



Reserved judgment

# **EMPLOYMENT TRIBUNALS**

**BETWEEN**

**Claimant**

**Respondent**

**AND**

Mr A Khan

Crown Prosecution Service

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING**

**HELD AT** Birmingham **ON** 18<sup>th</sup> and 19<sup>th</sup> September 2019

**EMPLOYMENT JUDGE** Richardson

### **Representation**

**For the Claimant:** in person

**For the Respondent:** Mr D Maxwell, Counsel

## **JUDGMENT**

**The judgment of the Tribunal is that**

1. The claimant is permitted to pursue complaints of race discrimination in respect of allegations 1(i)(a) and 9.
2. The claimant must pay a deposit of £50 to pursue allegation no. 4.
3. The remaining allegations are struck out under Rule 39.

## **REASONS**

### **Background and Issues**

1. The claimant brought claims of unfair dismissal, disability and race discrimination. In an oral judgment on 19<sup>th</sup> September 2019 the claimant's claim of unfair dismissal was dismissed. The amendments to the claimant's set out in the table of claims items 1 – 8 claim filed on 22<sup>nd</sup> October 2018 together with an additional 9<sup>th</sup> claim were allowed. The remaining application by the respondent to be considered is whether the claimant's claims should be struck out under Rule 37 of the Tribunal's procedural rules or a deposit order made under rule 39.

2. The claimant's ET1 contained unparticularised complaints of race and disability discrimination and harassment and detriment related to race and

disability.

3. The claimant applied to amend his grounds of complaint by email on 4<sup>th</sup> October 2019 and provided supporting documentation. The protected characteristics relied upon by the claimant are his race and disability. The claimant has a mental impairment of dissociative personality disorder, OCD and anxiety disorder. His physical impairment relates to his neck and back which were previously recognised in an occupational health report as a disability. The third disability relied upon by the claimant is a congenital/hereditary condition relating to his fingernails.

4. The claimant was ordered by Employment Judge Camp on 15<sup>th</sup> October 2018 to set out matters relating to his alleged disabilities and the reason for the delay in bringing his claim. The claimant submitted substantial documentation in support of his complaint form.

### **Submissions**

5. Mr Maxwell provided written submissions. I also heard oral submissions from both parties on whether the claimant's claim should be struck out for having no reasonable prospect of success or a deposit order being made on the ground that the claimant's claims have little reasonable prospect of success. I retained a note of the submissions made on the tribunal file. I have read and re-read the parties submissions and taken them into account in my findings and conclusions below.

6. The respondent also referred me to the authorities **North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA** and **Van Rensburg v Royal Borough of Kingston upon Thames [2007] UKEAT / 0096/07**. In respect of the respondent's submission on each of the allegations I deal with the relevant submissions in the findings below. The claimant's more general submissions can be summarised as follows:

6.1 The claimant stated that it was not possible to take his complaints singly. They had to be considered as a continuing act of bullying by his line manager and not be looked at as single events. The bigger picture of harassment had to be taken into account.

6.2 His line manager had assumed that the claimant was British Pakistani.

6.3 His line manager was aware of his disabilities including his nails.

6.4 Some of his grievances had been held up in the grievance process in March 2018.

6.5 There was no reason for his line manager's bullying behaviour and it could only have been because of the claimant's race and disability.

7. I have also had access to the parties' respective bundles C1 and R1

produced for the purposes of the hearing. In particular I have read the grievance report of March 2018 in order to properly understand the claimant's complaints which were set out in some detail in the grievance report although that contained many more complaints than those now before me.

8. The definition of disability is found at S6 Equality 2010. The definition of harassment is found at S26 Equality Act 2020 and of victimisation at S27. The law on strike out and reasonable adjustment are found at rules 39 and 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

**S 6 Equality Act 2010**

- (1) *A person (P) has a disability if –*
  - a. *P has a physical or mental impairment, and*
  - b. *The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities.*

**S26 Equality Act 2010 Harassment**

- (1) *A person (A) harasses another (B) if –*
  - a. *A engages in unwanted conduct related to a protected characteristic, and*
  - b. *The conduct has the purpose or effect of –*
    - i. *Violating B's dignity, or*
    - ii. *Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

**S27 Equality Act 2010 Victimisation**

- (1) *A person (A) victimises another person (B) if A subjects B to a detriment because –*
  - a. *B does a protected act, or*
  - b. *A believes that B has done a protected act.*
- (2) *Each of the following is a protected act –*
  - a. *Bringing proceedings under this Act;*
  - b. *Giving evidence or information in connection with proceedings under this Act;*
  - c. *Doing any other thing for the purposes of or in connection with this Act;*
  - d. *Making an allegation (whether express or not) that A or another person has contravened this Act.*

**Rule 37 Striking out**

- (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. ....
- c. ....
- d. ....
- 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)*

(2) *A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing, or if requested by the party, as set out in rule 21 above.*

(3) .....

### **Rule 39 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 £1000 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.*

### **Additional Authorities**

In ***Anyanwu v South Bank Student Union [2001] ICR 391*** the House of Lords emphasised the importance of investigating the facts at a full ET hearing, particularly in cases of alleged unlawful discrimination. At paragraph 29 Steyn LJ observed that it would only be in an exceptional case that an application to an Employment Tribunal will be struck out when the central facts (as in that case) are in dispute.

### **Findings and conclusions**

9. The claimant is British Afghani.

10. At the claimant's grievance hearing conducted by the CPS in about March 2018 did not provide any medical evidence that his hereditary fingernail condition is a disability.

11. There was no medical evidence shown to me by the claimant to support a claim that he has a congenital /hereditary condition affecting his fingernails which

amounts to a disability. Reference to this hereditary condition was not referred to in the detail set out in the email of 4<sup>th</sup> October 2018 by the claimant in which his mental impairments were described in detail. The claimant has not attempted to demonstrate that he has a disability within S6 Equality Act 2010 in respect of an hereditary fingernail condition.

12. The claimant submitted a substantial amount of background of evidence to support his complaints of discrimination in his attempt to follow Employment Judge Camp's directions, including a table of 8 claims identified below at 12.1 to 12.8 and a ninth claim at 12.9 below. These claims were agreed by the claimant to be his claims and they were the subject of his successful amendment application. At the hearing the claimant took us through each of his claims and they are listed and agreed by the claimant as follows:

12.1 Allegation (1) 16<sup>th</sup> October 2017: Harassment – S26 EqA 2010  
The claimant's line manager is alleged to have made inappropriate and unacceptable comments:

- (i) Of the claimant's work experience at the DWP:
  - a. *"that experience would not be worth the paper it would be written on"*
  - b. *"to be honest I though you blagged your way to the B2 grade."*
  - c. *"you have to look at the make up of the area ... Pakistanis and Blacks are given a fighting chance to move up the scale .... Grace has shown this works."*

12.2 Allegation (2) 25<sup>th</sup> September 2017: Harassment S26 EqA 2010  
Being forced to mediate with another member of staff resulting in a difficult working relationship.

12.3 Allegation (3) Mid October 2017: Harassment S26 EqA 2010  
Discriminatory and offensive remarks by line manager about my disability (hereditary condition of lack of finger nails).

12.4 Allegation (4) End November 2017: Harassment S26 EqA2010  
Line manager making racist remarks during a conversation with the claimant and a third member of staff about some ethnic minorities having a propensity to commit crime in some areas of Birmingham.

12.5 Allegation (5) 31<sup>st</sup> January 2018: S27 Victimisation EqA 2010  
At the meeting in mid October 2017 (at no. 3 above) the claimant confronted his line manager and said his comments about the claimant's hereditary condition were offensive. Thereafter the claimant's weekly assurance reports were heavily scrutinised by his line manager who frequently changed his expectations.

12.6 Allegation (6) Early December 2018: Harassment S26 EqA 2010

The claimant's line manager undermining the claimant's relationship with his direct reports giving misinformation to the claimant's direct reports and meeting with the claimant's direct reports without him being present.

12.7 Allegation (7) April 2018: Harassment: S26 EqA 2010 the claimant's line manager disclosed personal information about the claimant in the course of the claimant's application to transfer to the CPS head quarters, causing the claimant to withdraw his transfer application as the claimant was unsure of the extent of the disclosures and did not want to start in a new role in a negative light.

12.8 Allegation (8) February-May 2018: Harassment – S26 EqA 2010

The claimant's line manager requested a final meeting with the claimant prior to his transfer to another government department. The line manager accused the claimant of attempting to record the meeting and left to make a complaint to the District Prosecutor.

12.9 Allegation (9) December 2017: Failure to make reasonable adjustment – S20/21 EqA2010. The claimant's occupational health report suggested a reasonable adjustment for the winter months of a car parking space. The claimant line manger refused the request.

### Conclusions

13. At the preliminary hearing when considering whether or not to abridge time, the merits of the claims for the purposes of strike out and deposit were not analysed. With hindsight that was probably not the most efficient way to deal with the allegations as time considerations have some impact on the merits of some of the individual allegations.

14. I consider below each of the allegations in turn. However, as a general observation and the background to my conclusions, with respect to allegations 1 to 8, the claimant invited me to look at his line manager's conduct over the period in question October 2017 – May 2018 as a continuing act of race and/ or disability harassment citing these incidents at 1 – 8 to illustrate his point. The only references to race in the incidents (1) – (8) are in October 2017 and at the end of November 2017. In respect of the end of November 2017 incident, the claimant acknowledged that the conversation between his line manager and a third party did not refer to him. He recognised it as an inappropriate conversation but did not think he could complain about it.

15. In reaching my conclusions below I have had careful regard in considering each allegation to the principal from **Anyanwu** which is that it is only in an exceptional case that an application to an employment tribunal will be struck out when the central facts (as in that case) are in dispute. In this dispute were it to run to a full hearing, there is likely to be considerable dispute of fact about the claimant's line manager's conduct - was it mismanagement or motivated by the

claimant's ethnicity or his disability. The only disabilities referred to by the claimant were his neck/back condition in respect of allegation 9 and his alleged disability of the hereditary fingernail condition. There was nothing in the claimant's allegations which related to, or appeared to relate to the claimant's dissociative personality disorder.

**Allegation 1 – 16<sup>th</sup> October 2017**

The claimant's line manager is alleged to have made inappropriate and unacceptable comments:

- (i) Of the claimant's work experience at the DWP:
  - a. *"that experience would not be worth the paper it would be written on"*
  - b. *"to be honest I though you blagged your way to the B2 grade."*
  - c. *"you have to look at the make up of the area ... Pakistanis and Blacks are given a fighting chance to move up the scale .... Grace has shown this works."*

16. The respondent submitted that this allegation had nothing to do with race. It could be interpreted instead as a 'back handed' compliment, namely that the claimant is an excellent self promoter. Furthermore the claimant had not established the words were said with the purpose of harassing the claimant in accordance with S26 and the alleged effect of the words could not reasonably have created the atmosphere required for a harassment claim to succeed. Whilst the comments refer to race, they could not reasonably have the effect the claimant describes the comments had on him.

17. The claimant's line manager apparently did not rate the claimant's experience at the DWP as relevant for his new position in the CPS. I do not agree that (i)a. and (i)b. above could not be related to the claimant's ethnicity and his career progress in the CPS – the comment appearing to suggest in the context of the conversation had with the line manager that the claimant, as BAME, had not been appointed on merit to this new position in the CPS, transferring from the DWP. That is an insensitive and insulting comment to make and satisfies the definition of S26. This claim may proceed.

18. In respect of (i)c and (i)d I find both allegations referring as they do to the positive opportunities for ethnic minorities of working in the CPS are highly unlikely to found the basis of a racial harassment of the claimant and I dismiss those elements of allegation 1.

**Allegation (2) 25<sup>th</sup> September 2017**

19. The claimant complains of being forced by his line manager to mediate with another member of staff reporting to the claimant resulting in a difficult

working relationship with that member of staff for the claimant. There appears to be no connection whatsoever to any protected characteristic for the purposes of S26 EqA 2010. I reject the claimant's submission that the only reason for the claimant's line manager's motivation, in the absence of any other obvious reason, must have been his race/disability. The allegation is struck out under rule 37.

**Allegation (3) Mid October 2017**

20. The claimant complains of discriminatory and offensive remarks made by his line manager about his physical disability, namely the hereditary condition of lack of finger nails. I have no doubt whatsoever that the claimant would have found such comments insensitive and offensive and that they could amount to bullying. However, bullying is not necessarily discrimination if no protected characteristic shown as the motivation for the bullying behaviour where repeated reference to the claimant's condition is made. More important, in respect of this allegation, the claimant has failed to demonstrate that his hereditary fingernail condition is a disability within the meaning of S6 Equality Act 2010. The claimant was notified in March 2018 in the grievance outcome that he had not demonstrated that his hereditary condition was a disability and despite that has not produced evidence at this hearing to substantiate his claim that he has a disability in this disregard.

21. Without having attempted to establish that the claimant has a protected characteristic relating to this condition, the allegation cannot succeed. I strike out the claim as having no reasonable prospect of success.

**Allegation (4) End November 2017**

22. The claimant complains that his line manager made racist remarks during a conversation with the claimant and a third member of staff about some ethnic minorities having a propensity to commit crime in some areas of Birmingham and made a reference to the line manager's own ethnic group having no shame. The respondent submitted that the comments are a reference to the line manager's own racial group, not the claimant's. The claimant acknowledged that the comments were not directed at him and therefore he did not originally think he could pursue this complaint and had doubts about it.

23. I find that whilst the claimant believed the comments to be unacceptable, and although he knew he was not the target of the comments, I find it possible that the words could have had the effect of making the claimant uncomfortable, thus meeting the provisions of S26 EqA2010. Whilst it is not a strong claim, it cannot be said that this allegation has no reasonable prospect of success but I require the claimant to pay a deposit before he is permitted to pursue this allegation.

**Allegation (5) 31<sup>st</sup> January 2018**



24. At the meeting in mid October 2017 (referred to in allegation no. 3 above) the claimant confronted his line manager and said his comments about the claimant's hereditary condition were offensive. Thereafter the claimant's weekly assurance reports were heavily scrutinised by his line manager who frequently changed his expectations. The claimant alleges this amounts to victimisation.

25. The respondent submitted that the claimant first had to establish he had a disability in respect of his hereditary condition, and second that he conveyed in his complaint to his line manager that he had the status of being disabled such that subsequent conduct by his line manager could amount to victimisation. That is a correct analysis. The claimant has not established he has a disability in respect of his hereditary condition. He cannot therefore establish that he made a protected act under S27. This allegation is struck out as having no reasonable prospect of success.

### **Allegation (6) Early December 2018**

26. The claimant complains that his line manager undermined the claimant's relationship with his direct reports giving misinformation to the claimant's direct reports and meeting with the claimant's direct reports without him being present.

27. The respondent submitted that there was nothing in the allegation that could be linked to the claimant's ethnicity or either of his disabilities. The respondent submitted it was nothing more than bad management practise.

28. I find there is nothing in the claimant's claim as pleaded to support the suggestion that there was a connection between the line manager's alleged mismanagement/ poor managerial style and the claimant's disabilities or his ethnicity. The claimant has made the connection as a bare assertion that his race/disability is the only reasonable explanation for the conduct. That clearly cannot be right as poor management skills could also be at play. It is entirely possible that unreasonable conduct is not related to a protected characteristic. I am not satisfied that there is any merit in this claim and I find that it has no reasonable prospect of success and is struck out.

### **Allegation (7) April 2018**

29. In early 2018 the claimant had applied for and provisionally accepted new roles in CPS headquarters and HMRC. The claimant's complaint is that his line manager disclosed to the recruiting manager in CPS headquarters that the claimant had, as well as accepting the role at CPS headquarters, also accepted provisionally a position in HMRC. The claimant had asked his line manager to keep that fact confidential. The claimant alleges that his line manager did not do as he was asked. The claimant withdrew his transfer application to CPD headquarters as he was unsure of the extent of the disclosures made by his line manager and he did not want to start in a new role in a negative light.

30. There was no asserted facts which connects the line manager's conduct in making the disclosure complained of, to the claimant's ethnicity or any disability. The claimant makes not only a bare assertion of the disclosure being harassment because of race/disability but this allegation is also based on a speculation of what might have been said about him by his line manager. He does not know what was said. This is not sufficient to establish the prospect of a valid claim for harassment. This claim has no reasonable prospect of success and is struck out.

#### **Allegation (8) February-May 2018**

31. The claimant's line manager requested a final meeting with the claimant prior to his transfer to another government department (HMCTS) following a successful application. It is not disputed that the claimant's relationship with his line manager had increasingly deteriorated over the months. The claimant's line manager required a meeting to effect a hand over. During the meeting which the claimant had been reluctant to attend, the claimant was accused by his line manager of recording the meeting. The line manager was angry and left the meeting abruptly, going upstairs to report the claimant to the District Prosecutor and HR despite the claimant's protestations that he was not recording the meeting. The claimant alleges that this was deliberate conduct of the line manager to discredit the claimant.

32. The claimant has not established that this incident was related in any way to his ethnicity or a disability. The stated cause is the line manager's belief that the claimant was recording a meeting. Discrediting the claimant as alleged also has nothing to do with his ethnicity or disability. I find this allegation has no reasonable prospect of success and is struck out under rule 37.

#### **Allegation (9) Mid December 2017**

33. The claimant complains of his line manager's failure to make reasonable adjustment under S20/21 EqA2010. The claimant has a neck and back condition which was recognised as a disability by the respondent's Occupational Health Service. It was recommended by the Occupational Health Service that a reasonable adjustment should be made for the claimant by providing him with a car parking space during the winter months. The claimant's line manager refused, providing a reason why he refused and suggesting an alternative course of action in securing parking to be followed the claimant. This allegation was upheld by the grievance hearing officer and I find no reason not to uphold it now as a valid claim, time having been abridged in my earlier decision.

34. The claimant was directed to state what was the PCP applied by the line manager. He did so on 8<sup>th</sup> October 2019. The claimant has stated his PCP to be the practice or policy of allocating car parking to specific users without

review/revision.

35. This claim may proceed.

**Financial Means**

36. The claimant is employed by HMCTS. He states in his ET1 that he is earning £2521 per month. It is not clear whether that is net or gross. In respect of the deposit to be paid in order to pursue allegation 4. I order the claimant to pay the sum of £50.

37. The matter is listed for a further case management preliminary hearing on 24<sup>th</sup> October 2019.

Signed by Employment Judge Richardson

Date: 21 October 2019