THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M J Rosario De Matos	**v**	**Beluga Vodka International Limited**

Heard at: London Central **On**: 24 August 2020

Before: Employment Judge Glennie

Representation:
Claimant: In person
Respondent: Mr C Milsom (Counsel)

JUDGMENT ON PRELIMINARY HEARING

1. **The name of the Respondent as shown on the Tribunal's file is amended to Beluga Vodka International Limited.**

2. **The complaint of discrimination because of race is struck out on the grounds that it has no reasonable prospect of success.**

3. **A preliminary hearing for case management with a time estimate of 30 minutes will take place by telephone before Employment Judge Glennie at 9.30 am on 5 October 2020.**

REASONS

1. This preliminary hearing took place in public via CVP. The type of hearing was therefore video. The hearing had originally been listed to take place on 25 March 2020, but on that date proceeded on paper only because of the restrictions arising from the Covid-19 pandemic.

2. The Claimant appeared in person, but with the assistance of written submissions prepared for him by Mr Cumming of counsel. Mr Milsom had also prepared written submissions on behalf of the Respondent. Both he

and the Claimant supplemented their written submissions orally. I did not hear any evidence from either party.

3. The issues to be determined at this hearing were whether the discrimination complaint, or any part of it, should be struck out on the grounds that it has no reasonable prospect of success, or should be made the subject of a deposit order on the grounds that it has little reasonable prospect of success.

4. In the claim form, the Claimant completed box 8 indicating that he was discriminated against on the grounds of race, and that he was making another type of claim, in the following terms "discrimination…..failing to provide a contract or employment statement….unfairly treated". In box 8.2 the Claimant gave the following details:

"I believe because I am not Russian Beluga group HR didn't offered me the same rights and protections the other employees enjoy!

"They failed to issue me a contract or employment statement even though I ask for a contract in several occasions during my time working for Beluga.

"They failed to inform of their disciplinary and dismissal procedure or to seek guidance on basic guidelines for disciplinary & dismissal in the UK given that I was employed to work in the UK market on their behalf.

"I was further discriminated against when they failed to give me an opportunity to address the issues raised regarding my performance and they falsely accused me of having customer complaints with entering any information or evidence to substantiate this inflammatory accusation."

5. I agreed with Mr Milsom's submission that, on analysis, there were three elements to the discrimination complaint, i.e.

   5.1 Not providing the Claimant with a contract or statement of terms of employment.

   5.2 Failing to inform the Claimant of the disciplinary and dismissal procedure / failing to seek guidance on such procedure.

   5.3 Failing to give the Claimant an opportunity to address the performance issues / falsely accusing him of having customer complaints.

6. In the response the Respondent denied discrimination and asserted that the decision was made to dismiss the Claimant because of concerns about his performance. The Respondent accepted that the offer letter and contract provided to the Claimant did not contain all of the particulars required under section 1 of the Employment Rights Act 1996.

7. Rule 37 of the Rules of Procedure provides that a Tribunal may strike out all or part of a claim on grounds which include that it has no reasonable prospect of success. If that threshold requirement is satisfied, the Tribunal may strike out the claim, but is not bound to do so: there is then a discretion to be exercised.

8. It is often said that it is an exceptional course to take for a Tribunal to strike out a discrimination complaint. The position in this regard was explained by Lord Hope in paragraphs 37 and 39 of the judgments in **Anyanwu v South Bank Students' Union [2001] IRLR 305** in the following terms:

"….discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact sensitive.

"Nevertheless, I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial.

9. In **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126** Maurice Kay LJ, with whom Moore-Bick LJ and Ward LJ agreed, stated at paragraph 26 of his judgment that the test of no reasonable prospect of success involved asking whether a claim had "a realistic as opposed to a merely fanciful prospect of success". In other words, it is not necessary for the Tribunal to find that the claim has absolutely no prospect of success at all. In **Patel v Lloyd's Pharmacy Limited UKEAT/0418/12** Mitting J stated that the correct approach is to take the Claimant's case as its reasonable highest and then to decide whether it can succeed. Mitting J further observed that:

"…..in a case that otherwise has no reasonable prospect of success it cannot be right to allow it to proceed simply on the basis that "something might turn up"…..It is theoretically possible that that in response to skilled cross-examination [the Respondents' witnesses] might fall over themselves and admit to discrimination for an inadmissible reason. If there is a proposition that such a possibility requires a case to proceed then every….discrimination case that turns to any extent upon the oral evidence, in response to cross-examination, of employer's witnesses must be allowed to proceed. I do not believe that there is such a principle."

10. Section 136 of the Equality Act 2010 makes the following provision about the burden of proof:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

11. In **Madarassy v Nomura [2007] IRLR 246** the Court of Appeal held that the similar provisions in the earlier anti-discrimination legislation did not place the burden of proof on the employer where a claimant did no more than establish a difference in status (now, a difference in protected characteristic) and a difference in treatment. The provision that a tribunal "could" decide that discrimination had occurred meant a reasonable tribunal could properly decide this. There would have to be something more than a difference in protected characteristic and a difference in treatment, although the "something more" might not, in itself, be very significant.

12. The Employment Appeal Tribunal referred to the **Madarassy** principle in the context of an application to strike out a claim in **Chandhok v Tirkey**, where Langstaff P commented at paragraph 20 of the judgment that:

> "There may still be occasions when a claim can properly be struck out….where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic….."

13. Underhill LJ in **Ahir v British Airways [2017] EWCA 1392** made the following further observation:

> "Where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so."

14. Mr Milsom's primary, but not only, submission was that this was a case where the Claimant was asserting a difference in protected characteristic and a difference in treatment, without identifying anything that would enable a Tribunal properly to find, in the absence of any other explanation, that discrimination had occurred.

15. I found this to be true of the Claimant's pleaded case. This sets out the treatment of which he complains (being the three aspects identified above) and contains the assertion that it is the Claimant's belief that these things happened because he is not Russian. There is no express statement of the grounds for this belief. The following points directed to this aspect were made in the written submissions prepared by Mr Cumming:

    15.1 Although the Respondent is a company registered in Cyprus, it is part of a Russian group and is run by Russians. For the purposes of considering the present application, I take it as correct that it is, in practice, a Russian company.

    15.2 Following the Claimant's dismissal, he was replaced by a Ukrainian employee. The submission continued that it is arguable that this individual is of the same race as those whom the Claimant contends would have been better treated than he was; and he was better

treated in that he was provided with full terms and conditions of employment and was placed on the Respondent's payroll. (The Claimant was paid via the payroll of his previous employer).

15.3 The Claimant's case is that the reasons for his dismissal were "cooked-up" and that the purported reasons (his performance and complaints from clients about failing to attend meetings) were not true.

16. I have considered whether, taking all of these together and at their highest, and assuming no other explanation, there is any reasonable prospect of a Tribunal finding that the first stage of the **Madarassy** test has been made out. I have concluded that there is no reasonable prospect of this being the case.

17. I do not consider that the point about the Ukrainian replacement assists the Claimant. Although I do not have any evidence on, or particular knowledge of these matters, I assume for present purposes that it is correct, as asserted on the Claimant's behalf, that millions of Ukrainians identify as Russian; that Ukrainians and Russians share joint East Slavic ethnic roots; that Ukrainians and Russians share cultural similarities; and that Ukrainians and Russians share language similarities. The Claimant's pleaded case relies on his not being Russian. As I have indicated, it is part of his case that the Respondent company is, in practical terms, Russian. Whatever their similarities, ethnic roots, etc may be, it is not in my judgment correct to say that Ukrainians are Russian; and the Claimant's case relies on a distinction between those who are, and are not, Russian.

18. It follows, in my judgment, that the Claimant's case involves asserting that he was a non-Russian in a Russian company; that the reasons given for dismissing him were invented or exaggerated; and that the reason for this and the other treatment he complains of was that he was not Russian.

19. There is some difficulty about the Claimant's case concerning his dismissal, in that there is evidence of performance concerns and of an occasion when a client expressed concern about his missing a meeting. On 20 December 2018 Ms Kalmykova sent an email to the Claimant (page 40) setting out a number of actions that the Respondent required. The tone of the email is not necessarily critical, although it does introduce the requirements with the words "on the other had" (presumably meaning, on the other hand). The Claimant replied on 29 December 2018 setting out what he planned to do in response to this. On the same date, Ms Kalmykova replied in an email which included the following (page 40):

"Unfortunately the 200 TOP isn't updated enough – there are some places with key people which are no longer even working there [there followed 4 examples]……And these are the huge accounts for us and we are operating within outdated info, e.g. [another example].

"Re the Brand plan – we need you to also concentrate on the main KPIs and give us as many details as possible."

20. Then at page 44 there is a long email dated 16 April 2019 from the Claimant to Ms Kalmykova and others headed "1Q 2019 KPIs report". This begins, "Thank you so much for your feedback and let me take this opportunity to join you in agreeing the importance of the UK and rest assured I share that view.." The penultimate sentence is, "I hope I can continue in my role as we are starting to plan a big UK wide Beluga sales drive and there are some exciting projects….in the horizon." The main body of the email contained the Claimant's explanation of the actions he was taking. At one point he commented that he felt that it was not fair to say that the Brand Plan had been developed by a colleague and Beluga HQ only.

21. In relation to client complaints, an email dated 18 February 2019 at page 43 from a client stated that the Claimant had failed attend a training session that had been organised. The writer concluded, "I really hope this will be a singular case and it won't happen again." It seemed to me to be fair to describe this as a complaint, albeit not, perhaps, a formal one.

22. I therefore find that, so far as it relates to the Claimant's dismissal, the case is close to being of the type described in **Ahir**, where on the face of the matter there is a straightforward and well-documented explanation for what happened, namely that (whether or not an objective observer would find that they were "right" to do so) the Respondent's managers held genuine concerns about the Claimant's performance, including his non-attendance at a client meeting. I say that the present case is close to the **Ahir** type, rather than being a plain exemplar of it, because the available documentation is not extensive, and I am aware that the Claimant does not accept that he failed to reach the KPIs. I find, however, that one of the factors I should take into account in assessing the prospects of success is the contemporaneous evidence in support of the Respondent having genuine concerns. (I should say that I found the point that in the dismissal letter the Respondent had referred to complaints in the plural of little significance: assuming that there was only ever one complaint, an error of this sort would not be likely to found a determination that the reason was not genuine).

23. Additionally, in the course of the hearing the Claimant referred to there being a disparity in treatment as between himself and Russian speaking individuals. I asked him to explain this, and he said that it was easier (impliedly, for a Russian) to convey things to someone who was Russian speaking. He said that anyone else who was Russian speaking received a full contract, and when I asked who he meant, he replied that he was referring to his successor, a Ukrainian who speaks Russian. The Claimant added that he could highlight the treatment of other non-Russian speakers, and agreed that he was saying that his dismissal was a smokescreen to get him out and bring in his successor, a Russian speaker.

24. A complaint that an individual was treated in a particular way because he did not speak Russian is not the same as a complaint that he was so treated because he was not Russian. If a Tribunal were to find that the Claimant was treated in a particular way because he did not speak Russian, that would not support a finding that he had been directly discriminated against because he was not Russian (the pleaded case).

25. I therefore find the following about the Claimant's case as to why he was treated as he was:

    25.1 The Claimant's case in relation to his dismissal (the elements identified in paragraph 5.2 and 5.3 above) relies on a weak factual assertion about the genuineness of the Respondent's belief that his performance was unsatisfactory. This would not, standing alone, lead me to conclude that there was no reasonable prospect of success, although it might justify a conclusion that there was little reasonable prospect. It is, however, a factor that has to be considered with all the others in order to determine whether, considered as a whole, the claim has no reasonable prospect of success.

    25.2 The Claimant's own explanation of his case is that the reason for the treatment complained of was that he was not Russian speaking, rather than that he was not Russian.

    25.3 As Mr Milsom submitted, the Claimant was as non-Russian when he was engaged by the Respondent as when he was dismissed 8 months later. I find that there is no reasonable prospect of a Tribunal finding that the Respondent invented concerns about the Claimant's performance in order to dismiss him, and/or failed to follow a dismissal procedure, for the real reason that he was not Russian: if that were the case, it would be virtually impossible to explain why the Respondent had employed him in the first instance.

    25.4 Point 3 above (subject to the variation about not speaking Russian) is how the Claimant puts his case. Allowing for the fact that the Claimant is a litigant in person, I have also considered a possible different formulation of his case, being that a hypothetical Russian employee whose performance was the same as his would have been treated more leniently. This would not involve contending that the performance issues were invented or exaggerated because he was not Russian, but rather that a different view would have been taken of such issues in the case of a Russian employee. I consider that were the case put in this way, there would still be no reasonable prospect of a Tribunal finding that this was the case. There is nothing in the pleaded case to support the assertion that a Russian employee would have been treated differently. The fact that the Respondent is a Russian company would not be a proper basis on which, in the absence of any further explanation, a Tribunal could properly make such a finding.

25.5 I also find it to be the case that there is no reasonable prospect of a Tribunal finding that the Claimant was not provided with a full contract of employment because he was not Russian. It is not the case that he was provided with nothing at all: the offer letter dated 9.08.2018 contained information including job title, salary and bonus provision. The Claimant's (Ukrainian) successor received a much fuller contract. Again the Claimant's case suffers from the Russian / Russian speaking dichotomy described above. Again, nothing has been identified to support the assertion that a hypothetical Russian employee would have been given a full contract of employment, and the fact that the Respondent is a Russian company would not be a proper basis on which, in the absence of any further explanation, a Tribunal could properly make such a finding.

25.6 I therefore find that this is a case of the type identified by Mitting J where the reality is that any prospect of success rests on the possibility that "something might turn up". I have concluded that the discrimination complaint has no reasonable prospect of success.

26. Having so found, I have reminded myself that there is a discretion to be exercised. I find that I should exercise the discretion to strike out the claim. I can identify no other factor that would lead me to allow it to proceed, and it would not be in the interests of justice to do so.

27. There was brief discussion of whether the claim form also disclosed a complaint under section 1 of the Employment Rights Act 1996 and if so, how that should be dealt with. There was insufficient time for this to be concluded, and so I listed the telephone hearing above for this to be considered.

Employment Judge Glennie

Dated:04/09/2020.

Judgment sent to the parties on:

07/09/2020.

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For the Tribunal Office