



EMPLOYMENT TRIBUNALS

Claimant: Miss R Rokitowska

Respondent: Kneip Communication SA

Heard at: London Central (via CVP) **On:** 17th January 2022

Before: Employment Judge Nicklin (sitting alone)

Representation

Claimant: in person

Respondent: Mr J Arnold, Counsel

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face to face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the tribunal that:

1. The Claimant's claims have a reasonable prospect of success.
2. The Respondent's application to strike out the claims of sex and race discrimination and/or for a deposit order is dismissed.

REASONS

Introduction

1. This is the tribunal's judgment on the Respondent's application, dated 10th January 2022 (and heard at the hearing on 17th January 2022) to strike out the Claimant's claims of sex and race discrimination and/or for a deposit order in the alternative. The Respondent says that the Claimant's discrimination claims have no reasonable prospect of success (or little reasonable prospect of success).
2. A preliminary hearing took place on 17th January 2022 at which the Claimant

was given permission to amend her sex discrimination claim to add two further allegations and to add a claim of race discrimination, based on the same facts as relied on in her sex discrimination claim. After an oral judgment with reasons had been delivered on the amendment application, the Respondent made its application to strike out the claim and/or for a deposit order in accordance with its earlier written application to the tribunal.

3. The application was supported by a skeleton argument prepared for the preliminary hearing on behalf of the Respondent by its counsel, Mr Arnold.
4. I heard both parties' submissions on the application and it was agreed that, owing to the limited amount of time remaining, I would prepare this written decision after the hearing.

Background to the claims

5. It is important to make clear to the parties that, as this is an application to strike out the claim (or for a deposit order), I am not making findings of fact about the case. I have not heard any live evidence or been presented with all the documents and witness statements on which the parties may rely. Set out below is a summary of the Claimant's case which I must consider as part of the application.
6. By a claim form presented on 9th April 2021, the Claimant brought, amongst other complaints which have since been withdrawn, a claim of direct sex discrimination. The Claimant was employed as a Pre-Sales Specialist by the Respondent from 11th July 2019 until she was made redundant on 30th October 2020, with her one-month notice expiring on 30th November 2020.
7. The Claimant says that in the summer of 2020, the Respondent, which has its head office in Luxembourg, undertook a round of redundancies as part of what is known in that jurisdiction as its Social Plan. The Claimant was based at the Respondent's London office which, accordingly, was not part of the Social Plan. The Respondent says that, having determined that it would implement a round of redundancies in the UK at a similar time (summer 2020), it adopted a policy of seeking to broadly meet the advantages offered to those made redundant under the Social Plan in Luxembourg. This applied to the UK redundancies occurring around the same time. The Claimant was made redundant at a later stage on terms which, she says, were less favourable than two of her UK colleagues whose employment terminated in the summer.
8. The Claimant's claims of sex and race discrimination are therefore based on her contention that the Respondent treated her less favourably than two male, English comparators who were made redundant by the Respondent in Summer 2020. Following an earlier case management hearing which provided an opportunity for the Claimant to clarify the basis of her claims: in outline, her allegations of direct discrimination are:
 - a. Her comparators had more advance notice of being at risk of redundancy in summer 2020. The Claimant says this gave those employees more time to look for other work, causing her to be comparatively disadvantaged;
 - b. That she did not receive any consultation as part of her redundancy

whereas, she says, her comparators were given a full consultation process;

- c. That she received contradictory information about the redundancy process and decision (in respect of her pre-sales role) and, in the context of the speed at which she was made redundant, the Claimant says that she was treated less favourably than her comparators, whose roles were 'carefully evaluated' during a more substantial consultation process;
 - d. That her employment was terminated without justification owing to a 'different skill set' being required. The Claimant contends that her comparators' roles were assessed in accordance with a pre-defined criteria and associated rationale;
 - e. That the Claimant did not receive any redundancy pay or compensation upon termination of her employment because of her short service (i.e. under two years). The Claimant says this was less favourable treatment because her comparators both had less than two years' service and both received redundancy payments from the Respondent; and
 - f. The Claimant alleges that she was ignored by the Respondent when attempting to find a resolution and compares this to the alleged treatment of her comparators, as above.
9. As regards the comparators, the Claimant compares herself to two male employees who were, she says, both English and were made redundant in the UK in summer 2020. The Claimant is a Polish woman. She says of these comparators that:
- a. They both had less than two years' service;
 - b. They were both employed in the sales team, whereas the Claimant was in pre-sales;
 - c. They were both employed under contracts governed by English law (as was the Claimant);
 - d. They both received approximately 6 weeks' notice of being at risk of redundancy (separate from their contractual or statutory notice period) and were consulted throughout;
 - e. Their roles were assessed and evaluated, and they were kept informed throughout that process;
 - f. They were eligible for redundancy payments and/or severance pay despite having less than two years' service; and
 - g. They had an opportunity to engage in negotiation and/or resolution with their employer.

The Respondent's application

10. The Respondent applies to strike out the Claimant's discrimination claims (alternatively for a deposit order). In outline, the Respondent says:
- a. It is of crucial importance that the Claimant's redundancy was in Autumn 2020 and not at the time of the Social Plan in Summer 2020, when her comparators were made redundant in the UK;
 - b. The reason for any advantages being offered to the Claimant's UK colleagues in Summer 2020 was not because of any discriminatory reason but because those redundancies took effect at the time when Luxembourg employees were being made redundant under the Social Plan and a business decision was taken to make those redundancies

broadly (but not identically) similar. The Respondent says that the payments offered to UK employees in Summer 2020 were arbitrary sums and were not calculated in the same way as they would have been under the Social Plan;

- c. The context for the redundancies in Summer 2020 was different to the Autumn. In Summer 2020, the Respondent says it was undertaking a restructuring process led by a previous executive leadership team which was replaced following the appointment of a new CEO in August 2020. The new leadership team decided to initiate a new programme of restructuring which was effectively separate from what had gone before;
- d. The two comparators identified by the Claimant were not materially in the same circumstances because of the Respondent's arrangements (as above);
- e. The Respondent says that there are four other comparators, not relied on by the Claimant, who were in a comparable situation to the Claimant (were male and British), with less than two years' service and did not receive any payment for redundancy. These were identified by Mr Arnold at page 80 of the bundle as comparators C, D, F and G. Two other employees dismissed in Autumn 2020 did receive redundancy payments, but one of these had more than 2 years' service and the other, as evidenced by an email and reply in the bundle [at p.77-78], was given 1 month's pay following his request for a 'severance package' because of his personal and family circumstances;
- f. As regards the Claimant's allegation about contradictory information (as summarised at paragraph 8(c) above), the Respondent says that, as evidenced by the appeal outcome letter, this was an unfortunate error but it cannot reasonably be connected to the Claimant's sex or race; and
- g. The allegation that the Respondent did not respond to the Claimant (as summarised at paragraph 8(f) above) is, the Respondent says, answered by the appeal outcome or previous correspondence. In all the circumstances, the Respondent says it is unlikely that it would have acted as it did because of the Claimant's sex or race.

11. The Claimant responded to the application during the hearing. In summary, she says:

- a. That the less favourable treatment was clear as between her and the comparators on which she relies;
- b. That, whilst another comparator (identified by the Respondent as Comparator H) was paid a gratuity payment upon request, the Claimant herself had health problems but did not receive any such payment;
- c. The timings of the redundancies (as between Summer and Autumn) is not significant: her comparators were told that they were at risk of redundancy; they had a 6 week process in which to engage with their employer. Conversely, the Claimant says her decision was 'out of the blue' and therefore caused her disadvantage;
- d. The Claimant also made brief submissions about her means and the difficulty she might have in paying any more than £500 if a deposit order is made.

12. After the Claimant's submissions, Mr Arnold confirmed that, if the tribunal decided to make a deposit order, it would seek £250 on each of the direct discrimination claims.

Law

Strike out

13. The power to strike out a statement of case is set out in Rule 37 of the tribunal's Rules of Procedure:

(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*

...

...

14. In Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108, the EAT (Langstaff J presiding, at paragraph 33), observed: "...in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general, it is better to proceed to determine a case on the evidence in light of all the facts".

15. More recently, in Cox v Adecco Group UK & Ireland and others [2021] ICR 1307 (before HHJ Tayler sitting in the EAT), guidance was provided as to several principles of relevance when considering (or making an application for) strike out on the ground of no reasonable prospect of success.

"(1) No one gains by truly hopeless cases being pursued to a hearing.

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.

(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.

(4) The claimant's case must ordinarily be taken at its highest.

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances".

16. The test which must be applied is whether the claims have a reasonable

prospect of success. It is not whether the claim is likely to fail, nor whether it is possible it will fail and has been described by the EAT as a 'high test' (Balls v Downham Market High School & College, [2011] IRLR 217 at paragraph 6, per Lady Smith). Further, as referred to in Mr Arnold's skeleton argument at paragraph 44, the EAT has observed in Hak v St Christopher Fellowship [2016] ICR 411 at paragraph 55, that "*some prospect may exist, but be insufficient*", in a passage which refers to Lady Smith's judgment, above.

Deposit order

17. As regards the tribunal's power to make a deposit order, this is set out at Rule 39. The tribunal may make a deposit order in the following circumstances:

- (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.*

...

18. Mr Arnold has referred me to Wright v Nipponkoa Insurance (Europe) Limited (UKEAT/0113/14/JOJ, unreported, 17th September 2014, per HHJ Eady QC), where it was observed (at paragraph 34): "*When determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to considering purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case*".

19. Mr Arnold has also referred me to Van Rensburg v Royal Borough of Kingston-upon-Thames (UKEAT/0096/07 unreported, 16th October 2007), where Elias P, at paragraphs 25 and 27, refers to the power to order a deposit being exercised where the tribunal had doubts about the inherent likelihood of the claim succeeding. The tribunal had "*greater leeway when considering whether or not to order a deposit*", but "*must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim...*".

20. The tribunal must exercise any discretion under either rule in accordance with the overriding objective, having regard to all the circumstances of the case.

Discussion and conclusions on the application

21. In this case, the Claimant has been able, with assistance, to focus her claims on six allegations which have helpfully been set out in a draft list of issues. The Respondent has made its application based on those allegations and, accordingly, the parties and the tribunal have been able to proceed with a clear understanding of the issues. Both parties have also provided helpful information about the likely comparators in this case. I have therefore been able to take the Claimant's case at its highest, based on the allegations she makes and the comparators to whom both parties have referred.

22. In my judgment, the claims do have a reasonable prospect of success (i.e. neither threshold – for strike out or deposit order – is met in this case) for the following reasons:

- a. The Claimant's case, taken at its highest, demonstrates a properly arguable case for less favourable treatment in respect of her redundancy process and outcomes as compared to her two identified comparators. The documentary evidence before the tribunal shows that two male comparators of different nationality to the Claimant (whether described as English or British) were treated differently despite having less than two years' service with the Respondent. This means that those comparators, as employees in the UK, did not have the statutory protections under the Employment Rights Act 1996 which a longer serving employee would enjoy. Notwithstanding, the Claimant is able to point to a more advantageous outcome and process for these employees by comparison. The Claimant's case has reasonable prospects of establishing that her treatment was less favourable because:
- i. She did not receive any redundancy payment when they did;
 - ii. On her pleaded case, the comparators received a consultation process and earlier notification of being at risk as compared to the short notice arrangements the Claimant says she experienced; and
 - iii. She has reasonable prospects, in the circumstances, of establishing a less favourable approach to the termination of her employment as compared to the two male employees. At the very least, the Claimant is likely to be able to rely on the difference in consultation and notification in this regard.
- b. Further:
- i. the schedule of redundancies produced by the Respondent for comparison purposes, on the face of it, supports the Claimant's argument that her treatment was less favourable upon termination than her two identified comparators. It confirms they both received a payment where there was no statutory entitlement; and
 - ii. whilst the schedule indicates that these comparators received no process, the Claimant maintains that they did (the Claimant's allegation schedule produced in advance of the preliminary hearing refers to a procedure being explained to the affected employees, alleging that they were advised to obtain legal advice as part of that procedure). That is a dispute which is properly resolved on oral evidence at a final hearing. The Respondent's schedule refers, in respect of the two comparators identified by the Claimant, to a short period from notification until a settlement was reached. That does not answer whether those employees were offered or afforded any process or consultation in comparison to the Claimant. In my judgment, that is a matter for final evidence.
- c. As regards the question of prospects in establishing facts supporting a conclusion that any such less favourable treatment (if found) was 'because of' the Claimant's sex or race, I do not consider that the case can be put as low as no reasonable or little reasonable prospect of success. In particular:
- i. I have considered the documentary evidence and submissions

made by the Respondent. There may be some force in its contention that other British males were made redundant in Autumn 2020 and, without sufficient service, did not receive any financial reward (i.e. like the Claimant). That is an argument that militates in favour of other, non-discriminatory, reasons such as the Respondent's contention that new management made the decisions in Autumn 2020 (and those decisions were not aligned with the Social Plan in Luxembourg). However, the Claimant's case is not simply limited to the receipt of payments. In my judgment, it is necessary for a tribunal to hear evidence and make findings about the two redundancy rounds and to consider those findings having regard to the Claimant's contention about sex and/or race.

- ii. The Respondent has placed weight on the claimed treatment of a number of other comparators in the Autumn 2020 round of redundancies. The Claimant does not rely on these employees. All of those identified held senior positions and do not, on the face of it, appear to have likely held a comparable role (although that would be, of course, a matter for a final hearing). The Claimant compares herself to two employees from the sales team and specifically alleges that less favourable treatment in relation to those employees was because of sex and/or race. In my judgment, that is a question, in the context of this case, which requires evidence to be heard to resolve disputed factual issues.
- iii. The Claimant's case as to the reason for any less favourable treatment (if found), in my judgment, requires a full hearing of the evidence. There are reasonable prospects as to the treatment of which she complains in comparing herself to two British males in the sales team. The final hearing tribunal can resolve any factual dispute between the parties in terms of the reason for approaching the redundancies of the two comparators differently. I make no indication as to the outcome of any such hearing and the Respondent will be able to properly advance the non-discriminatory reasons on which it relies. At this stage, much of the Respondent's position has been advanced through submissions. The amendment application having only just been granted, it has not yet fully stated its case through an Amended Response.

23. In the circumstances, the tests for strike out and/or a deposit order are not met in this case and the Respondent's application must therefore be dismissed. I shall make a separate case management order to progress this case to final hearing accordingly.

Employment Judge Nicklin

Date 10th February 2022

JUDGMENT SENT TO THE PARTIES ON

11 Feb. 22

.....
FOR THE TRIBUNAL OFFICE