



EMPLOYMENT TRIBUNALS

Claimant: Mr Lucian-Sorin Andrei

Respondent: DHL Services Limited

Heard at: Birmingham Employment
Tribunal via CVP

On: 31 March 2024

Before: Employment Judge C L Taylor

REPRESENTATION:

Claimant: In person

Respondent: Ms Baylis, Counsel

PRELIMINARY HEARING IN PUBLIC JUDGMENT AND REASONS

The judgment of the Tribunal is as follows:

1. The claim for direct discrimination is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.
2. The application for amendment to include a claim of victimisation is refused.
3. The claimant's claims for indirect discrimination and direct discrimination, save for in respect of the November 2022 job application, are dismissed on withdrawal.

Reasons

Background, Claims and Issues

1. The claimant made claims in his claim form for direct discrimination on the basis of race – ethnic or national origins and a wages claim. The claims were partially clarified at a case management hearing on 04 July 2023. A draft list of issues was produced, with parties to write to the Tribunal and each other to confirm whether, after provision of further information from the claimant, the draft list of issues was wrong or incomplete.
2. The claimant provided further information by way of a table of allegations which sought to amend the claim to include allegations of indirect discrimination and victimisation, however the claimant had not included all necessary information in respect of the new claims.
3. The respondent wrote to the Tribunal and the claimant on 04 September 2023 confirming that they objected to the application to amend the claim to include new factual allegations and /or grounds of claim and contended that the draft list of issues is wrong because the claims ought to be interpreted as confined to allegations in the claim form.
4. The matter was therefore before me to consider:
 - i. The respondent's application to strike out the claims as having no reasonable prospects of success or alternatively to order the claimant to pay a deposit.
 - ii. The claimant's table of allegations/further particulars of claim
 - iii. To complete/amend the list of issues as necessary;
 - iv. To consider further case management.
5. The claimant also made an application on 29 January 2024 under Rule 50 (3)(b) to keep his home address confidential and for the witnesses he intended to call to essentially keep their identities confidential.

Procedure, Documents and Evidence Heard

6. The hearing was conducted via CVP to which neither party objected, and which did not impact upon the fairness of the hearing. I had before me a bundle of 128 pages and an email dated 29 January 2024 from the respondent with 16 attachments. I heard submissions from the claimant and the respondent's representative. I have considered all of the documentary evidence and submissions made even where not explicitly referred to in this decision.

Law

7. Rule 37(1)(a) ET Rules 2013 provides the employment tribunal a power to strike out a claim at any stage of the proceedings on the grounds that the claim has no reasonable prospect of success.
8. The basic principles which are relevant to my consideration are as follows:

- (1) A strike out is a draconian step or a high test: *Balls v Downham Market High School* [2011] IRLR 217.
- (2) Cases should not, as a general principle, be struck out when the central facts are in dispute: *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126.
- (3) There is a special need for caution in striking out discrimination and because:
 - (i) they are generally fact-sensitive;
 - (ii) there is high public interest in examining the merits at a full hearing: *Anyanwu v South Bank Student Union* [2001] IRLR 305;
 - (iii) There is a shifting burden of proof.

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

(5) Particularly where a litigant in person is involved, the tribunal should do more than simply ask the question orally to be taken to the relevant material. The Tribunal should carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding that there is nothing of substance behind it: *Cox v Adecco Group UK* [2021] ICR 1307 quoting Choudhury P in *Malik v Birmingham City Council* UKEAT/0027/19/BA.

9. In respect of the application to amend I considered the principles established in the leading cases including *Selkent Bus Company Ltd v Moore* 1996 ICR 836, EAT, *Chaudhry v Cerberus Security and Monitoring Services Ltd* 2022 EAT 172, *Vaughan v Modality Partnership* UKEAT/0147/20/BA(V).
10. Rule 51 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 states: "Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order."

Fact-finding and submissions

11. The claimant submitted that it was agreed and he was given permission at the case management hearing to amend his claim to include a claim for victimisation. The respondent submitted that the list of issues was not finalised at the case management hearing.
12. The case management order supports the respondent's submission. The order is clear that the list of issues is in draft format and allowed for either party to write to the Tribunal to dispute the draft list of issues, as the respondent duly did.
13. Significant time was spent at the outset of the hearing clarifying the claims the appellant sought to bring before there could be submissions on the applications for strike out, deposit order and amendment.
14. Towards the end of the hearing the claimant stated that he wished to withdraw his claims in respect of wages and in respect of indirect discrimination. The

claimant stated that he only wanted to pursue one claim for direct discrimination in respect of his application for the role of operational support in November 2022 and that he wished to limit his application to amend to include a claim for victimisation relating to how his grievance of 18 November 2022 was dealt with.

Application to amend to include a claim for victimisation

15. The issues the claimant wishes to include in respect of the claim for victimisation are as follows:

Did the claimant raise a grievance due to the rejection of his application on the basis that he considered the rejection to amount to discrimination on 18 November 2022?

Did the respondent consider the claimant has done a protected act in raising that grievance?

Did the respondent do the following things:

Sam Fletcher taking 35 days to respond to the grievance.

Nominating Andrew Stamp to attend the grievance meeting when he was a member of the department about which the claimant was complaining.

Setting an agenda for the grievance meeting.

Not dealing with everything raised in the claimant's grievance

Making a decision on the outcome of the grievance before the grievance meeting.

By doing so did the respondent subject the claimant to detriment, if so was it because the respondent believed the claimant had done or might do a protected act.

16. The claimant's position is that these details were included in his claim form and that victimisation was agreed as an issue at the case management hearing. I have discussed above the reasons why I do not accept that this amendment was agreed at the case management hearing. Further, the victimisation claim included in the draft list of issues relied on entirely different detriments to those outlined above. Therefore, if I decide that the victimisation claim as pleaded above was not included in the claim form, the application for amendment was made at the hearing.

17. The claimant makes reference to raising a grievance on 18 November 2022 because he was not successful in five applications, in his claim form. The claim form also states that the claimant was not satisfied with the outcome of the grievance.

18. Although the fact that a grievance was raised on 18 November 2022 was raised in the claim form, this was labelled as direct discrimination and framed as a

response to how the respondent had treated the claimant by him not succeeding in various job applications. However, the claimant states in his claim form that the reason for him not succeeding in his applications was essentially nepotism and cronyism.

19. There is no reference to anything which could be a protected act. I remind myself that a claim for victimisation can succeed on the basis that a respondent believes that a claimant may do a protected act, however there is no evidence before me that the respondent held such a belief.
20. The claimant added further detail to his this claim in a table produced pursuant to the case management order of 04 July 2023. In this table the claimant referred to his grievance not being dealt with fully; a meeting being scheduled 35 days after the grievance was made and nominating Andrew Stamp to attend the hearing of the grievance. This is labelled as a claim for victimisation. The detriments of setting an agenda for the grievance meeting and making a decision before the grievance meeting were not referenced in the table and not raised before this hearing.
21. The nature of the amendment is a substantive alteration to what was claimed in the claim form rather than a simple re-labelling. The raising of the grievance was not framed in a way which made it identifiable as a protected act or the basis of a claim for victimisation in the claim form, nor were there facts from which, even though incorrectly labelled, it could be concluded that the claimant was describing acts of victimisation. Because the amendment sought is a new claim raised at this hearing, it is considerably out of time.
22. Delay is a factor for me to consider, there are no time limits for making a claim for amendment, but it is relevant to consider why the application was delayed. The claimant is acting in person, however there was a significant delay in making the application for amendment. The application being made in this hearing following the claim form being dated 13 April 2023, a claim for victimisation being discussed at the case management hearing on 04 July 2023 and the respondent sending correspondence in September 2023 indicting that an application for amendment was required. The claimant was, I accept, genuinely under the impression, albeit incorrect, that the claim for victimisation has been accepted at the case management hearing. However, the claim as pleaded at this hearing relied on entirely different detriments to those discussed at the case management hearing.
23. I am also entitled to consider the merits of the claim the claimant seeks to introduce. The claimant now pleads that the protected act was raising a grievance in November 2022. The difficulty the claimant has with this claim is that the basis of his grievance is that others were picked for roles because of nepotism and cronyism. Such circumstances do not give rise to protection from

the Equality Act, notwithstanding that such acts may be, in the everyday use of the word, unfair.

24. I must balance the injustice and hardship in allowing or refusing the application to amend. The respondent submitted that, in allowing the application the respondent is in the position of having to defend an entirely new claim, requiring evidence from a new witness when the basis of the claim, that people with connections were promoted over the claimant, is not a claim that the Tribunal can look at in terms of the Equality Act. Allowing the claim to go ahead in those circumstances is, to an extent, misusing the Tribunal.
25. The claimant submitted that the Tribunal must evaluate the strength of the claim by hearing evidence. He stated in his grievance that the Equality Act was being breached. Providing an answer after 35 days and not 14 days, nominating a manager from planning to attend the meeting are things which are protected by the Equality Act. The reason for the delay is that he was waiting for an answer to his grievance which did not come until January and then were issues with the name on the early conciliation certificate. The claim to the Tribunal was in March and the victimisation continued. The reason he made his application is justice, breaches of policy and the Equality Act.
26. The claimant's case as pleaded is that the grievance relates to nepotism and cronyism. Whilst the grievance may have made reference to the Equality Act, this would have been misconceived because the acts relied upon are not acts in respect of which the Equality Act offers protection. There is more hardship to the respondent in having to defend a new, weak, significantly delayed claim involving further witness evidence than there is to the claimant in being prevented from bring a claim where the behaviour he complains about is not related to a protected act. The claimant states in his claim form that others were promoted for reasons that have nothing to do with protected acts. The application to amend is therefore refused.

Application to strike out/for a deposit order

27. The claimant only clarified the claims he wished to withdraw at the end of the hearing. The respondent therefore made submissions in respect of all of the claims. Given the withdrawal, I will only consider the application to strike out/for a deposit order in respect of the claims remaining after the withdrawal.
28. The claim for direct discrimination remaining after the withdrawal is that the claimant was not successful in his application for the role of operational support in November 2022 and that this was less favourable treatment because he is Romanian. The claimant compares himself to those employed by the respondent who are not Romanian.

29. In November 2022, there were two successful candidates, one of whom was Polish and another whose nationality is not known to the claimant. The decision was made by three managers who are also Polish. The claimant stated that the Polish person was hired because they are Polish, they speak Polish and were friends with one of the hiring managers on social media. The claimant does not know if this is the case for the second person who was hired.
30. The respondent submitted that it is not in accordance with the overriding objective to allow claims, where, even if there are no disputed facts, the claim would not succeed on those undisputed facts. The respondent accepts the claimant's facts for the purposes of the application for strike out. The Tribunal must consider whether there is some sort of evidence which would allow the Tribunal to draw inferences. The Tribunal must consider the mind of the decision maker and if there was, in any part, a discriminatory belief against Romanian people. It cannot simply be a case of a bare difference in treatment.
31. The respondent submitted that there are two problems with this claim. Firstly, it is no more than a bare difference. The claimant noticed a similarity between the recruiter and one person recruited and can't point to anything else. The second problem is that not even everyone who was recruited is Polish. The decision makers were therefore not recruiting people because of nationality. On the claimant's own case, the managers weren't recruiting along nationality and this therefore cannot succeed as a discrimination claim.
32. The claimant submitted that discrimination claims need to be fully heard. The claimant submitted that he does not agree with the respondent to just pay attention to nationality, it is about fairness, the Equality Act is about justice in the workplace. There is not the space for any possibility of discrimination in the workplace. The protected characteristic can be race or religion and the Tribunal must consider all evidence of claims. All of the claims are about breaching of policy and equality.
33. I agree with the submissions made by the respondent. The claimant's submission that the Employment Tribunal has a general power to deal with any claim a claimant may want to bring based on the entirety of the protection offered by the Equality Act, rather than the specific claims pleaded is simply incorrect. The claimant's case is not pleaded as any more than a bare difference. He was not successful in a job application and he is of a different nationality than those who were successful. However, those employed were not both of the same nationality as the recruiting managers and were different nationalities to each other. Even taking the claims as undisputed facts, there is nothing in the claimant's claim providing a basis for a finding that the recruitment decision was based on race or an act of discrimination. There is no factual basis to shift the burden of proof. Further, the claimant submitted in respect of other claims that other people were employed because of friendships and relationships with hiring managers and evidence of other Romanian people securing jobs which the claimant applied for. There is nothing even from the peripheral circumstances, workplace environment and general treatment the

claimant raised to form the basis of a finding that decisions were taken because of race. The claimant's claim for direct discrimination has no reasonable prospect of success.

Application under Rule 50

34. Given my findings and decisions above, there are no claims to proceed to a full hearing and therefore it is not necessary to consider the application under Rule 20.

Conclusions

35. The application to amend is refused. The claim remaining after the claimant's withdrawal is struck out because it has no reasonable prospect of success.

Employment Judge C L Taylor

04 March 2024