EMPLOYMENT TRIBUNALS

Claimant: **Ms Folasade Odupelu**

Respondent: **(1) The Salvation Army Trustee Company.**
(2) Commissioner Clive Adams
(3) Colonel David Hinton
(4) Lieutenant-Colonel Paul Main

Heard at: **London South** **On:** **12 September 2017**

Before: **Employment Judge Cheetham**

Representation
Claimant: Ms C Darwin
Respondent: Mr D Stilitz QC

JUDGMENT

1. The Claimant will pay a deposit, as the Tribunal considers that Allegations 1, 2 and 3 as set out at paragraph 4 of the Reasons below (the allegations of direct sex and race brought against the First and Second Respondent in respect of the HR Director role) have little reasonable prospect of success.

2. The deposit will be in the sum of £200 for each of the allegations of direct sex and direct race discrimination in each of Allegations 1, 2 and 3 brought against the First and the Second Respondent, giving a total deposit to be paid of £2,400.

3. Payment is to be made within 28 days of the date on which this Judgment is sent to the parties, in default of which Allegations 1, 2 and 3 or such parts of those Allegations in respect of which deposits are not paid will be struck out.

4. The application that the claims should be struck out and the application for a deposit order in respect of Allegations 4 and 5 are dismissed.

REASONS

1. At a Preliminary Hearing held on 13 July 2017, EJ Elliot listed this hearing to determine whether the claims against the Second, Third and Fourth Respondents should be struck out and/or made subject to deposit orders.

2. Following that Hearing, the Claimant served Further and Better Particulars of her Claim and the Respondents filed an Amended Response. They also (by letter of 7 September 2017) set out the extended basis upon which they sought to strike out the claims, alternatively seek deposit orders.

3. The Claimant, who is a woman and of black African ethnic origins, remains employed by the First Respondent. The Fourth Respondent was, at the relevant time, the Claimant's line manager. He reported to the Third Respondent, who in turn reported to the Second Respondent. In these proceedings, the Claimant has raised complaints of direct race and/or sex discrimination pursuant to the Equality Act 2010 s.13.

4. The Respondents' application related to each of the Claimant's 5 allegations, which can be summarised as follows (and in this judgment will be referred to as "Allegation 1" etc.):

	Allegation	Respondents	Cause of action
1.	The failure to redeploy the Claimant automatically as HR Director.	First and Second	Sex and race discrimination
2.	The requirement that the Claimant should apply for the HR Director role.	First and Second	Sex and race discrimination
3.	The requirement that the Claimant participate in a competitive interview process with external candidates.	First and Second	Sex and race discrimination
4.	The decision to assimilate the Claimant to the role of Deputy HR Director/Head of Delivery on/before 12 January 2017.	First, Second, Third and Fourth	Sex and race discrimination
5.	Carrying out a flawed assimilation exercise.	First, Second, Third and Fourth	Sex and race discrimination

5. Collectively, Allegations 1, 2 and 3 can be called "the HR Director Allegations" and Allegations 4 and 5 "the Assimilation Allegations".

6. The 4 grounds of the application to strike out, alternatively seek deposit orders. were as follows (and in this judgment will be referred to as "Ground 1" etc.):

(1) In respect of Allegations 4 and 5, none of the Second, Third or Fourth Respondents had any involvement at all in the decision as to assimilation. The assimilation exercise was undertaken by the HR Fit for Mission Team, which the Claimant herself exercised. The application was made in respect of the claims against the Second, Third and Fourth Respondents.

(2) In respect of Allegations 4 and 5, the decision to assimilate the Claimant to the role of Deputy HR Director (Head of Delivery) was entirely beneficial to her, in no way prejudicial to her and therefore incapable of amounting to a detriment and/or less favourable treatment. The application was made in respect of the claims against all 4 Respondents.

(3) In relation to each of Allegations 1, 2 and 3, a woman was ultimately appointed to the position of HR Director (from a shortlist of 6, 4 of whom women and 3 of whom were black). The application was made in respect of the claims against the First and Second Respondent.

(4) All of the claims are substantially out of time. The First Respondent's policy required the role to be recruited externally. Therefore the decision to advertise the HR Director role externally was taken by June 2015, as the Claimant was aware, and communicated to her the same month. The decision to assimilate the Claimant to the role of Deputy HR Director (Head of Delivery) was communicated to the Claimant by 14 December 2015. The application was made in respect of all 4 Respondents.

7. The Tribunal did not hear any evidence. There was an agreed bundle of documents running to 238 pages. Both counsel provided detailed written submissions, supported by authorities, and made full oral submissions.

The Law

8. The Tribunal's power to strike out a statement of case is contained in Rule 37 of the Rules of Procedure 2013:

(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;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

9. The proper approach to be taken to striking out claims was summarised by Mitting J. in ***Mechkarov v Citibank NA [2016] ICR 1121***, in which – after

reviewing the authorities - he said:

"…the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

10. Under Rule 39, the Tribunal has power to make deposit orders:

(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.

11. This power has been recently considered by Simler P in the Employment Appeal Tribunal, in ***Hemdan v Ishmail and another [2017] ICR 486***:

12. … The test, therefore, is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis.

13 The assessment of the likelihood of a party being able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success, a mini-trial of the facts is to be avoided, just as it is to be avoided on a strikeout application, because it defeats the object of the exercise. Where, for example as in this case, the preliminary hearing to consider whether deposit orders should be made was listed for three days, we question how consistent that is with the overriding objective. If there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested.

12. Under the Equality Act 2010 s.123:

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

The parties' submissions

13. In summary, the parties' respective submissions were as follows. Mr Stilitz drew attention to a letter to the Claimant dated 23 June 2015, which referred to a meeting to discuss the Claimant's future employment. It referred to her appointment as Interim HR Director for one year, which would be reviewed at that time. He also referred to the Recruitment and Selection Policy (with which the Claimant will have been very familiar), which required vacancies at that level to be advertised both internally and externally. On 14 December 2015, the Claimant was advised by email of her assimilation into the role of Deputy HR Director/Head of HR Delivery, with her appointment "*with effect from 1st July 2016*".

14. Further, there was a footnote to paragraph 16 of the Further and Better Particulars which read, "*C first became aware of the date of this decision [i.e. to recruit externally] on 25th July 2016 but the final decision was not made until 25th November following challenges from the Claimant*".

15. These various documents showed that the decisions to advertise for HR Director externally and to assimilate the Claimant into the Deputy HR Director post were taken well before the expiry of the limitation period for bringing a claim; the Claimant issued proceedings on 2 May 2017.

16. As to the HR Director Allegations, the Claimant was invited to apply, was interviewed, but was not shortlisted. She makes no complaint about that, which Mr Stilitz described as a strange feature of the case, as it is implicit that she was not even one of the top 6 candidates. Moreover, of the 6 short-listed candidates, 4 were women and 3 were black. The successful candidate was a woman. That, it was submitted, made for a poor start to a claim for direct sex and race discrimination in respect of the HR Director Allegations. Further, it is implausible that an employer that appointed a woman to that role would have treated the Claimant less favourably because of sex in the decision-making process that led to that appointment.

17. Mr Stilitz spent some time considering each of the allegations and identifying exactly what was pleaded against each. The HR Director Allegations are against the First and Second Respondents only (and Ms Darwin confirmed that was correct). While the Assimilation Allegations are against all 4 Respondents, they are – he submitted – vague and repetitious. There was no positive case advanced.

18. Mr Stilitz referred to the EAT's decision in ***ABN Amro Management Services ltd v Hogben UKEAT/0266/09***, in which Underhill P (as he then was) listed the relevant authorities in respect of striking out and, referring to ***Anyanwu v South Bank Students Union [2001] ICR 391***, said (at paragraph 7):

"… it is fair to note that the force of those observations [about the caution to be observed in exercising the power to strike out] will inevitably vary depending on the nature of the particular issues; and Lord Hope in the same case made clear that in an appropriate case a claim for discrimination can and should still be struck out if the tribunal can be satisfied that it has no reasonable prospect of success".

19. Further, on the facts of that case, Underhill P referred to it being "*prima facie implausible to the point of absurdity*" that those facts could have given rise to a case of discrimination (see paragraphs 11 and 35). Mr Stilitz said that the Claimant's case in respect of the HR Director was similarly implausible. This was also relevant to his submission in respect of the Assimilation Allegations, where the decision to assimilate was in fact beneficial to the Claimant, rather than detrimental.

20. He also referred to ***Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14***, in which HHJ Eady QC comprehensively reviewed the proper approach that an employment tribunal should take both to striking out and also deposit orders (and see paragraphs 23-24 and 30-34 in particular). That case on its facts (at paragraphs 60 and 61) also considered the position where a person with the same relevant protected characteristic as the claimant had been appointed to the position sought by the claimant. The employment judge had referred to this as "*evidentially relevant*" and HHJ Eady QC said that it was hard to see why it would not be.

21. Mr Stilitz argued that striking out was appropriate in this case, but also advanced making deposit orders in the alternative.

22. In her written submissions, as well as her oral submissions, Ms Darwin emphasised the need to determine the applications solely by reference to the pleadings and submitted that it would not be appropriate for the Tribunal to consider contemporaneous documents at all.

23. She submitted that her central objection was that there were core disputes of fact. With regard to the Assimilation Allegations, this was an ongoing exercise and there is a dispute on the facts whether or not the Claimant was ever told in 2015. In any event, she was only told of the final decision in January 2017. Similarly, with regard to the HR Director Allegations, this appointment was still being discussed in December 2016.

24. This distinction between final decisions and earlier indications was important to the Claimant's case and Ms Darwin went through each of the Allegations accordingly. Thus, with regard to Allegation 1, it was the whole process (i.e. 2015-2017) that ended in 2017. Similarly for Allegation 3, the last act was in January 2017 and so on. The Claimant would argue in due course that the discrimination was "a continuing act".

25. Ms Darwin referred to passages from ***Mechkarov***, ***Hemdan*** and also ***Wright***, where she drew attention (amongst other paragraphs) to paragraph 34:

When determining whether to make a deposit order an Employment Tribunal is given a broad discretion. It is not restricted to considering purely legal questions. It is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case. Given that it is an exercise of judicial discretion, an appeal against such an order will need to demonstrate that the order made was one which no reasonable Employment Judge could make or that it failed to take into account relevant matters or took into account irrelevant matters.

26. On the question of the relevance to the sex discrimination claim of a woman being appointed to the HR Director role. Ms Darwin said this was not relevant. It would be for the Respondents to show that the decision to recruit externally had nothing to do with race or sex; the Claimant should have been slotted into the role and she compares herself with others (all white men) who were promoted internally.

27. Ms Darwin then gave the Tribunal information about the Claimant's means, which I have set out in an annex to this Judgment, which should not be placed in the public record. That is because that part of this hearing was conducted in private, pursuant to Rule 56.

28. In reply, Mr Stilitz addressed the issue of whether or not there were significant disputes of fact. He made the point, by reference to the documents, that the decision to advertise externally for the HR Director must have been taken at the same time as the decision not to deploy the Claimant into that role and, on any view, that made the claim out of time.

29. He reiterated his arguments regarding the appointment of the HR Director being a woman and also further considered the time point.

Conclusions

30. As a preliminary point, it is - of course - open to a claimant to bring complaints against individual respondents. The Amended Response took issue with the Claimant for doing so in circumstances where the First Respondent – the employer – did not seek to rely upon the statutory defence contained in the Equality Act 2010 s.109(4). It said that, in those circumstances, the claims against the individual Respondents were being pursued unreasonably, solely to create a nuisance.

31. That was not the basis upon which the application was made at this hearing, as set out above. It remains the Claimant's choice whether to continue with her claims against individuals. Given that she remains in employment and that all parties will be very keen to see the working relationship repaired, no doubt that is something she and her legal representatives will keep under review.

32. Turning first to the application to strike out, the first point is that – as ***Mechkarov*** makes clear – it is only "*in the clearest case*" that a discrimination claim should be struck out. Ms Darwin restricts the tribunal too far by submitting that the application must be determined solely on the pleadings and not by reference to any contemporaneous documents, but at the same time it is only complete inconsistency between a claimant's case and "*undisputed"* contemporaneous documents that will be relevant.

In this case, I have been taken to several emails and letters, which seem to be clear on their face, although I am bound to accept that there may be a context that will only become clear when evidence is heard.

33. Ms Darwin placed great weight on the material disputes of fact over what the Claimant was or was not told at various times and what had or had not been decided. It may be that the important question for the Tribunal at the final hearing – or at least one of the most important - would be whether or not a decision was actually made in 2015 to advertise externally for an HR Director and to assimilate the Claimant into the Deputy HR Director role. There is certainly documentary evidence that suggests that is the case, but on balance – and echoing ***Mechkarov*** – it is a core issue of fact that may turn on oral evidence, as Ms Darwin submits. On that basis, I cannot conclude at this stage that the claims have not been brought in time and that, as a result, they have no reasonable prospect of success.

34. More broadly, if I accept Ms Darwin's submission - as I think I must - that there are disputes of fact and that the contemporaneous documents cannot be described as "undisputed", it is very difficult to conclude that it would be just to strike out these discrimination claims.

35. Taking each of the 4 grounds for striking out the claim:

    (1) Ground 1: it seems to me that there may arguably be a dispute of fact over when the decision was made and therefore who was involved in the process. That is not necessarily apparent from the documents I was taken to, but I accept the submission that the Tribunal should hear evidence on these issues. I cannot say there is no reasonable prospect of success.

    (2) Ground 2: although there seems considerable force in the submission that, in respect of Allegations 4 and 5, the decision to assimilate the Claimant to the role of Deputy HR Director was likely to be beneficial to her, I do not think I can conclude at this stage that it was incapable of amounting to a detriment and/or less favourable treatment, as there may be evidence that suggests that to be the case. I cannot say there is no reasonable prospect of success.

    (3) Ground 3: the fact that a woman was ultimately appointed to the position of HR Director seems highly relevant, as does the composition of the short-list and the Claimant's failure to be placed on it, but I accept Ms Darwin's argument that there may be evidence that might show that to be less relevant. I cannot say there is no reasonable prospect of success.

    (4) Ground 4: as to the time points, if I accept that it is at least arguable that there may be evidence to show that the actionable decisions were not taken "out of time", then it would be wrong to strike out the claims as showing no reasonable prospect of success on that basis.

36. However, although I do not conclude that the application meets the requirements for striking out the claim, I do consider that there are significant weaknesses in the claim, which are relevant to its prospects of success and which I would identify as follows:

(i) Regarding the HR Director Allegations, it is hard to see how it is not evidentially significant that the successful candidate for HR Director was a woman. Ms Darwin is correct in saying that I should be concerned with the Claimant's treatment, but the fact that the First Respondent appointed a woman (and out of a shortlist of 6 that included 4 women) to a post that the Claimant says was denied her because of her gender seems highly relevant.

(ii) Equally, the fact that 3 out of 6 of the candidates on the short-list were black seems to me evidentially significant. Whatever reason the First Respondent may have had for not short-listing the Claimant, it is very difficult at this stage to see how her race had anything to with it.

(iii) It is also difficult to see how – as the Claimant contends – it is irrelevant that she was not short-listed, given that she makes no complaint about that. If she was not even in the top 6 for that post, then it becomes harder to see that the reason for her treatment in not being slotted in automatically was discriminatory on the ground of sex or race, as opposed to simply (arguably) unfair.

(iv) In the circumstances, at this stage, I struggle to see how the Claimant will establish the facts essential to this part of her case, which is that she should have been automatically redeployed into that role, should not have had to apply for it and that it should not have been advertised externally.

(v) As to the Assimilation Allegations, at this stage is not at all clear exactly why that should be seen by the Tribunal as detrimental. However, I accept that that is an issue where the Tribunal will need to hear evidence.

(vi) As stated above, there is arguably a dispute of fact over whether or not decisions were made sufficiently early to make the claims out of time. However, those documents to which I was taken, none of which appeared to me to require much further explanation or context, certainly point towards the decisions being taken in 2015 or perhaps in in 2016.

37. It follows that, whilst I am persuaded by Ms Darwin that the claims should not be struck out as having no reasonable prospects of success, I have concluded that the Respondents have stronger arguments in respect of their application for deposit orders.

38. Specifically, I conclude that the claims for sex and race discrimination in respect of the HR Director Allegations (and therefore against the First and Second Respondents) have little reasonable prospect of success for the reasons set out above. The undisputed fact that the successful appointee was a woman and the composition of the shortlist (which the Claimant did not make) seems highly relevant evidentially and I do not easily see how the Claimant will establish the facts necessary for those Allegations to succeed. That is Ground 3 of the application.

39. I have looked carefully at each of those Allegations in deciding whether the deposit order should cover all 3. It is difficult to separate them, in that the "failure" automatically to appoint the Claimant to that role necessarily led to her having to apply, which application process resulted in an external appointment. The Allegations are different stages of the same process and therefore it seems to me that Mr Stilitz is correct in suggesting that they should be grouped together and that the deposit order should apply to all 3.

40. On balance, I have concluded that I should not make an unless order in respect of each of the other 3 grounds advanced by the Respondents. As stated above, I am bound to accept Ms Darwin's central objection that there are factual disputes that need to be resolved and, in my view, that militates against making a more extensive deposit order.

41. I therefore make a deposit order in respect of the HR Director Allegations of sex discrimination (Allegations 1, 2 and 3) brought against the First and Second Respondents.

42. For the reasons set out in the annex to this Judgment ("Annex A"), I make that Order in the sum of £200 per allegation (i.e. Allegations 1, 2 and 3, each including separate claims for sex and race discrimination against each of the First and Second Respondent), making the total sum payable by way of deposit £2,400 (12 x £200).

43. As I understand it, there is no need for me to make further case management orders and I do not think this Judgment affects the timetable and time allocated. However, the parties can write to the Tribunal seeking further or varied directions, if that is appropriate.

_____

Employment Judge Cheetham

Date 12 October 2017