



EMPLOYMENT TRIBUNALS

Claimant: Mr R Iqbal
Respondent: Sharps Bedrooms Limited
Heard at: Reading (by telephone) **On:** 2 March 2022
Before: Employment Judge Hawksworth (sitting alone)

Appearances

For the claimant: In person
For the respondent: Mr A Francis (counsel)

JUDGMENT

Employment Tribunal Rules of Procedure 2013 Rule 37

1. The claimant's complaint that he was not hired by the respondent as the first choice following interviews and that this amounted to direct sex discrimination (issue 7.1) has no reasonable prospect of success and is struck out under rule 37 of the Employment Tribunal Rules of Procedure 2013.
2. The respondent's application for the claimant's other complaints of direct sex/age discrimination (issues 8.1 to 8.6) to be struck out is refused.

REASONS

1. The claimant's complaints of sex and age discrimination were discussed at the preliminary hearing on 1 September 2021 and set out in paragraphs 7 and 8 of the case management summary.
2. On 28 July 2021 the respondent made a written application to strike out the claimant's discrimination complaints. The claimant replied, objecting to the application, on 5 August 2021. The application was heard at a preliminary hearing on 2 March 2022. At the hearing Mr Francis and the claimant made submissions. Both had produced a bundle of documents and Mr Francis prepared a skeleton argument which was sent to the tribunal and the claimant on 24 February 2022.
3. I gave my decision and reasons at the hearing on 2 March 2022. The claimant requested written reasons.

The law

4. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides:

*“(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...”*

5. The relevant legal principles on strike out in complaints of discrimination were summarised by the EAT in *Mechkarov v Citibank NA* [2016] ICR 1121:

- 5.1 Only in the clearest case should a discrimination claim be struck out;
- 5.2 Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
- 5.3 The claimant's case must ordinarily be taken at its highest;
- 5.4 If the claimant's case is “conclusively disproved by” or is “totally and inexplicably inconsistent” with undisputed contemporaneous documents, it may be struck out;
- 5.5 A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

6. In *Ahir v British Airways plc* [2017] EWCA Civ 1392, Underhill LJ said at paragraph 16:

“...Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context...”

Conclusions

Issue 7.1

- 7. The claimant's complaint of sex discrimination was recorded at paragraph 7.1 of the case management summary of 1 September 2021. He says that the respondent did not hire him as first choice at interview and a woman was appointed. The summary recorded that the claimant did not know the name of the successful applicant and relied on a hypothetical comparator.
- 8. The respondent agreed that another candidate was offered the claimant's role before him. That preferred candidate accepted the role and worked for the respondent for a very short time, about one day, before resigning. The claimant was then offered the role very shortly before the role start date. (The respondent said that the claimant was in fact the third choice, as another candidate (also a man) was offered the role before him, but turned down the offer. However, the claimant was not aware of this other candidate and he says this is not part of his complaint.)

9. The claimant understood that the preferred candidate who accepted the role was female. The respondent said that the preferred candidate was a man, not a woman. The respondent provided documentary evidence (an offer of employment authorisation form, page 67 of the respondent's bundle) which records the candidate's title as 'Mr'.
10. The claimant said that the form might have been made up.
11. In order for the claimant's claim at issue 7.1 to succeed, the tribunal would have to be satisfied that the employment authorisation form was made up, that the preferred candidate was female, and that the decision to offer her the role ahead of the claimant was related in some way to sex.
12. The threshold for striking out a claim of discrimination without hearing the evidence is a high one. However, I decided that this was one of the unusual cases where it is appropriate to do so. While I could not say that there was no chance at all of the claimant showing that the preferred candidate was female, despite what was said in the form, and of establishing the other elements required for the claim to succeed, I decided that there was no *reasonable* chance of the claimant being able to do so.
13. Therefore issue 7.1 is struck out, which means not allowed to proceed.

Issues 8.1 to 8.6

14. The claimant's complaints at paragraph 8.1 to 8.6 of the case management summary are all complaints of direct sex and age discrimination. The claimant says that he was treated less favourably than his colleague Ms Palmer and his predecessor Ms Jones, and that this treatment was because Ms Palmer and Ms Jones are female and because Ms Palmer was in her 50s whereas he was 41. The claimant says that his manager Mr Hall twice took Ms Palmer's side when she complained about the claimant, and that HR manager Ms Pangbourne pressured him to apologise to Ms Palmer in a grievance meeting. His probationary period was extended and he was then dismissed for failing his probationary period. His grievance/appeal was not considered by the respondent.
15. I considered these complaints carefully, and in particular I have in mind that, as Mr Francis said, for the claim to succeed, the claimant will need to show more than someone of a different gender being treated better than him, or someone who is older being treated better than him. In *Ahir*, LJ Underhill said:

"where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it".
16. The respondent's explanation was that there was a dispute between colleagues and that the extension of his probationary period and dismissal were because of the unresolved grievance against the claimant and his interactions with his

- colleagues. The claimant has found it hard to articulate what he says is the 'real story' behind this, and what it was that made him believe that his sex and age had played a part in the treatment he complains about.
17. However, he referred to the respondent's failure to reply to his questionnaire. The statutory questionnaire procedure, under which a tribunal was allowed to draw an inference from a failure to answer questions within eight weeks is not longer in force. However, a failure to provide information remains something from which a tribunal may draw adverse inferences, and the claimant relies on the respondent's failure here as giving rise to an inference of discrimination. He also relies on the gender and age breakdown of the employer's workforce in the South West region. This information has been provided by the respondent and shows that the majority of its employees were female and the majority were over 50. These factors have led me to conclude that I cannot at this stage say that these complaints have no reasonable prospect of success. The complaints at issues 8.1 to 8.6 should be decided by a tribunal which has had the chance to hear the evidence in full.
18. For these reasons the respondent's application to strike out issues 8.1 to 8.6 is refused.

Employment Judge Hawksworth

Date: 7 March 2022

Sent to the parties on: 17//3/2022

N Gotecha

For the Tribunals Office