



EMPLOYMENT TRIBUNALS

Claimant: Mr H Khalaf

Respondents: 1. The Cabinet Office
2. HM Revenue & Customs

Heard at: Manchester

On: 8 November 2019

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: In person

Respondents: Mr Redpath

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of race discrimination has no reasonable prospect of success and is struck out.
2. The claimant's claim of wrongful dismissal has no reasonable prospect of success and is struck out.
3. The claimant's claim of breach of contract has no reasonable prospect of success and is struck out.

REASONS

1. The claimant filed a claim form at the Tribunal on 9 June 2019. He made complaints of race discrimination, breach of contract and wrongful dismissal. He named two respondents: the first was "The Civil Service Government Recruitment Service" and the second was HMRC.

2. I dealt with two issues at the preliminary hearing. The first was clarification of the correct respondent or respondents to the claim. The second was the application to strike out all the claimant's claim. That application was made by The Cabinet

Office. Mr Redpath made it clear at the hearing that he was instructed by the Cabinet Office and was not instructed to represent HMRC.

3. I gave my decisions on both issues with reasons orally at the hearing. At the hearing the claimant requested these written reasons. The case management summary and order of today's date set out my decision on the first issue. That decision was that the correct name of the first respondent was "the Cabinet Office" and that HM Revenue & Customs should be joined as a second respondent.

4. This judgment and reasons set out my decision on the second issue. I have separated them out into two documents because the judgment will be made public at www.gov.uk/employment-tribunal-decisions but this order will not.

5. The facts in the case were not really in dispute. The claimant applied for three Customer Service Consultant posts at HMRC in August 2018. He was successful at interview and on 12 October 2018 he was given a conditional offer for the role subject to satisfactory completion of all pre-employment checks. These specifically included his identity and his nationality and right to work.

6. The significance of these checks was that the claimant was at the relevant time a Syrian national. As he explained to me he had on previous occasions when he was seeking work had to prove his right to work and live in the UK and had successfully done so. On 2 January 2019 he received an email from a Civil Service email address to confirm that his checks had been satisfactorily completed and that the vacancy holder i.e. HMRC, would contact him to agree next steps.

7. On 30 January 2019 the claimant received an unconditional offer of employment from HMRC. That email confirmed his position as a Customer Service Consultant at HMRC in Manchester. It confirmed his start date of 25 February 2019. The claimant accepted that offer and on 20 February 2019 he received a welcome letter and email from HMRC.

8. However, on 22 February 2019 on the afternoon of the last working day before he was due to start at HMRC the claimant received an email from them telling him that he could not take up the role because of his nationality. The essence of the claimant's claim is that having been given a job by HMRC it was then taken away and the reason for that was his nationality.

9. I am very grateful to Mr Redpath and to the claimant for their submissions at the hearing.

10. Rule 37 of the Employment Tribunals Rules 2013 says that 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 on the basis, amongst others, that it has no reasonable prospects of success. The claim 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.

11. Mr Redpath explained that the basis of the application to strike out was that the Civil Service Nationality Rules ("the Rules") which govern employment in the Civil Service meant that neither HMRC nor any other Civil Service employer could lawfully

employ the claimant as at 25 February 2019. That was because as a Syrian national he was an “alien” for the purposes of the Rules. Mr Redpath took me through the legislative provisions which culminate in the Rules. He submitted, and I accept, that by virtue of the Act of Settlement 1700 s.3 and the Aliens Restriction (Amendment) Act 1919 s.6, no “alien” shall be appointed to any office or place in the Civil Service of the state. The 1919 Act goes further and makes it a criminal offence for a person to act in contravention of section 6 of that Act.

12. In terms of the impact of that legislation on the claims brought by the claimant, Mr Redpath submitted that schedule 22 paragraph 5 of the Equality Act 2010 was crucial. Paragraph 5(1)(b) says that a person does not contravene the Equality Act 2010 by implementing rules relating to restrictions of persons of particular birth, nationality when it comes to employment in the service of the Crown. In summary, that meant that a discrimination claim could not succeed against an organisation where its decision not to employ somebody in the service of the Crown is due to restrictions on nationality included in such rules.

13. In this case it was accepted that at the relevant time the claimant did not satisfy the requirements in terms of nationality to be employed in the Civil Service set out in the Rules. Mr Redpath submitted that this meant that Schedule 22 paragraph 5(1)(b) of the Equality Act 2010 was an absolute defence to the claimant's race discrimination claim whether against The Cabinet Office or HMRC.

14. Mr Redpath went further and said that the legislative position meant that there could be no contract claim arising from the purported contract of employment between the claimant and HMRC. S.13 of the 1919 Act states it is a criminal offence for anybody to enter into such a contract. The result was that such contract would be void as being illegal and that, to summarise Mr Redpath's submissions, meant that the breach of contract and/or wrongful dismissal claims could not succeed.

15. The claimant made very clear submissions. He did not argue that the legislation referred to by Mr Redpath did not apply. He did not seek to deny that its effect was to prevent HMRC being in a position to lawfully employ him. He did make the point, with which I have a great deal of sympathy, that it was extremely frustrating and disappointing to be told over a period of a number of months that he would be employed and then be told at the last minute that he could not be. For the claimant, the disappointment and frustration was made worse by the fact that he is a refugee and has worked hard to learn English and seek employment, with employment by the Government being seen by the claimant as the culmination of his efforts.

16. I reminded myself that what I was deciding was whether, given the relevant law, the claimant's claim has any reasonable prospect of success.

17. As I have said, I have a great deal of sympathy with the claimant but I concluded that the legislative provisions referred to by Mr Redpath meant that both the race discrimination claim and the contract based claims, including wrongful dismissal, had no reasonable prospects of success. Schedule 22 paragraph 5(1)(b) does, it seems to me, provide a comprehensive defence to a race discrimination claim in these circumstances. It is clear that the Government did rely on rules which make it clear that those of certain nationalities, including that of the claimant at the

relevant time, cannot be employed in the Civil Service. Equally, section 13 of the 1919 Act makes it clear that it would be unlawful for anybody to enter into such a contract, and I therefore accepted that the proposed employment contract in this case was void for illegality. That means that it cannot be enforced either through a breach of contract claim or a claim for wrongful dismissal (which is also a contract based claim).

18. The claimant did point out that he was at a ceremony two days after his employment with HMRC was due to start at which his nationality as a British citizen would be confirmed. He submitted that given the circumstances the spirit of the law required that his claim should be allowed to proceed. As I have made clear, I do have a great deal of sympathy with the claimant but in this case the wording of the relevant legislation does not seem to me to allow me room for interpretation to take into account what was fair in the circumstances of this particular case. I must make my decision based on the claimant's status and the relevant law when the alleged act of discrimination and breach of contract occurred, when the claimant was an "alien" for the purposes of the Rules.

19. With some regret therefore I concluded that the claimant's claims did not have a reasonable prospect of success and must be struck out.

Employment Judge McDonald

Date: 11 December 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 December 2019

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