



EMPLOYMENT TRIBUNALS

Claimant: Mr L Pinkowski

Respondent: G & E Murgatroyde Ltd

Heard at: Manchester (by CVP video)

On: 22 June 2022

Before: Employment Judge Parkin

Representation

Claimant: In person

Respondent: Mr C MacNaughton, Solicitor

JUDGMENT AT A PRELIMINARY HEARING

The Judgment of the Tribunal is that:

- 1) The claimant's unfair dismissal claim is struck out as having no reasonable prospects of success;
- 2) The claimant's age discrimination claim is struck out as having no reasonable prospect of success; and
- 3) The claimant's race discrimination claim is struck out as having no reasonable prospect of success

REASONS

1. The claim and response

1.1 The claimant presented his ET1 claim form on 6 September 2021 claiming unfair dismissal, age discrimination and race discrimination. He also ticked a box for "other payments" but made clear at the case management hearing on 10 March 2022 that there was no separate payments claim. Although not expressly referred to in Employment Judge Aspinall's Case Management Order following that hearing, the claimant clarified at this Preliminary Hearing that he did pursue the unfair dismissal claim which he considered was interconnected with his discrimination claims.

1.2 The core of the claimant's case is set out in the ET1 at part 8.1: "It was part time and manager did not allow work me for another company" and at part 8.2: "I was looking for a job. I get job but only 16 hours a week. They expected me to be fully flexible. Contract 16 hours and I have to be fully ready to work in every day. I said that I can work in every day. In contract it was not said that I have to be fully flexible They can't expect people to be flexible with contract 16 hours...".

1.3 The respondent had vigorously resisted the claims in its ET3 response and grounds of resistance presented on 19 October 2021, contending that the claimant lacked two years' continuous service for an unfair dismissal claim and denying any unlawful discrimination or that the withdrawal of its 16-hour part-time offer of employment was in any way related to his age or race.

2. The issues at the Preliminary Hearing

2.1 At the case management hearing, having considered the claim and response and heard the parties, Employment Judge Aspinall gave her case summary at paragraphs 7-8 of her Order and then sought to identify the discrimination claims and issues at paragraphs 10-12. At paragraphs 10 -11 she effectively described claims of indirect discrimination contrary to section 19 of the Equality Act 2010, although the Annex to her Order set out only indicative issues for direct discrimination claims.

2.2 EJ Aspinall had the assistance of a Polish interpreter and directed that such an interpreter attend this hearing. The Tribunal and the claimant were assisted greatly by the interpreter, Ms Barbara Faligowska, who interpreted throughout the hearing for the claimant.

2.3 The hearing was listed to determine whether all or any of the claimant's claims should be struck out for having no reasonable prospects of success or whether he should be required to pay a deposit as a condition of continuing with any of the claims which had little reasonable prospect of success. Since he was pursuing the unfair dismissal claim, I considered those issues in respect of that claim as well as the discrimination claims.

2.4 At the start of the hearing, I explained the law and concepts of both direct discrimination and indirect discrimination to the claimant. The claimant confirmed that he understood the distinction and during his representations made clear he was pursuing claims of indirect discrimination only and not of direct discrimination. Whilst afforded the opportunity to give oral evidence at the hearing (which meant he could have been cross-examined), the claimant elected to make representations explaining more fully the claims he wished to pursue.

3. The Facts

For the purpose of determining the preliminary issues, I made the following brief findings of key facts:

3.1 The claimant's race and nationality is Polish and he has experience of working in shops.

3.2 In about June 2021, when aged 45 years, the claimant applied for a part-time job as an assistant at the respondent's SPAR store in Preston.

3.3 This was a 16-hour role and, at his interview, the manager explained those hours needed to be worked flexibly, potentially at different times and on different days during the week.

3.4 However, the claimant wanted employment for longer hours (about three times those offered by the respondent) and with higher earnings. He had, or had been offered, another job and wanted certainty of shifts and days to enable him to do the other job which was something the respondent was not offering.

3.5 In the event, despite the respondent's manager understanding the claimant had accepted and was due to start work on 28 June 2021 (about a week after the final interview), he never started work for the respondent and the offer of employment was retracted by the respondent.

3.6 Whilst the claimant had some knowledge of the circumstances of existing employees at the store, who were mothers and fathers and of different nationalities and who worked fixed shifts commensurate with their childcare responsibilities, he provided no detail of any age or race of those other employees beyond referring to them caring for children. In particular, he provided no detail of any other job applicants applying alongside him for the 16 hour part-time role in about June 2021.

3.7 There was no evidence of the impact of a 16-hour flexible working requirement upon people of the claimant's age or age group or on Polish people more generally. Nor is there any obvious group disadvantage to people of this age group or to Polish people which the Tribunal can accept or take judicial knowledge of without supporting evidence.

4. The parties' submissions

4.1 The claimant contended that he was being required to work flexibly when other people with children were on the different scheme and had fixed days allocated to them. He had wanted and asked for set hours so he could get another job but was refused this and the manager who interviewed him told him he must "Take it or leave it". He believed that others had set hours and he was discriminated against in being asked to work flexibly and not being given set hours, although he didn't know if that was because of his race or his age or because he had no family.

4.2 The respondent contended the unfair dismissal claim could not possibly succeed because the claimant lacked service to bring it. On the discrimination claims, he had not shown any possible discrimination related to his age or race and his claims had no merit. It was perfectly reasonable for the respondent to seek to employ flexible cover in a store which employed staff on fixed hours due to childcare arrangements. The claimant did not establish disadvantage but in any event the 16-hour flexible work and the claimant's inability to work it had nothing to do with age or race. His claims should be struck out or in the alternative meaningful deposits ordered notwithstanding his limited means.

5. The Law

5.1 The provisions relating to Unfair Dismissal are set out at Part X of the Employment Rights Act 1996. The right not to be unfairly dismissed is at Section 94 and Section 108 governs qualifying periods of employment:

“(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination...”

Subsection (3) then disapplies Subsection (1) in a very limited number of defined cases, known as inadmissible reason or “automatically unfair” dismissal situations.

5.2 Protection against unlawful discrimination and harassment relating to defined protected characteristics is provided in the Equality Act 2010, in particular Parts 2 and 5, with age included by Section 5 and race by Section 9 as protected characteristics. Direct discrimination is at Section 13:

“(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim...”

Indirect discrimination is at Section 19:

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

Age... Race...”

Section 39 governs discrimination against employees and applicants for employment; applicants for employment such as this claimant are entitled to rely on the protections against discrimination.

5.3 The claimant needs to prove as primary facts firstly that the employer or prospective employer applied or would apply a provision, criterion or practice, i.e. a work requirement or arrangement, both to the claimant and others without the

relevant protected characteristic; secondly that this would put others sharing the relevant characteristic at a particular disadvantage when compared with others (“group disadvantage”) and thirdly that it put or would put him at that disadvantage (“individual disadvantage”). The final aspect of the proportionate justification defence was not relied upon by the respondent here.

5.4 The Tribunal’s procedural rules are at the Employment Tribunals Rules of Procedure 2013. Rule 2 states:

“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

Rule 37 states:

“(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...
- (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...”

Rule 39 states:

“(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...”

5.5 Whilst there is much case law on this and other individual provisions within Rule 37, the clear import of the authorities is that gives the Tribunal draconian powers which are exercised infrequently and only after careful consideration in clear cases, having taken the party's case at its highest at this interlocutory stage. Striking out orders are unlikely to be made where there are matters of fact to be determined on oral evidence and the Tribunal does seek to determine claims fully after hearing oral evidence and submissions, especially where the claims concern sensitive allegations of unlawful discrimination, detriment and whistleblowing. The slight difference of wording between "no reasonable prospects of success" (within Rule 37) and "little reasonable prospects of success" (Rule 39) can perhaps be described colloquially as the difference between a hopeless case and a really weak case.

6. Conclusion

6.1 The most straightforward matter relates to the unfair dismissal claim. The claimant never started work for the respondent; he does not have two years' service and has not shown any basis for an unfair dismissal claim which does not need two years' service within the limited exceptions in section 108. That claim has no reasonable prospect of success as the Tribunal simply has no jurisdiction to hear it. It is struck out.

6.2 Turning to the discrimination claims. Notwithstanding the claimant's representations today, he has not significantly moved his claims forward from what he said to EJ Aspinall at the case management hearing except by clarifying that he pursues indirect discrimination claims only. Although he is able to show personal or individual disadvantage resulting from the flexible work requirement applied to applicants for the part-time post, he is wholly unable to demonstrate any general or group disadvantage which the flexible work requirement imposes on people with whom he shares his protected characteristic, that is people of or around the age group of 45 years or of the Polish race. The disadvantage shown is wholly personal to him and his own situation.

6.3 Whilst the Tribunal is always extremely careful before it adopts the unusual and draconian step of striking out a discrimination claim at this early stage, this is an appropriate case for me to do so. Whereas discrimination claims are normally hugely fact-sensitive and often involve the drawing of inferences from primary fact-finding, this is not a case which will turn upon the way the evidence comes out at a final hearing, such as under cross-examination from the other party. Without questioning the claimant's strength of feeling and disappointment, I conclude that both discrimination claims have no reasonable prospect of success when set within their legal framework. The discrimination claims are hopeless and the right outcome in accordance with the overriding objective is to strike them out.

6.4 In these circumstances, there is no need to consider making deposit orders as a condition of permitting the claimed to continue with his claim.

Employment Judge Parkin
Date: 23 June 2022

JUDGMENT & REASONS
SENT TO THE PARTIES ON
24 June 2022

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