Case no: 2200404/2024

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Alessandro Buono	**v**	**(1) Haris Aslam Khan** **(2) Infinity London PVT Ltd**

Heard at: London Central **On**: 25 November 2024

Before: Employment Judge Lewis

Representation

For the Claimant: Represented himself

For the Respondents: Mr S.A. Khan (representing his brother and the company)

PRELIMINARY HEARING JUDGMENT

1. The claim for age discrimination is struck out.

2. The claim for race discrimination is not struck out. No deposit order is made.

3. The claim for expenses (breach of contract) is struck out.

4. The claim for failure to provide a section 1 statement is not struck out. No deposit order is made.

5. The final merits hearing will go ahead as planned, but it will only deal with the claims for direct race discrimination, race harassment, and failure to provide a section 1 statement.

REASONS

The claims and issues for the preliminary hearing.

1. By consent, Infinity London PVT Ltd was added as 2nd respondent. The 1st respondent is Haris Aslam Khan. The name 'Viasat UK Ltd' has nothing to do with this case and seems to have crept in as an administrative error.

2. The claimant has brought claims for direct race discrimination, race harassment, direct age discrimination, age harassment, breach of contract (expenses) and failure to provide a section 1 statement of terms and conditions.

3. Employment Judge Anthony set out the claims and issues in her case management letter sent to the parties on 22 August 2024. She had discussed these with the claimant at the case management hearing on 21 August 2024, when she had refused the claimant's amendment request..

4. The respondents make an application to strike out the claims on grounds that they have no reasonable prospect of success or alternatively to order a deposit on grounds that they have little reasonable prospect of success.

5. I was given these documents: The respondents' written strike out application with the claimant's added comments; the ET1; EJ Anthony's case management letter; the amended grounds of response with the claimant's comments; the respondents' bundle accompanying their strike-out application; the respondents' 'evidence bundle' which was used at the last preliminary hearing; and a google file of individual WhatsApp messages and photos from the claimant – this latter document was extremely difficult to navigate as it would not save on my computer and comprised a large number of individual documents which were not completely in date order and not clearly indexed.

The law

Strike out

6. Under Schedule 1, rule 37(a) of the ET Rules of Procedure 2013, the tribunal can strike out all or part of a claim on the grounds that it is scandalous or vexatious or has no reasonable prospect of success. However, the case law is very clear that a tribunal must be extremely slow to strike out a discrimination claim at a preliminary hearing on grounds that it has no reasonable prospect of success. Where a strike-out is based on fact findings which are in dispute, it will only be in an extreme case that the evidence does not need testing in cross-examination at a full merits hearing. An exception might be where facts put forward by the claimant are totally and inexplicably inconsistent with undisputed contemporaneous documentation. Moreover, a strike out should only take place in the most obvious and plainest case. 'No' reasonable prospects of success really does mean *no*. (See Ezsias v North Glamorgan NHS Trust [2007] EWCA

Civ 330; A v B and C [2010] EWCA Civ 1378; Anyanwu v South Bank Students Union [2001] ICR 391, CA; Balls v Downham Market High School & College [2011] IRLR 217, EAT.)

7. Regarding discrimination claims, in Anyanwu v South Bank Students Union [2001] ICR 391 Lord Steyen said:

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of the claim being examined on the merits or de-merits of its particular facts is a matter of high public interest."

Lord Hope said:

"I would have been reluctant to strike out these claims on the view that 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. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to leave evidence."

8. In Chandhok v Tirkey [2015] IRLR 195, the EAT said that there is no blanket ban on strike-out applications succeeding in discrimination claims. "There may still be occasions when 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 which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura [2007] ICR 867):

> "...only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.""

9. In Ahir v. British Airways plc [2017] EWCA Civ 1392 CA, Underhill LJ stated at paras 16 and 19 respectively:

"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."

"…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."

Deposit orders

10. Under Schedule 1, rule 39 of the ET Rules of Procedure 2013, if a tribunal at a preliminary hearing considers that any allegation or argument in a claim has little reasonable prospect of success, it can order the claimant to pay a deposit up to £1000 as a condition of continuing to advance that allegation or argument. The tribunal must make reasonable enquiries into the claimant's ability to pay and take account of any information obtained in that respect when deciding the amount of the deposit.

Conclusions

Age: direct discrimination and harassment

11. This claim is that because of the claimant's age (26), on 2 and 11 October, Haris Khan, Caitlyn and Susan played songs by The Weeknd who owe the claimant royalties. The claimant says everyone was aware of his dispute over royalties and that the songs were deliberately played to upset him.

12. The claimant says Caitlyn and Susan (and a third colleague) were younger than him, still going to university, and he believed their behaviour was because of age as some kind of inverse power play – to show him that although they were younger than him, they were still in charge and could still harass him. However, the claimant did not suggest they had ever said that was what they were doing. The claimant felt they may have been envious of his involvement in the music industry. They kept asking what he was doing in the job if he was good at music. I asked the claimant whether he felt they might have done and said the same things if he had been their age. He said he did not know.

13. The claimant also said that his colleagues complained to each other about their treatment at work and how none of them (including the claimant) had contracts, and that they expected him to take matters up, but never took them up themselves. The claimant did not suggest they said anything like 'You are older, you take it up'. In fact the claimant says that at no point did his colleagues make any comment about age.

14. I cannot see any reasonable prospect of success in proving the age direct discrimination or harassment claims. There may have been some conflict around the music, and even some jealousy, but I do not see any evidence that could suggest it was because of or related in any way to the claimant's age. Clearly the whole issue of music and royalties played heavily on the claimant's mind. His colleagues appear to have been unsympathetic and possibly sceptical. They may have been looking him up on line – the claimant says they were stalking him on line. But none of that is anything to do with the claimant's age.

Race: direct discrimination and harassment

15. The claimant describes his 'race' as of African Italian descent.

16. I do not strike out the race direct discrimination and race harassment claims. Our discussion today became bogged down in evidence put forward by both sides, which I was not in a position to evaluate fully.

17. Regarding the requirement to work late until 9 pm, this is not completely answered by the respondent's argument that other employees (who were white/British or white/Asian) also had to work late, or by their argument that the claimant's written contract allowed them to put him on late shifts, because the claimant's argument is that he was the only person whose preferences were not honoured.

18. Taking the claimant's case at its highest, he had colleagues who were white British and white Asian (his description), and unlike him, their shift preferences were honoured. The respondents did not tell me that these comparators were required to work shifts which they did not want to work, and certainly I was not shown any clear-cut evidence of that. If it is disputed, that would have to be explored at a hearing.

19. The respondents say that the reason that the claimant was put on the second (late shift) was because the first shift involved detailed cooking procedure before the store opened which the claimant's colleagues had shown they were able to do, but in which the claimant still made numerous errors. The respondents say that the second shift better matched the claimant's skillset and that the intention was gradually to teach the claimant the cooking procedure for the first shift.

20. As against this are the claimant's assertions that his colleagues also made mistakes, which he says he can prove. Moreover, after the claimant left, the respondents completed a reference request ticking the box for 'excellent' against 'quality of work'. There is also a WhatsApp message when the claimant resigned, trying to persuade him to stay, and stating 'You are very good at your job'.

21. The claimant has therefore thrown some potential doubt on the ostensibly innocent sequence of events leading to him being put on the second shift and has pointed to some facts which could indicate things are not what they seem. I am conscious that this decision is being read by unrepresented parties. I am not saying that race discrimination will necessarily be proved. I am just saying that at this preliminary stage, I cannot say there are 'no' reasonable prospects of success.

22. The respondents say that none of the discrimination claims were raised by the claimant prior to his resignation. However he did refer to discrimination at a much earlier stage in WhatsApp messages when he was initially dismissed on 5

October 2024. He referred to discrimination again in Whats App messages when he resigned.

23. In relation to the claim concerning Hana, it is agreed that 'Hana' told the claimant on 5 October 2023 that the job was not right for him. Hana is the first name of a compliance manager / inspector from T4 who spent approximately 7 days with the store after it opened in 2 October 2024. The claimant says he had only made two mistakes and that his colleagues of a different race also made mistakes. The respondents say he had made more than two mistakes. The claimant also says that Hana spent more time communicating with his colleagues during the inspection week, whereas she did not tell him he was going wrong until she gave her final pronouncement. The respondents deny this. I cannot at this stage make a fact-finding about these matters and whether it was a surprisingly premature reaction from Hana. The claimant also says, and I think this is agreed, that his colleagues as well as himself failed the test the first time. The respondents state that the other three passed the second time. The detail of this and its significance involves looking at the evidence in more detail than I can on this application.

24. I am not sure on what basis the respondents would be liable for any discrimination by Hana. She was not their employee. I am doubtful that she was their agent since she had no authority to dismiss employees. She was simply carrying out inspections for the company which granted the franchise. The respondents initial decision to dismiss the claimant was on the basis of what Hana had said and repeated the assertion that the job was not correct for the claimant. On the other hand, the respondents were persuaded by the claimant to change their mind and keep him on. This will need to be addressed at the hearing, but I am not in a position to explore this further today.

25. As regards the elements of the definition of harassment, the one that is potentially problematic is 'related to race', in respect of which I make the same observations as for the direct discrimination claim. The other stages of the definition would plainly be arguable.

26. For these reasons, I do not strike out the direct race discrimination or race harassment claims.

27. Having thought very carefully about the matter, I also do not make a deposit order in respect of those claims. There are some difficulties for the claimant, but I would not go as far as saying at this stage without hearing evidence that the case has 'little' reasonable prospect of success such that a deposit order ought to be considered.

<u>Breach of contract / expenses claim</u>

28. The claimant thought it was the position in the UK that some companies paid travel expenses when there were cancellations of trains / public transport. I explained there was no general rule to that effect. He did not say there was any other basis for this claim. There was no verbal or written agreement that the respondents would pay his travel expenses or that they would do so if he was

made late by cancelled trains. I therefore strike out this claim as it has no reasonable prospects of success.

Failure to provide written particulars of employment

29. This type of claim is not a stand alone. It can only be brought if one of the claimant's remaining claims, ie the direct race discrimination or race harassment claim is upheld.

30. Written particulars of employment are supposed to be provided when a worker starts work. However, the claimant will only get compensation if the employer still had not complied with the section at the time the claimant brought his tribunal claim. If the contract of employment which the claimant was eventually given covers all the required section 1 particulars, the claim will fail. [See Govdata Ltd v Denton [2019] ICR D8, EAT.] We did not have time to go into this, so I do not strike out the claim or make a deposit order. As the race discrimination and race harassment claims are going ahead anyway, it will be a simple matter to cover the written particulars claim at the same time.

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Employment Judge Lewis

26 November 2024

Sent to the parties on:

3 December 2024

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For the Tribunals Office