Case Number: 6002053/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr P Chmielewski

Respondent: The Symphony Group Plc

Heard at: Leeds (by CVP videolink) **On:** 1 October 2024

Before: Employment Judge Deeley

Appearances
For the claimant: represented himself
For the respondent: Mr S Lassey (Counsel)
Interpreter: Ms B Matusik

JUDGMENT

(Preliminary Hearing applications)

1. The complaint of failure to pay a statutory redundancy payment is dismissed on withdrawal by the claimant at the preliminary hearing on 1 October 2024.

2. The complaint of race discrimination was struck out at the preliminary hearing on 1 October 2024, under Rule 27 of the Employment Tribunal Rules of Procedure 2013 (the "**Rules**").

3. The respondent's application for strike out of the claimant's unfair dismissal and disability discrimination complaints under Rule 37 of the Rules is refused.

4. For the avoidance of doubt, the claimant's remaining complaints will proceed.

REASONS

1. The procedural background to this claim is set out in the Preliminary Hearing Record of the hearing on 1 October 2024 (the "**October Hearing**"). The claimant's complaints in his original claim form were identified by Employment Judge Flanagan at the preliminary hearing on 31 July 2024 and set out in the List of Issues contained within the summary of that hearing (the "**July Hearing**").

The claimant has since applied to amend his claim to include complaints of whistleblowing detriment. He has also indicated that he intends to apply to amend his claim to include further complaints of race discrimination. The claimant's applications to amend will be considered at the next preliminary hearing.

2. The complaint of failure to pay a statutory redundancy payment was dismissed on withdrawal by the claimant at the October Hearing, with the respondent's consent.

3. The respondent produced a skeleton argument for the October Hearing and sent a copy to the claimant the day before the hearing. The interpreter kindly translated the respondent's skeleton argument during the October Hearing. I also considered the helpful oral submissions made by both parties during the hearing. I have not reproduced these in full in the interests of brevity.

Rule 27 – jurisdiction application

4. The claimant was dismissed by the respondent on 13 July 2023. He presented an ET1 form on 12 October 2023, having undertaken ACAS early claim conciliation from 13 August to 14 September 2023. The claimant ticked the boxes on the ET1 form for unfair dismissal, disability discrimination and race discrimination. He attached a document setting out the details of his claims, however that document was written in Polish.

5. Legal Officer Woolley accepted the claimant's claim on 16 November 2023 and wrote to the claimant stating:

"Your claim has been accepted. It has been given the above case number, which you should quote in all correspondence.

Legal Officer Woolley has directed me to inform you that the PDF document containing the grounds of your claim is not in a form that can be responded to and that if you want it to form part of your claim you will need to provide an English translation."

6. The claim was served on the respondent on 16 November 2023 and the respondent applied on 29 November 2023 to strike out the claimant's claim on the basis that it could not sensibly be responded to, referring to Rule 12(1)(b) of the Rules.

7. The respondent presented its response and applied to strike out the claimant's claim in its entirety by email dated 29 November 2023, on the basis that the Tribunal should not have accepted the claim under Rule 12 in the first place.

8. The claimant sent a sworn translation of his details of claim to the respondent and the Tribunal on 5 December 2023. The respondent then presented its amended response to the Tribunal on 13 December 2023.

9. Rule 12 states:

Rejection: substantive defects

12.—(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—

(a) one which the Tribunal has no jurisdiction to consider;

(b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;…

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a)[, (b), (c) or (d)](c) of paragraph (1).

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

10. I note that in the case of *Secretary of State for Business, Energy and Industrial Strategy v Parry and anor* 2018 ICR 1807 CA, the Court of Appeal considered the application of Rule 12(1)(b) to a claim for unfair dismissal. In *Parry*, the boxes in the ET1 had been ticked for the relevant complaints but the claimant's solicitor had attached the wrong document setting out details of the claim to the ET1. Lord Justice Bean stated at paragraphs 30-32 that:

"Was the ET1 in this case in a form which could sensibly be responded to?

30 … The school knew perfectly well that, as the ET1 states, she had been employed by them as director of dance from 1 September 1996 onwards. They also knew, although the ET1 did not state this, that her employment in that capacity had been terminated on 31 August 2015 and that she had been re-engaged as head of dance the next day. Their case was that the dismissal was a genuine redundancy. Her case was that it was not. (No separate argument was advanced before us relating to the claim for arrears of wages.)

31 The school could and in my view should have filed an ET3 stating something on these lines: "The claimant was dismissed on 31 August 2015 on the grounds of redundancy, which in the circumstances the respondent acted reasonably in treating as a sufficient reason for dismissal." Either side could then have been directed to give further details of their case. But at least proceedings would have been properly launched. Employment tribunals should do their best not to place artificial barriers in the way of genuine claims.

32 I should add that, in holding that a sensible response could have been given to this claim, I am not laying down a general rule that the respondent to a claim in an employment tribunal must always be treated, for the purposes of rule 12(1)(b), as having detailed knowledge of everything that has occurred between

the parties. If, for example, a claimant brings a claim for sex or race or disability discrimination without giving any particulars at all, or attaching the particulars from someone else's case, that ET1 might well be held to be in a form to which the employer could not sensibly respond and thus properly rejected under rule 12(1)(b). But in many unfair dismissal cases there will be a single determinative issue well known to both parties, so that even if particulars are omitted from the ET1 the employer can sensibly respond, for example: (a) "the claimant was not dismissed; she resigned on [date X]"; or (b) "the claimant was dismissed on [date X] on the grounds of gross misconduct, which in the circumstances the respondent acted reasonably in treating as a sufficient reason for dismissal".

11. The Court of Appeal held in *Sainsbury's Supermarkets Limited v Clark and others* [2023] EWCA Civ386 [235 - 260] that once a claim has been accepted by the Tribunal, the respondent cannot argue that the claim should have been rejected under Rule 12 because the Tribunal was wrong to accept it in the first place (cf paragraph 42). The Court of Appeal stated that the respondent should instead seek to have the case dismissed under Rule 27, or struck out under Rule 37.

12. Rule 27 states:

Dismissal of claim (or part)

27.—(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties—

(a) setting out the Judge's view and the reasons for it; and

(b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.

(2) If no such representations are received, the claim shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).

(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The respondent may, but need not, attend and participate in the hearing.

(4) If any part of the claim is permitted to proceed the Judge shall make a case management order.

13. Rule 37 states:

> **Striking out**
> **37.**—(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;
> (b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
> (c)for non-compliance with any of these Rules or with an order of the Tribunal;
> …
> (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.

14. Caselaw holds that striking out a claim of discrimination is considered a draconian step, which must only to be taken in the clearest of cases (*Anyanwu & Another v South Bank University and South Bank Student Union* [2001] ICR 391). The Court of Appeal in *Mechkarov v Citibank* N.A [2016] ICR 1121 summarised the applicable principles, including:
    14.1 where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing it;
    14.2 a claimant's case must ordinarily be taken at its highest; and
    14.3 if a claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, they may be struck out.

15. However, I also note that in discrimination cases the initial burden of proof is on the claimant to show facts that may lead to a finding of discrimination in the absence of any other explanation. In order for the burden of proof to shift in a case of discrimination, it is not enough for a claimant to show that there is a difference in status and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

16. Mummery LJ stated in *Madarassy v Nomura International plc* [2007] ICR 867:

> *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"*.

17. In addition, unreasonable or unfair behaviour or treatment would not, by itself, be enough to shift the burden of proof (see *Bahl v The Law Society* [2004] IRLR

799). The House of Lords held in *Zafar v Glasgow City Council* [1998] IRLR 36) that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

18. The claimant presented his ET1 form in English, but attached the particulars of his claim in Polish. I have therefore first considered whether or not his claim was in a form which could sensibly be responded to under Rule 12(1)(b) and, therefore, whether they should be struck out under Rule 27.

19. I note that:

    19.1 this claimant's unfair dismissal complaint was in a form which could sensibly be responded to, taking into account the decision in *Parry*. The respondent to this claim knew "perfectly well" that the claimant was complaining that he had been dismissed unfairly on 13 July 2023, following the claimant's absence on long term sick leave since 2 November 2021. The respondent did not need to wait for further details before responding to the claim of unfair dismissal;

    19.2 however, the position is different in respect of the claimant's discrimination complaints. As the Court of Appeal noted in *Parry*, if a claimant brings discrimination complaints without giving any particulars at all, then the ET1 might well be held to be in a form to which the employer could not properly respond and therefore be rejected under Rule 12(1)(b);

    19.3 the guidance provided by the EAT in *Adams v British Telecommunications plc 2017 ICR 382, EAT* states that if a claim needs to be rectified, then it should be treated as rectified for the purposes of Rule 13(4) of the Tribunal Rules when the missing information is presented to the Tribunal. I note that the claimant's translated Particulars of Claim were presented to the Tribunal on 5 December 2023, around three weeks after the time limit for presentation of his claim expired.

20. In relation to the claimant's discrimination complaints, I note that:

    20.1 this is not a case where either no particulars of claim or, as in *Parry,* incorrect particulars of claim were provided. The claimant presented his particulars of claim with his ET1 but they were written in Polish;

    20.2 the respondent's HR administrator, Ms Karolina Lawrence, had acted as an interpreter for the respondent during the claimant's capability meeting (including at his dismissal meeting). The respondent stated that she had left the respondent before they received the claim and, in any event, there was a significant difference between providing translation during meetings and translation of legal documents;

    20.3 the claimant later provided a certified translation of his particulars of claim to the Tribunal on 5 December 2023. The respondent presented their amended grounds of resistance on 13 December 2023;

20.4 the claimant's particulars of claim included factual allegations that formed the basis of his disability discrimination claim, as later clarified by Employment Judge Flanagan at the preliminary hearing in July 2024. These complaints related to the management of the claimant's absence and his dismissal for ill health, having been absent on sick leave since November 2021;

20.5 by way of contrast, the particulars of claim relating to the claimant's race discrimination complaints were somewhat vague. Judge Flanagan stated that there was insufficient time to clarify the claimant's race discrimination complaints at the July Hearing. I noted that the claimant's details of claim referred to potential race discrimination complaints as follows:

20.5.1 at pages 1 and 6 of his details of claim– the claimant referred to a document written in English by his Supervisor (Kamil Zyskowski) in August 2021 which made various allegations about the claimant (Mr Zyskowski is also Polish); and

20.5.2 at page 5 of his details of claim– the claimant describes why is he is unhappy with his dismissal relating to capability and states: *"I believe that the non-acceptance of me in the workplace by the said manager* [Mr Steve Barlow] *is due to my background, as I am not British but Polish."*

20.6 I asked the claimant to explain the basis of his race discrimination claim during the October Hearing. He did not identify any specific complaints and instead stated that:

20.6.1 he was a person of 'particular interest' to high-ranking managers (including Steve Barstow and others), despite being a junior employee;

20.6.2 other junior employees did not have individual meetings with high-ranking managers, as the claimant did in August 2021 with Mr Barstow and HR (following on from allegations raised against him by Mr Zyskowski); and

20.6.3 he was unable to identify any non-Polish junior employees in similar circumstances to himself who had not been invited to meetings with Mr Barstow (or other senior managers) and HR.

Conclusions on disability discrimination complaints

21. I concluded that the claimant's disability discrimination complaints should <u>not</u> be struck out. The key reasons for my decision include:

21.1 Rule 2 sets out the overriding objective, which includes provisions to be taken into account when interpreting the Rules. The Tribunal is required to deal with cases 'fairly and justly', including ensuring the parties are on an equal footing, dealing with cases in a proportionate manner, avoiding unnecessary formality and seeking flexibility;

21.2 Rule 27 does not prohibit me from taking into account events that took place after the claim was accepted. Taking into account the Tribunal's overriding objective, I note that:

21.2.1 if the Tribunal had rejected the claimant's document containing the Polish language version of his details of claim at the time of receipt of his claim on 13 October 2023, the claimant would still have had until 14 November 2023 to present the translated document and potentially be in time to present his disability discrimination complaints (at least in relation to his dismissal);

21.2.2 the claimant presented an official translation of his details of claim on 5 December 2023 (within three weeks of the Tribunal's letter). The respondent provided their amended response around a week after that on 13 December 2023. There was no material delay to these proceedings as a result;

21.2.3 Judge Flanagan was able to identify the claimant's disability discrimination complaints in sufficient detail to set them out in the record of the July Hearing;

21.2.4 the disability discrimination complaints overlap significantly with the claimant's unfair dismissal complaint. This means that the witness evidence and documents required from both parties to consider these complaints will also overlap to a significant degree.

21.3 if the claimant's Polish language details of claim had been referred to a Judge when it was presented, the Judge would have been bound to reject it because it was not written in English and therefore not in a form that could sensibly be responded to. However, the Court of Appeal in *Clarke* makes it clear that the Tribunal is not empowered to 'reconsider' a decision to accept a claim. I have concluded that the Tribunal's jurisdiction is no longer an issue at this point in time because the claimant provided an English language translation of his claim promptly after the respondent raised this issue. If time limits are an issue given the date on which the claimant's translated document was provided, this should be dealt with at the final hearing of the claim;

21.4 the second limb of Rule 27 requires me to consider whether or not the disability discrimination complaints have no reasonable prospect of success. In considering whether or not a complaint has no reasonable prospect of success, I have to take the claimant's case at its highest (by analogy with the caselaw under Rule 37). I have concluded that I cannot say that the claimant's disability discrimination complaints have no reasonable prospects of success because:

21.4.1 the claimant stated that he could produce a list of tasks that he was able to carry out or could carry out with assistance as an alternative to being dismissed. The claimant proceeded to provide the Tribunal with examples of those tasks;

21.4.2 the claimant stated that the respondent could have sent a list of alternative roles or duties to the GP and asked for the GP's opinion on those, but it failed to do so.

22. However, I have made a deposit order in relation to the claimant's unfair dismissal and disability discrimination complaints on the basis that they have little reasonable prospect of success. My reasons for making the deposit orders are set out in the Preliminary Hearing Record.

Conclusions on race discrimination complaints

23. I concluded that:

23.1 the claimant's race discrimination complaints should be struck out because it had no reasonable prospects of success. The key reasons for this include:

23.1.1 the claimant was still unable to identify any specific race discrimination complaints (other than those set out above) nearly a year after he presented his original claim form and despite being told by Judge Flanagan at the July Hearing that he would need to clarify his complaints at the October Hearing;

23.1.2 taking the claimant's case at its highest, the reason why the claimant was invited to a meeting with management and HR in 2021 appears to be because a supervisor, Mr Zyskowski (who is also Polish), raised allegations against him. No action was taken against him as a result of that meeting. In addition, the claimant provided no evidence as to why he did not present a Tribunal claim for race discrimination within three months of that meeting (as extended by any ACAS early claim conciliation period);

23.1.3 the claimant was unable to name any non-Polish individuals who had not been invited to a meeting with management and HR in similar circumstances;

23.1.4 the claimant was absent on sick leave from November 2021 until his dismissal on 13 July 2023. The respondent states that Mr Barstow decided to dismiss the claimant due to ill health. The respondent relies on a GP's report dated 22 March 2023 which stated that the claimant would not return to work for the foreseeable future, due to his medical conditions. Again, taking the claimant's case at its highest, the claimant has not provided any evidence that suggests he has met the initial burden of proof required to suggest that his dismissal was because of his race.

24. The claimant's race discrimination complaints are therefore struck out under Rule 27 on the basis that they have no reasonable prospects of success. If Rule 27 is the incorrect rule to apply in these circumstances, in the alternative I would

have struck out the claimant's race discrimination complaints under Rule 37 for the same reasons.

Rule 37 – strike out application (unfair dismissal and disability discrimination complaints)

25. I concluded that the claimant's disability discrimination complaints should not be struck out for the same reasons that I did not strike them out under the respondent's Rule 27 application.

26. I have also concluded that the claimant's unfair dismissal claim should not be struck out. In considering whether or not a complaint has no reasonable prospect of success, I have to take the claimant's case at its highest. I have concluded I cannot say that the claimant's unfair dismissal complaint has no reasonable prospects of success for the following reasons:

    26.1.1 the claimant stated that he could produce a list of tasks that he was able to carry out or could carry out with assistance as an alternative to being dismissed. The claimant proceeded to provide the Tribunal with examples of those tasks;

    26.1.2 the claimant stated that the respondent could have sent a list of alternative roles or duties to the GP and asked for the GP's opinion on those, but it failed to do so.

27. As noted above, I have made deposit orders in relation to the claimant's unfair dismissal and disability discrimination complaints on the basis that they have little reasonable prospect of success. My reasons for making the deposit orders are set out in the Preliminary Hearing Record.

Employment Judge Deeley

Date: 8 October 2024