JB1

THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms M Mbira **v Leigh Day**

Heard at: London Central **On**: 8 June 2017

Before: Employment Judge D A Pearl

Representation:
Claimant: In Person
Respondent: Mr S Margo, Counsel

JUDGMENT AT PRELIMINARY HEARING

The Judgment of the Tribunal is as follows:

These claims are struck out as having no reasonable prospect of success.

REASONS

1. This is a strike out application made by the Respondent on the basis that the claims have no reasonable prospect of success. The ET1 was presented on 6 April 2017 in respect of employment by the Claimant as a Team Coordinator with the Respondent firm of solicitors from 11 November to 21 November 2016.

2. The claim is brought in respect of her termination and I established during the course of reasonably lengthy discussions with the Claimant that there is no further claim made for the events of early 2017, or at least she has been unable to identify any such claims. She has invited me to see whether I can discern any claims in that part of the chronology and as will be seen it is my

conclusion that the facts that she has pleaded give rise to no arguable claim of any sort post-dismissal.

3. The ET3 sets out the relatively straightforward basis upon which the claim is defended and also on which the application is based. The Claimant is of Kenyan nationality and at the time she applied for and obtained employment with the Respondent, she had a visa that confirmed that she enjoyed indefinite leave to remain in the UK. The real nub of the difficulty in this case is that that visa was only endorsed in a passport that had expired. There was a current passport that she held, but that did no contain the visa. The pleading states that the Respondent missed the fact that the visa was in an expired passport when originally employing the Claimant. In any event, the error came to light on 21 November 2016 and at that point the Respondent looked into the matter and came to the conclusion that the Claimant had to be dismissed.

4. The problem arises because of statutory instrument 2014/1183, the Immigration (Restrictions on Employment etc) Order 2014. Taking matters shortly, there are acceptable documents that have to be produced. Whether the employer was subsequently attempting to rely upon Annex A (a document that would establish a continuous statutory excuse for the employer) or List B (documents where a time limited statutory excuse exists) it was essential for the acceptable document to be "a current passport endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the UK …" or " a current passport endorsed to show that the holder is allowed to stay in the UK …"

5. Failure to comply with the requirements imposed on employers in respect of documentation renders an employer liable to a civil penalty of up to £20,000.00. There are various guidance documents and codes that have been produced and I shall shortly refer to some of the relevant pages.

6. In the document "frequently asked questions about the illegal working civil penalty scheme", there are two questions (page 55 of the bundle). The first is: does an indefinite leave to remain (ILR) stamp have to be in a current Passport? The second is: why does an ILR stamp have to be in a current Passport? The answers that are given are that the ILR stamp must be in a current Passport where checks are being made after 16 May 2014; and that since May 2014 endorsements including those for ILR have to be in documents that have not expired. The answer to question 17 goes on to give the rationale for this.

7. There are also documents that explain the statutory excuse scheme and I was briefly referred to these. I also ought to note that from 12 July 2016 under Section 21 of the 2006 Act, as amended, an employer commits an offence if he employs an illegal worker and knows or has reasonable cause to believe that the person has no right to do the work in question. I am left in doubt as to whether continuing to employ anybody whose ILR stamp was in an expired passport would be committing a criminal offence. However, I am

certain that they would be rendering themselves liable to a civil penalty of up to £20,000.00.

8. There is an employer's guide to right to work checks that was published in July 2016 and at page 104 of my papers I can see the steps that employers are told they must undertake. In this document there is also reference to Home Office verification checks and this is relevant because there are circumstances in which the Home Office can be requested to give a positive verification notice. The consequence of such a notice is that it will establish a statutory excuse. The Claimant has suggested to me at various points that this could be relevant to her circumstances. What I note in particular at page 109 is that three circumstances are set out where an employer must contact the Home Office if he wishes to establish (or retain) a statutory excuse. The first two of these do not apply to the circumstances here but the third probably does. This states:-

   "You are satisfied that you have not been provided with any acceptable documents because the person has an outstanding application with the Home Office which was made before their previous permission expired or has an appeal or administrative review pending …"

9. The first part of this is met because the Claimant did not provide any acceptable documents, but it was not because there was an outstanding application at that time.

10. I ought to mention in passing that the Claimant handed up a further guide "to acceptable right to work documents" of May 2015 and that this is consistent with what I have recited above. For example, in relation to right of abode certificates, this is only demonstrated while the passport is current, which is defined as not having time expired.

11. Email correspondence is also very helpful. The Respondent wrote to the Claimant on 22 November 2016 and at that point suggested that a loan might be made available so that the Claimant could apply for her biometric residence card. Subsequently it was discovered that such a loan could not be made to her. In any event, the Respondent's stance can be seen from the further email to her dated 25 November 2016, which includes the following:-

    "I can confirm that we are able to hold the post open for you until we recommence work after the Christmas break on 3 January 2017 in order to allow you time to do this."

12. This was an application that the Claimant could make to obtain the relevant documents and it seems agreed between the parties that application for a biometric residence card was one way that she would be able to do this.

13. The Claimant forwarded to the Respondent on 21 December 2016 an email from the Home Office which is also helpful. It explained (page 38) that Home Office letters and endorsements in an expired passport "no longer establish a right to work." It goes on to say that those holding such documents are

required to apply for the biometric residence permit and this would assist them in demonstrating their entitlement to work. It is not necessary to wait for the outcome of such an application before establishing the right to work. On page 39 it is stated, with tolerable clarity, that once an application has been made, the employer or prospective employer can contact the Home Office checking service to verify that an immigration application has been made and that the employee has the right to work "and therefore employment can commence." Employers are advised to wait 14 days after the employee has made the application to the Home Office before taking this step. The key point here, for this application, is that the application has to be made before such a confirmation can be sought or given. It is common ground that probably for reasons relating to means, the Claimant was unable to make the application until 5 January 2017. It will be remembered that this was two days after the time when the post would be held open.

14. What happened after this date is material, because on 8 February 2017 it is clear that the Respondent internally decided to revise the advertisement for the Team Leader position and change it to one for a paralegal. The next day the Respondent wrote to the Claimant and notified her that it had now been decided that administrative support was not required, that secretarial/paralegal support was and that the job description had been amended. This position would now be advertised and if the Claimant remained interested she should send her application in once the advert had been released. It seems that the Claimant did not want to make an application for this post.

15. The questions therefore that arise are:-

    (a) What are the Claimant's claims; and
    (b) Is the Respondent correct to contend that they have no reasonable prospects of success.

16. During the course of the hearing, the Claimant confirmed that her claim in respect of her dismissal on 21 November 2016, were of direct race discrimination or alternatively indirect race discrimination. As it has transpired she does not positively assert any claim for the early part of 2017 and I have been unable to find any potential claim that arises on these facts. I therefore am only concerned with the alleged act of discrimination being dismissal.

17. The direct discrimination claim is in my view patently one that must fail. The Respondent has demonstrated by the production of the relevant documents and also Home Office materials that it only terminated the Claimant's employment because the endorsement was in an out of date passport; and because of relatively recent changes in the law, employers were obliged to check that the endorsement was in a current passport.

18. Therefore, any suggestion that the Claimant was dismissed because of her race or ethnic origin or colour has no prospects of any sort of succeeding in a claim for direct discrimination. Indeed since the Respondent had chosen to employ the Claimant, such a claim can be seen to be one that is wholly at

odds with the established facts. There is no suggestion from the Claimant that if she had been of a different ethnicity, the Respondent would have done anything else. Moreover, there is, as I have briefly set out above, nothing else that the Respondent could have done that was consistent with or provided for in any of the guidance that was available to it. At one point during the argument, the Claimant suggested that they could have carried out a verification process. For the reasons I have given even that does not appear to have been possible at the point of dismissal.

19. It is therefore my conclusion that the direct discrimination claim is bound to fail and it has to be struck out.

20. The alternative claim of indirect discrimination engages section 19 of the Equality Act 2010 and for the purpose of this application, Mr Margo does not challenge the proposition that applying the PCP to the Claimant (namely that her stamp had to be in her current Passport) either put or would put persons of her nationality at a particular disadvantage when compared with persons who do not share it. Clearly there were certain nationalities who would have been in exactly the same position but the Claimant is entitled to compare herself with a UK National upon whom such obligations do not rest. That is not the basis upon which Mr Margo asserts the application to strike out the claim.

21. Section 19, provides that even where such comparative disadvantage can be shown, there is a defence if the employer can show that it is a proportionate means of achieving a legitimate aim. His point, very straightforwardly, is that such a defence must succeed in this case and could not be open to challenge. As Mr Margo puts it, if the Respondent applied a PCP that it would only employee people who have a right to work in the UK, it is objectively justified because the employer would be acting unlawfully were the PCP not applied. In my judgment, this argument is irresistible. The position here is that the legitimate aim has been prescribed by Parliament and it is the aim of achieving efficient immigration control. This case is not a challenge in the High Court to the statutory instrument and in any event the Claimant has not made that sort of argument here. It must be the case that it is proportionate for an employer to comply with the requirements laid down by the State concerning the checking of documents in the interests of immigration control.

22. Where I have some considerable sympathy for the Claimant, is that she states, correctly, that her immigration status permitted her to work. However, as I have explained to her, it does not mean that she was free to be employed if there were ancillary and further obligations placed upon both employers and employees which could not be met. Here, the obligation on the employer, reinforced by legal sanction, was that it had to check for documents. The obligation on the employee was to produce her endorsed passport in a current document and not in one that had expired. Because the Claimant unfortunately was unable to meet the legal requirements placed upon the parties, it follows that her termination of employment was not only necessary if the employer was to avoid the possibility of a civil penalty, but a

proportionate means of achieving the legitimate aim which the Respondent here was seeking to meet. However the case is argued in terms of indirect discrimination, it would in my judgment be verging on the irrational to conclude that the Respondent was at any risk of a finding of indirect discrimination, therefore, this claim is one that is bound to fail.

23. I have not, in coming to these conclusions, set out the case law concerning the striking out of claims. This is because the well known guidance, that discrimination cases should rarely be struck out because they are fact sensitive, does not have any realistic application here. It seems to me that this is not a fact sensitive case and that the essential facts are agreed. Therefore Mr Margo is correct to point to a short citation from *Community Law Clinic v Methuen [2012] EWCA Civ 571*, where Moses LJ said that as a matter of principle Claimants should not be allowed to pursue hopeless cases "merely because there are many discrimination cases which are sensitive to the facts …" He may there have been referring to a case where there was factual dispute, but in this particular instance such a scenario does not arise. Unfortunately, although the Claimant has found herself in a very difficult position, for which one is bound to express sympathy, her sense of frustration or annoyance can find no remedy in the Employment Tribunal and the reason is that there is no claim she can assert in discrimination law which has any prospect of succeeding. Accordingly I am obliged to strike out these claims.

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Employment Judge Pearl
19 June 2017