not approved or cancelled. Had those individuals been white then the matter would be beyond dispute. However, four of the five individuals were minority ethnic and consequently the same argument applies as in the earpiece issue. There is disparate treatment of a group 80% of which were of the same ethnicity as the Claimant. I cannot see how the Claimant can demonstrate that that differential treatment was on the grounds of race by reference to the fifth comparator who was not of the same ethnicity as the Claimant. It would not be appropriate to substitute hypothetical comparators to bolster what is otherwise a hopeless argument. I therefore see no reasonable prospect of success in relation to this claim and it is therefore struck out.

20. I turn to the fact finding meeting. The Claimant was invited to this meeting to establish whether there was a disciplinary case to answer in light to the fact that he had refused to follow a reasonable management instruction. The Claimant offers no comparator either actual or hypothetical and it is difficult to see how he could do so. I do not see how amendment could cure the fundamental weakness of this claim. Again, I find that this claim stands no reasonable prospect of success and it is struck out.

The Victimisation Claim

21. Finally, I turn to the victimisation claim. In his e-mail of 30 May 2018, the Claimant stated: “these acts give background and show an intentional agenda to discriminate, harass and victimise due to race”.

22. On 5 June 2018 the Respondent set out in a request to the Claimant the details required for a protected act and asked him to supply a response to them by 8 June 2018. The Claimant did not respond. After a further email he wrote on 14 June 2018 to say the information was held by the Respondent. He gave no detail regarding his victimisation claim. On 20 July 2018 the Respondent applied for the victimisation claim to be struck out. No protected act had been identified and so the claim of victimisation stood no prospect of success.

23. In the course of the hearing I explained to the Claimant the difference between the technical and colloquial meaning of victimisation. The Claimant explained that the protected act he relied on was the grievance he made following the events on 19 April 2017. Those events do not appear in the claim but are part of the Claimant's application to amend dated 30 May 2018 considered below. The other matters raised in that letter are referred to in the Claim and are therefore particularisation rather than amendment. Although the application to amend was a matter which the Judge to whom the file was referred directed should be considered at hearing further correspondence and a further referral lead to a notice of hearing which did not cover that aspect. On this occasion he alleged he was criticised for taking a break without authorisation from Mr Andrews when others with whom he had taken the break were not taken to task. In that grievance he said that the Respondent's actions were discrimination on grounds of race. The Respondent indicated that this was not raised in the grievance in November 2017.

24. The Respondent submitted that the first stage that the Claimant suggested that Mr Andrews actions were racially motivated was at the grievance meeting on 12 February 2018. I accept that the Claimant has not produced or alleged prior to this hearing that an allegation of race discrimination was made at this distance in time.

25. As stated above it was not until this hearing the Claimant said the protected act was his grievance following the events on 19 April 2017. The Respondents began writing to the Claimant on 5 June 2018 explaining the components of a protected act. A further e-mail was sent on 12 June and on 14 June the Claimant said that with the information in that e-mail he considered he had complied with the Judge's order

26. A further e-mail from the Claimant of 9 July did not supply any clarity. I do not believe the Claimant's victimisation claim has been clarified by the Claimant. I do not accept he has established his assertion that the protected act was a grievance in 2017. Unless the protected act can be established it is not possible to assess the prospects of success of the victimisation claim the Claimant wishes to bring. I therefore consider the victimisation claim has no reasonable prospect of success it should therefore be struck out pursuant to Rule 37.

27. Finally, I turn to the Claimant's application to amend.

28. In the order of 8 May 2018 Employment Judge Martin ordered that the Claimant was to set out in writing his application to amend together with his draft amended pleading and send it to the Tribunal and to the Respondent no later than 31 May. At 21.18 on 30 May the Claimant sent to the Tribunal and the Respondents a document which has already been

referred to above. It deals with the earpiece issue, the work rest day issue, the grievance issue and finally refers to continuing act. At this point a number of matters are raised which date from 2017. The Claimant took a break on 19 April 2017 for 32 minutes on what he recalls was a very cold day. He then received a call from Richard Andrews to say that the Claimant was not to work with his colleagues, but they should go their separate ways. The Claimant said he was called by Richard Andrews after they parted and told that he had been on a break for 32 minutes which he could not have unless Richard Andrews authorised it. The Claimant insisted that his actions were within the Health and Safety Act. His other two other colleagues had the same break. The Claimant said he submitted an official grievance. The Claimant was told by another that he overheard two managers discussing how they were going to "brush it under the carpet". He was called to a meeting with Mark Little and informed that the Respondent were not going to investigate the complaint which he had made. This is an amendment which derives from paragraph 15 of the claim form. In it the Claimant says: -

> "Though you can only make a claim within 3 months of a particular incident there has been another incident where I have made a grievance against Richard Andrews and Mark Little did not investigate it. There has been instances in the past where Mark Little stopped my pay, there has been instances in the past where Richard Andrews tried to get me to do a duty at the time that he knows that was difficult for me to attend as I am a flexi worker. I asked him to give allowance he refused and then granted it to another colleague who was not at work at that time. This particular duty was manning Hammersmith Bridge when it was being repaired. It turned out that their colleagues doing flexible working who the employer did not bullied to do that particular duty. There has been an incident where I made a complaint to Mark Little about Richard Andrews and Mark Little was overheard by a colleague laughing and discussing the matter with Mark Birch in the office not taking it serious".

29. The Claimant is aware that a claim must be made within 3 months of a particular incident. He is sought to amend to include an incident dating from April 2017 which is one of a number of matters which he raised at paragraph 15 of the claim form. The Claimant does not give any insight into why this matter was not raised at some earlier date, why he considers to be part of a continuing act and whether he has acted promptly in relation to notifying it to the Respondent.

30. In all the circumstances I consider this to be appropriately characterised as fresh facts and a fresh claim therefore one to which section 123 of the Equality Act applies and which should be considered as out of time and subject to an application for an extension to extend time on the grounds that it is just and equitable. The Claimant has provided no material upon

which that exercise of discretion could be undertaken, and the Respondent has no opportunity to respond to the case for amendment which he has put forward. Indeed, the Claimant has expressly confirmed his awareness of the three-month's limit. I therefore find that amendment is not appropriate to introduce this otherwise out of time allegation into this claim.

31. Since all the claims have been found to have no reasonable prospect of success it follows the case is concluded.

Regional Employment Judge Hildebrand

Date 7 January 2019