Neutral Citation Number: [2022] EAT 164

Case No: EA-2020-000954-LA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 June 2022

Before :

JOHN BOWERS KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MS R THOMAS	**Appellant**
- v-	
EXPANSYS UK LIMITED	**Respondent**

- -
- -

A Burns KC for the **Appellant**
O Isaacs (instructed by **WorkNest Law**) for the **Respondent**

Hearing date: 27 June 2022

- -

JUDGMENT

SUMMARY

SEX DISCRIMINATION, RACE DISCRIMINATION, & JURISDICTIONAL/TIME POINTS

The claimant brought various claims before the employment tribunal. The EJ struck out the claimant's complaints of direct race and sex discrimination, harassment and victimisation. One issue raised on appeal was that the claimant was "put on the spot to define her case at the strike out hearing" and that this put her at a disadvantage.

The EAT found no error of law in the decision to strike out nor perversity. The tribunal may decide to strike out if there was no causation pleaded in respect of the sole person who was alleged to have discriminated where there were several opportunities to do so. There were many missed opportunities for the claimant to clarify what her case was on this point, but she did not do so.

JOHN BOWERS KC, DEPUTY JUDGE OF THE HIGH COURT

Introduction

1. By a claim form issued on 18 January 2017 the claimant brought various claims before the Employment Tribunal. This is an appeal against the judgment of EJ Finlay on 19 October 2020 striking out the claimant's complaints of direct race and sex discrimination, harassment and victimisation.

2. The appeal was rejected on the paper sift by HHJ Auerbach but allowed to proceed after a hearing before Deputy High Court Judge Coppel QC. Following a case management hearing, the claimant's claims were limited to the question of whether her dismissal was either unfair or discriminatory (page 90).

3. The decision to dismiss was one taken by Mr Capp on 17 October 2016. The claim was somewhat general and there were orders for further information (page 272). The claimant has been a litigant in person throughout, save that she received advice, she told me, at the hearing from a CAB. A full procedural history of the matter can be found in the decision of EJ Finlay.

4. This matter has been before the employment tribunal four times. It is unusual in that the claimant's unfair dismissal claim has already by now been heard and was unsuccessful and also because there were two strike out applications.

5. There was a dispute between the parties as to whether I should pay attention to the judgment in the unfair dismissal claim to which I will return. The respondent's first application to strike out was considered before EJ Vowles on 7 January 2019. At that hearing the Employment Judge noted that there was "**nothing in the claimant's claims or in her further and better particulars providing any basis for a finding that the dismissal was an act of race or sex discrimination nor**

harassment related to sex or race or an act of victimisation" (page 3). A deposit order was made in respect of those claims but there was no strike out.

6. The witness statement which in due course the claimant presented has featured in the hearing before me for what it missed out, namely that it did not mention dismissal at all or make criticisms of Mr Capp, the dismissing officers (pages 132 to 150), nor did the statements of her friends and family refer to the act of dismissal (pages 153 to 177). The claimant's explanation for why dismissal was an act of race discrimination were identified at paragraphs 13 to 24 of her statement. They did not refer to Mr Capp.

Employment Tribunal judgment

7. Following adjournments of the trial, the respondent renewed the application to strike out. This was by CVP although the claimant used a telephone to join. The judge asked the claimant several questions about her claim. He asked her whether there was anything else apart from a bare difference in status between her and Chris and Tom, the comparators, to found discrimination and the claimant said that "maybe" they did not like her ethnicity and that Mr Capp was close to the males (page 6).

8. Before me, Mr Burns KC criticised the judge for putting the claimant on the spot in this way and the claimant has expressed that she thought she was being "cross-examined by the judge". I will need to return to this point.

9. The employment tribunal noted that it should only strike out in "exceptional cases" (page 7). Nevertheless, the tribunal determined that this was a case in which the tribunal should so exercise its discretion. The judge said that he took the claimant's case at its highest, but determined that even then, there would not be enough to reverse the burden of proof (page 8). The judge noted that **"she may have been the victim of unfair treatment at work and her dismissal may have been unfair,**

but there is nothing upon which a Tribunal could form a prima facie case of discrimination on the basis of race or sex" (page 8).

The reconsideration judgment (page 101)

10. On 24 February 2021 on the application of the claimant for reconsideration, the judge concluded that he should not reconsider the Judgment. The causation issue was again central to that decision. He noted that **"the claimant continues to focus on events prior to her dismissal and does not appear to make connection between those events and her dismissal"** (page 102). The judge noted that the claimant's skeleton argument did not address how her **"dismissal by Mr Capp might be tainted by discrimination nor does she resile from the statement made on 19 October 2020 … that Mr Capp had an entirely alternative motive for dismissing her."**

11. In the later unfair dismissal decision, the tribunal found that the decision to dismiss was **"at the harsher end of the spectrum"** but fell within the band of reasonable responses (page 125 paragraph 93).

The issues before the EAT

12. It is important to note what are the three issues on appeal as the debate ranged somewhat wider than these three and because the original notice of appeal is itself obscure. The three issues formulated by Mr Coppel on the sift can be summarised as:

(a) whether there is an error of law in applying the test on strike out;

(b) the five particular areas where the tribunal might have inferred discrimination;

(c) the way in which the claimant was put on the spot to define her case at the strike out hearing rather than the judge "rolling up his sleeve" as per paragraph 30 of **Cox** and consider the core documents.

Legal principles

13. Rule 37(1)(a) **ET Rules 2013** provides the employment tribunal a power to strike out a claim at any stage of the proceedings on the grounds that the claim has no reasonable prospect of success. There was no real dispute about the law in this case and, save for nuances in how the law should be applied, I can distil the basic principles which are relevant to my consideration as follows:

(1) A strike out is a draconian step or a high test: **Balls v Downham Market High School** [2011] IRLR 217.

(2) Cases should not, as a general principle, be struck out when the central facts are in dispute: **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126.

(3) Where there are core issues of facts that turn to any extent on oral evidence, they should not be decided without hearing oral evidence, but there may be exceptional cases where strike out is justified in cases even of factual dispute; this should only be done when it is instantly demonstrable that the central facts in the claim are untrue or the claim is fanciful or inherently implausible: **Mechkarov v Citibank NA** [2016] ICR 1121. Further, in **Ahir v British Airways** [2017] EWCA Civ 1392, Underhill LJ gave the following guidance:

> **"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. Whether the necessary test is met in a particular case depends on an exercise of judgment … Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be '*little* reasonable prospect of success'"**

(4) There is a special need for caution in striking out discrimination and possibly whistleblowing cases too because:

(i) they are generally fact-sensitive;

(ii) there is high public interest in examining the merits at a full hearing: **Anyanwu v South Bank Student Union** [2001] IRLR 305;

(iii) There is a shifting burden of proof.

(5) The claimant's case must ordinarily be taken at its highest: **Mechkarov**.

(6) Particularly where a litigant in person is involved, the tribunal should do more than simply ask the question orally to be taken to the relevant material. The Tribunal should carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding that there is nothing of substance behind it: **Cox v Adecco Group UK** [2021] ICR 1307 quoting Choudhury P in **Malik v Birmingham City Council UKEAT/0027/19/BA**.

The appellant's case

14. Mr Burns said that this is a paradigm case where oral evidence was at the heart of it. He reminded me that the tribunal here was decided before the **Cox** guidance was published, and he said the judge fell into almost exactly the same trap as the tribunal in **Cox**. In what was

essentially a telephone hearing, an unrepresented claimant did not understand the factors that she needed to emphasise in answer to the tribunal's questions about her case. As it was put by HHJ Taylor in the **Cox** case, she was like **"a rabbit in the headlights"**. He said that although the tribunal judge recited the legal principles about the exceptional threshold for striking out discrimination cases, he did not apply them.

15. He referred to eight factors I should take into account of which the four most important seem to me to be:

(a) one key event that on an Asian manager leaving in early 2016, she had said to the Claimant that both she and a colleague were being discriminated against because of her colour;

(b) the tribunal at a full hearing would need to investigate the extent to which the senior manager had responsibility for contact with Mr Capp to assess whether his decision was tainted by prejudice;

(c) the respondent's HR officer accused a family member of the claimant of being aggressive, which the ET should have recognised as a common stereotypical trait, but that it was also notable that Mr Capp in dismissing referred to the claimant's manner had exacerbated the situation. The tribunal should have investigated what aspect of a black female's manner was taken by a white male to be objectionable. He said that I should take account of the fact that the respondent's reason for dismissal was on any view fairly extreme and he cited particular examples of that.

The respondent's case

16. Mr Isaacs' response is that, even if it is appropriate to take this into account which he denies, the material in the unfair dismissal case had nothing to do with Mr Capp in terms of discrimination. He also says it is no part of the EAT's function to overturn the tribunal's decision simply because it

believes the tribunal came to a wrong conclusion. The question is whether it was a permissible conclusion, the tribunal having properly directed itself.

17. As to the claimant's victimisation claim, he notes that the claimant seemingly relied upon three protected acts. The first was an act of Chris, but the claimant acknowledged she did not say in those complaints that the colleague's behaviour was because of race or sex. The second was her discussion with HR on 2 June which again did not reference race or sex. Lastly there was a witness statement commenting on the behaviour of a colleague, who may or may not have been of Asian ethnicity.

18. Mr Isaacs says that there was absolutely no evidence that the claimant did a protected act. They were merely complaints about treatment which do not so qualify. He relies on the fact the judge noted the claimant did not link any of the historic matters to Mr Capp, so none of these were capable of shifting the burden of proof.

Discussion

19. It is first important to recognise that I am not deciding this matter afresh but instead considering whether the employment judge erred in law. I regard it as unfortunate that the claimant as a litigant in person was effectively put on the spot to explain her case and well imagine that this might have caused her stress. She may not have done herself justice in the answer of "maybe" which she gave But I think one must also stand back and look at the missed opportunities the claimant had to clarify what her case was outside the hearing. I think the judge did look beyond this to the pleadings and other core documents as he was required to do.

20. It is also crucial to recognise that the complaint was one of discriminatory decision to dismissal and not a series of incidents and that this dismissal was determined solely by Mr Capp.

Although the actions of others within the company might be of some limited inferential value, the key question of whether there was an assertion that Mr Capp's reasoning was influenced in any way, however, small, by the discrimination, was what was important and there was not. The case of **Reynolds v CLFIS (UK) Limited** [2015] EWCA Civ 439 is important to bear in mind.

21. I do not think any weight can be placed in this regard on the decision of EJ Quill on the unfair dismissal aspect in criticising the judgment under appeal for two reasons: (a) it was reached several months after the strike out application; (b) it was considering a different set of issues. But even if I am wrong on this, I do not think anything decided there would influence my decision here. I consider that it was relevant to pay considerable attention of lack of reference to discrimination on the part of Mr Capp in the witness statement of the claimant in particular, but also her supporting witnesses.

22. Given the decision on the sift of Judge Coppel QC, I should concentrate on the five issues he identified as potentially sufficient to shift the burden of proof when taking the claimant's case at its highest.

23. The first was that a black colleague informed the claimant that they were both being discriminated against because of their colour. This allegation relates to a statement made by a third party and was stated to be about Mr Capp, so I do not think that this is relevant.

24. Secondly, the appellant alleged that her final written warning was based on an allegation that was a complete fabrication. This was not in fact what the claimant's case was: see paragraph 6.9 (page 104). It was not that the allegation was false as such but that it had occurred on a different day to that which was stated. In any event, whether or not Tom had a discriminatory mindset was not part of the case advanced by the claimant and could not be relevant to the decision taken by Mr Capp save somewhat relevant background.

25. Thirdly, it was said that she had been dismissed for matters relating to the investigation of a grievance submitted by colleagues, but her own grievance was not investigated. The individual who was accused of not addressing the claimant's grievance was, however, Jessica Wheeler and not Mr Capp. There was no evidence that Mr Capp even knew of any oral grievance. Again, it seems to me that **Reynolds** is important here. Mr Burns said that they (Ms Wheeler and Mr Capp) were both in the same HR department. I do not think that this matters. The allegation of discrimination was solely about Mr Capp.

26. Fourthly, her dismissal was harsh but in fairness is not sufficient to shift the burden of proof: see **Bahl v The Law Society** [2003] IRLR 640.

27. Fifthly, a sexist conversation took place in front of her in January 2016. Even if true, this was not said to be a conversation involving Mr Capp.

28. As to victimisation, making a criticism without suggesting it was in some sense an allegation of discrimination, is not sufficient to amount to a protected act: **Benveniste v Kingston University EAT 393/05 and Fullah v MRC UKEAT/0586/12/RN**.

29. Sixth, the claimant did not allege that Mr Capp knew about any alleged protected act.

30. I am not altogether sure I would have reached the same conclusion as the judge in this case, but that is not the issue. The question is whether I find an error of law in the decision or perversity. I do not think that **Cox** although a useful distillation of the principles really changes the underlying position. In particular, in deciding that there is no error of law: (a) I refer to the five points above; (b) the claimant has several opportunities to tie Mr Capp to be the person with the discriminatory motivation; (c) I do not think that it is appropriate to have regard to the later unfair dismissal decision.

But even if it is, I cannot see anything there that creates a shifting of the burden. (d) Although allegations against others were of marginal relevance, the tribunal may decide to strike out if there was no causation pleaded in respect of the sole person who was alleged to have discriminated where there were several opportunities to do so. Ultimately, it did not matter whether there were other individuals within the business who may have discriminated as that was not her pleaded case.

31. Although the claimant may have subjectively felt disadvantaged by being asked what her case was, it was legitimate to do so in the circumstances and it should have been easy for her to identify Mr Capp as the discriminator as this was really her case. It would have been wrong not to give her that opportunity. I do not think the "maybe" response was decisive of the decision made. Instead, the response is at paragraphs 20 and 25 of the judgment.

32. The piece of the jigsaw which remains out of place was the connection between her dismissal and sex and race. In relation to victimisation, there was a lack of information or evidence connecting the dismissal to the protected acts.

33. I also bear in mind what HHJ Tayler said in paragraph 32 in **Cox** about the duty of a litigant in person. Although the judge might have rolled his sleeves up further, he did, I think, look at the core documents presented to him.

34. Overall and stepping back from the detail, I do not think that what the claimant put forward in her pleadings raised an inference of discrimination by Mr Capp over her dismissal. I think the judge properly directed himself on the authorities, realised it was a draconian step to strike out and I do not think he reached a perverse conclusion.

35. I second his remarks that **"it is extremely difficult to discern the full details of the**

claimant's case from the pleadings, her other documents or the witness statements" (paragraph 17 of the decision). The tribunal did not make any findings of fact, in my view, or determine any factual disputes against her.

36. I dismiss the appeal but wish to thank both counsel for their considerable assistance in this case.