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# EMPLOYMENT TRIBUNALS

(RESERVED)

**Claimant:** Ms Bennett

**Respondent:** Birmingham City Council

**Heard at:** Birmingham      **On:** 7 June 2018

**Before:** Employment Judge Hindmarch

**Representation**

**Claimant:** In person

**Respondent:** Mr Wallace, Counsel

## JUDGMENT

The complaint of direct race discrimination is struck out on the basis it has no reasonable prospect of success.

## REASONS

1 This case came before me on 7 June for an Open Preliminary Hearing to determine the respondent's principal application that the claimant's Claim should be struck out. There had been a previous Open Preliminary Hearing before Employment Judge Self on 11 May 2018, where Employment Judge Self had dismissed the claimant's complaints of unfair dismissal, age and disability discrimination but had allowed the race discrimination Claim to remain, subject to the claimant particularizing her various complaints by 31 May 2017. The claimant did so in a document dated 30 May 2017, setting out 14 separate allegations.

2 The respondent contended some of the allegations would require the claimant making an application to amend the ET1, as they did not appear in the ET1 and/or that there were complaints about family court proceedings and therefore matters about which the tribunal had no jurisdiction. The respondent's principal submission however was a strike out application and/or for the making of a deposit order.

3 The Claims were issued on 18 October 2017, following the claimant's dismissal by the respondent for gross misconduct following the claimant's arrest on immigration offences and discovery by the police of confidential information on her personal computer concerning service users with which the claimant came

into contact in her role with the respondent as a social worker/special practitioner AMPH. It appears the immigration matters concerned the Claimant's adoption of a child in Bangladesh, such adaptation possibly not being legal in the UK.

4 The respondent was represented by Counsel Mr Wallace. The claimant appeared in person but was supported by Mr Graves, a former colleague.

5 The claimant had prepared her own bundle which she said had been delivered to and signed for by the respondent.

6 The respondent's Counsel however, did not have a copy of the claimant's bundle with him. The respondent had prepared a separate paginated bundle. The claimant's further and better particulars in which she documented 14 separate allegations, and with which we were primarily concerned were at pages 260 to 272 of the respondent's bundle. The respondent's Counsel assured me that all of the documents in the claimant's bundle were in the respondent's bundle, however, during the course of the claimant's submissions this transpired not to be the case, and where appropriate I either read out the document to the respondent's Counsel or allowed him to have sight of it. The respondent also handed up an agenda and case law.

7 At the outset of the Hearing, I explained to the claimant the application that was being made by the respondent. The claimant told me she thought the Hearing was simply to give directions for the substantive Hearing and asserted that she did not have legal representation, a matter that she had previously asserted before Employment Judge Self. I established that the claimant had attended the previous Open Preliminary Hearing before Employment Judge Self and that she had received the Order of Employment Judge Self following that Hearing and therefore that it was clear that today was not simply a direction's Hearing but rather to deal with the respondent's various applications.

8 I afforded the claimant 45 minutes after the respondent's submissions to consider and prepare her own submissions with the assistance of her supporting person Mr Graves.

9 The respondent's primary application before me today was that the complaint of direct race discrimination should be struck out under Rule 37(1) (a) on the basis it has no reasonable prospect of success. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 Rule 37 provides as follows:

*"(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 prospects of success".*

10 At the outset of my deliberations I reminded myself that when considering an application for strike out I should take the claimant's case at its highest and that there is public interest in cases of discrimination going to a full merits Hearing. I therefore took each of the claimant's 14 allegations from her own further and better particulars document dated 30 May 2018.

11 Taking each complaint at its highest, I had to decide whether it had no reasonable prospect of success. I accept where there are facts in dispute having regard to the court of appeal in Ezsias v North Glamorgan NHS Trust [2007] EWCA, CIV 330 that is only very exceptionally that I should strike out without evidence being heard. I was pleased to note however, in this application there was little dispute on the facts as pleaded by the claimant.

12 The respondent's Counsel referred me to paragraphs 19 and 20 of the EAT judgment in Chandhok & another v Tirkey [2015] IRLR 195. That case references Anyanwu v Southbank Students' Union & Southbank University [2001] IRL 305. That is clear authority that I should not strike out unless in the most plain and obvious case. Chandhok also references Madarassy v Nomura International Plc [2007] IRLR LR 246 and Anyanwu and provides these cases "*stop short of a blanket ban on strike-out applications succeeding in discrimination claims. There may still be occasions where a Claim can properly be struck-out where, for instance, on the case as pleaded there is really no more than an assertion of a difference of treatment and a difference of protected characteristic*". Chandok then quoted Mummery LJ in Madarassy a case which "*only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of possibilities, the respondent had committed an unlawful act of discrimination*".

13 In short, a claimant cannot simply assert I have a protected characteristic, therefore, I must have suffered discrimination. There must be something more.

14 In her submissions the claimant sought to detract from her ET1 and refer me to other documentation and allegations. Mr Wallace then referred me to paragraph 17 and 18 of Chandhok which state:

*"If a 'claim' or 'case' is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was 'their case' and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus,..... a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective."*

15 I turn now to each of the claimant's 14 allegations, the submissions made in relation to each and my findings.

16 Item 1

16.1 The claimant's first assertion was that the respondent instructed her line managers not to give her any references referring to her work experience/performance. The claimant referred me to a reference given by the respondent's HR team post dismissal (page B36 of the claimant's bundle) which stated: "We can confirm that Mrs Bennett worked for Birmingham City Council from 5 July 2004 to 8 June 2007."

Mrs Bennett was dismissed from her position of Specialist Practitioner AMPH for reasons of gross misconduct.

We have reported Mrs Bennett's dismissal to her regulatory body, the Health Care Professional's Council. Following Mrs Bennett's dismissal a referral to the Disclosure and Barring Services is being prepared.

16.2 The Claimant also referred me to an e mail from an unknown person (the name had been blocked out) but which she said was from her manager and dated 19 July 2017, again after dismissal, which was at page B38 of the claimant's bundle and said:

"Dear Rekha

I am really sorry but I am unable to provide you with a reference. I have been instructed to inform you, you should contact HR, Mark Owen".

16.3 The claimant asserted that the only possible explanation for both her manager directing her to HR for any reference, and for the type of reference that she referred me to, was that she was Bangladeshi. She asserted no other staff member had been treated the way that she was.

16.4 In the respondent's submission given the claimant had been dismissed for gross misconduct there was a perfectly good explanation for the respondent directing the references to be given by HR and for HR giving references in the format that they did. The claimant's assertion that this was race discrimination was a bare assertion. The something other required by Madarassy was missing.

16.5 Taking the claimant's complaint as it highest, namely that the Respondent sent a reference in the terms set out above and directed that reference requests be dealt with by HR, it can have no reasonable prospect of success as a complaint of direct race discrimination. I am satisfied that on the facts the respondent acted entirely appropriately and race cannot have played any part in its actions.

## Item 2

17.1 The claimant asserted that after dismissal Loretta Crow, an employee of the respondent, made unproven and false allegations to HCPC (the Healthcare and Care Professions Council). The claimant told me the allegations made were false and unproven and she lost her permission to work as a social worker as a result of them. She said that the reason the referral was made to HCPC was because she was Bangladeshi.

17.2 The respondent pointed out that this allegation was not in the ET1 and the claimant accepted this as the referral of the HCPC was made after the issue of the Claim. The respondent stated that it was incumbent on the Council where gross misconduct was made out to refer matters to the Regulator. There was nothing to tie this referral to the claimant's race or ethnicity.

17.3 Taking the claimants case at its highest namely that the Respondent made a referral to HCPC, a matter that is not in dispute, it can have no reasonable prospect of success as a complaint of direct race discrimination. The respondent was obliged to make the referral and would have done so irrespective of race.

### Item 3

18.1 The claimant asserted that Loretta Crow had said to her

“You work for Birmingham City Council, but did not follow British law for adopting the child in Bangladesh. Do they have any adoption law in Bangladesh?”

18.2 Again the respondent submitted this allegation was not within the ET1 and the claimant accepted this. The claimant said that she did in the ET1 make a broad assertion of her dismissal being racially motivated and that she had said in box 8.2 of the ET1, “these are not all the grounds; there will be more”. The claimant told me that she had adopted a Bangladeshi child under Bangladeshi law. She then came to the UK and followed British law. However, the respondent had refused to listen to her account; she felt that the respondent had unfairly criticized her because she was Bangladeshi.

18.3 In the respondent’s submissions the claimant’s case its highest was the statement from Miss Crow and the question being asked by her during the disciplinary process. The Madarassy something other is lacking.

18.4 Taking the claimants case at its highest and accepting Ms Crow made the comment attributed to her it can have no reasonable prospect of success. On the facts the respondent would have asked the question to any employee irrespective of race.

### Item 4

19.1 The claimant alleged that her unfair dismissal without notice was an act of race discrimination. At this point the claimant began to refer me to documents within her bundle including page B48, a letter from the Assistant High Commissioner in Bangladesh and B49. Again a document from Bangladesh confirming the adoption in that country. She also referred me to a document from the Home Office confirming the adoption was legal in Bangladesh but confirmed the latter document had not been put to the respondent during the disciplinary process as she did not receive it until after that date.

19.2 The claimant began to address me on the adoption process arguing that the respondent had said that she had no respect for British law. She believed that she was dismissed because she was Bangladeshi. I asked the claimant whether she was saying that a hypothetical comparator of non-Bangladeshi origin would not have been dismissed. The claimant insisted this was the case. I asked her whether this also would be the case with the allegation in relation to holding confidential information for

service users on her personal computer and the claimant said she believed it would be because her computer information was held safely and securely.

19.3 The respondent reminded me that I was not hearing an unfair dismissal case. That case had already been dismissed by Employment Judge Self. The claimant was in a position of trust with the respondent and she was being investigated for illegally taking a child from Bangladesh.

19.4 Taking the Claim as its highest, the claimant accepted that she was dismissed for the reasons given, that she was arrested and put on bail, that her passport was removed and that she was not allowed out of the country. She also accepts that service users private information was found on her personal computer during the Police investigation.

19.5 The respondent said that on the claimant's own pleaded case there was a serious allegation of breach of immigration law.

19.6 Taking the claimants case at its highest she was indeed dismissed for the reasons given. This was nothing to do with her race of itself, and I find a non Bangladeshi employee would have been dismissed. This claim has no reasonable prospect of success.

#### Item 5

20.1 The claimant's fifth allegation was that the investigating officers were laughing whilst the decision to dismiss was being read out to her. She felt that they were laughing at her because she was Bangladeshi and had no respect for her. She submitted that if anyone else was being dismissed they would have had respect for them.

20.2 The respondent contended that the manner of the investigation of subsequent dismissal were not because the claimant was Bangladeshi but were for the matters leading to the dismissal i.e. matters of gross misconduct.

20.3 Even were the investigating officers laughing there is nothing to suggest that this was because of the claimant's race, and/or lack of respect for the claimants race. There is no reasonable prospects of the claim succeeding.

#### Item 6

21.1 The claimant's complaint here was that when she was on suspension she was not allowed to enter the respondent's buildings and her badge, keys and computer were removed from her. She argued that no other staff member would have been treated like that.

21.2 The respondent argued that these events occurred because the claimant had been suspended for gross misconduct. This was normal practice. It had nothing to do with her race. The respondent had perfectly good reason for its actions.

21.3 The claimant's claim appears here to be that she was suspended because of her race. In fact she was suspended because she was facing serious allegations of gross misconduct and I find any employee regardless of race would have been similarly treated. This claim has no reasonable prospect of success.

Item 7

22.1 The claimant contended that Mark Green of the respondent had said to her "studying psychology ..... what for?" She said she felt this was connected with her race as it felt to her like a suggestion that someone from Bangladesh would not study psychology. She went on to say that the comment was made because she was a woman. She complained it was Mr Green's attitude and not what he said but how he said it.

22.2 The respondent said that it was a one-off statement with no link whatsoever to race or ethnicity. There was nothing to suggest it was asked because of race.

22.3 The claimant appeared to be arguing that the comment made was either because of her race or her sex. I reminded myself there was no sex discrimination claim before me. I can see no reasonable prospect of success in relation to this allegation. There is nothing before me to suggest the comment was made because the claimant was Bangladeshi.

Item 8 – 13 (excluding item 9)

23.3 As regards items 8 to 13, excluding Item 9, it is the case that the respondent as well being the claimant's employer was also the local authority that stepped in to provide an assessment of the child she had adopted in Bangladesh and to provide accommodation for her child while the family courts decide what to do with the child. In the respondent's submission the allegations made at items 8-13 (excluding item 9) were all in relation to family court matters and nothing to do with the claimant's employment and should be separated. The allegations were as follows; allegations concerning the Social Worker Special Guardian for the child reporting that a "positive recommendation could not be made based upon the seriousness of the parallel investigation of the Home Office", allegations regarding comments made by Social Services at/during contact at a contact center, allegations regarding the care of the child having been removed from the claimant's care, and allegations regarding the child being removed from the claimant's care.

23.4 The claimant alleged that these matters were tied up with her employment as the respondent as her employer was the same organization as the local authority dealing with the child care issues. They shared the same HR and administrative teams. The claimant believed her employment information was being shared with the child's social worker.

23.5 In the respondent's submission these were nothing to do with employment.

23.6 These claims can have no reasonable prospect of success as the Claimants contentions are not connected in any way with her employment but rather with the family proceedings involving her adopted child. The Tribunal has no jurisdiction to hear these matters.

Item 9

24.1 The claimant's allegation was that Mark Green the HR Advisor had told the child's social worker that "I have been advised by Birmingham City Council's HR Department who (Mr Green) are assisting with these investigations (Home Office) that the crimes carry a sentence of between 4 and 18 years imprisonment". The claimant in her submissions said that the family court was misguided by that statement and she lost the custody of the child although her solicitor said that she had no criminal conviction at that time. She pointed me to a document in her bundle at B69 which appeared to be an e mail from an unnamed solicitor at BNV Solicitors Ltd, (Criminal Law Specialists) confirming that the claimant was under investigation by the Home Office; that the investigation had been going on for nearly 2 years, but that the claimant had not been convicted of any offences, had not been charged with any offences and was not bailed to return to any police station. That email was dated 13 March 2018.

24.2 In the respondent's submission the comment attributed to Mr Green's regarding likely sentence whether it be correct in law or not, had nothing to do with the claimant's race. There was no Madarassy something other.

24.3 I agree with the respondents submission. It appears Mr Green was simply stating his understanding of the likely sentence for the crimes for which the claimant had been arrested. I find his observations were not made because the claimant was Bangladeshi. They would have been made on the facts irrespective of race.

Item 14

25.1 The claimant makes an undated somewhat sweeping allegation that she had suffered injustice during her employment in general. She took me to a document in the claimant's bundle at B75 and 76 which she said was her evidence in respect of Item 14. This was a letter that she had sent to a Grayson Ellis, Operations Manager on 27 September 2010, mainly about an incident regarding a colleagues behaviour towards her. Nowhere in that letter does she say that the behavior amounted to race discrimination. Quite beside the issue of the time limit, and the claimant's contention that the allegations that she was complaining about in 2010 was "totally racially motivated", the respondent was quite right to point out to the claimant that she had twice been asked previously to particularize her claims, by Employment Judge Broughton on 24 October 2017 and by Employment Judge Self on 11 May 2018, and that the allegation at Item 14 was undated and vague. Having established the allegation related to the complaints set out in a letter of 27 September 2010 the respondent's submission was that this was a bare allegation. In short, an allegation someone had done something that she did not like and therefore that was because she was Bangladeshi.



25.2 Taking the claimants allegation at its highest namely in 2010 she made a complaint about a colleagues behavior towards her, there is nothing whatsoever to suggest this was because of her race. Even were this allegation in time, which it patently is not, it has no reasonable prospect of success.

26 In conclusion I strike out the complaint of direct race discrimination on the ground that it has no reasonable prospect of success.

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Signed by Employment Judge **Hindmarch** on 25 June 2018