



EMPLOYMENT TRIBUNALS

Claimant: Ms G Williams

Respondent: Maidstone & Tunbridge Wells NHS Trust

OPEN PRELIMINARY HEARING

Heard at London South: by CVP

On: 29 September 2020

Before: Employment Judge Truscott QC (sitting alone)

Appearances

For the claimant: in person

For the respondent: Ms K Shields of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The claim of disability discrimination is struck out on the grounds that the claimant has not established that she was disabled on account of anxiety/stress/depression at the relevant time in accordance with section 6(1) of the Equality Act.
2. In any event, the claims of direct disability discrimination and failure to make reasonable adjustments have no reasonable prospect of success and are struck out under Rule 37(1)(a).
3. The claim of detriment on account of trade union activities is struck out as it has no reasonable prospects of success under Rule 37(1)(a).
4. The claimant is not permitted to amend her claim to add a claim for failure to allow her time off for her trade union duties.

REASONS

Preliminary

5. This has been a remote hearing because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.

6. This Preliminary Hearing was listed to determine the following issues which were identified at a Preliminary Hearing on 4 May 2020 as follows:
 - a. To determine whether the claimant was a disabled person within the meaning of s.6 of the Equality Act 2010 (“EqA”) at all material times.
 - b. If time allows, to determine any application by the respondent to strike out the claim or parts of it, or for a deposit order to be made.
 - c. To finalise the issues for the final hearing and discuss case management.
7. In relation to the third issue, case management orders for the hearing on 22-26 March 2021 are issued in a separate document.
8. The claimant applied to amend her claim to bring a claim for failure to allow her time off for her trade union activities, under s.168 and/or s.170 Trade Union and Labour Relations (Consolidation) Act 1992.

The claim

9. The claimant resigned on 10 October 2019. Her ET1 is dated 1 November 2019. Her Grounds of Complaint did not particularise her direct disability discrimination and trade union activity claims.
10. The respondent has requested that the claimant properly particularise these claims in the following documents:
 - a. The Grounds of Resistance dated 11 December 2019.
 - b. A request for Further and Better Particulars dated 17 February 2020.
 - c. The Amended Grounds of Resistance dated 24 April 2020.
 - d. The Further Amended Grounds of Resistance dated 19 June 2020.
11. In relation to the disability discrimination claim, the respondent has identified within the documents listed above that the basis upon which the claimant pursues this claim is unclear.
12. In relation to the trade union activities claim, the respondent has identified in the documents listed above that the claimant provides information as to the alleged detriment that she has suffered, the act(s) to which this relates and date(s) upon which these occurred.
13. On 4 May 2020, the Tribunal ordered that the claimant must provide, by 1 June 2020,

“full details of each occasion on which she was subjected to this treatment [alleged disability discrimination by way of the Respondent accusing her of having made mistakes on three occasions], including the date(s) on which it occurred, the person or people involved and details of what was said, and by what means. She must also confirm whether she relies on an actual comparator ... or a hypothetical comparator”
14. The claimant has responded by letters dated 1 June 2020, 12 June 2020 and an undated letter received on 28 June 2020. Despite these responses, the claimant has not provided the information required by the Order. Her letter dated 1 June 2020 states only that “In March, April and May I was accused of making mistakes, it was

always after I'd returned from holiday." On the assumption that the claimant is referring to 2019, the respondent has no information about the precise dates of these alleged events, who was involved, what was said and by what means, and of what the claimant was apparently accused.

15. The claimant has not provided any detail as to who her comparator is.

16. The Order of 4 May 2020 summarises the Claimant's trade union detriment claim as "the above less favourable treatment amounted to detriments which had the purpose of preventing or deterring her from taking part in the activities of an independent trade union at an appropriate time, or penalising her for doing so." However, the alleged less favourable treatment relating to the claimant's disability discrimination is not particularised and therefore is not known to the respondent. As a result, the respondent remains unable to comment on any effect such alleged events would have had, if any, upon the claimant's trade union activities.

17. The claimant had a further opportunity to comply with the Order of the Tribunal in correspondence with the respondent, and by way of response to the Further Amended Grounds of Resistance. To date, the further information has not been forthcoming. The claimant was unable to provide any further information at the hearing itself.

18. The respondent remains unable to respond to the claimant's claims of disability discrimination and detriment related to trade union activities and unable to understand the case they are required to answer.

19. The medical evidence and information provided by the claimant supports that she suffered with stress and anxiety from August 2016 until January 2017 with depression raised from September 2018. Following treatment, the claimant made a good recovery and returned to work. There is no evidence that stress, anxiety/depression were raised until in or around May 2019 when the claimant flagged this by email dated 7 May 2019 sent to Lucie Dodd. The claimant was signed off work from 25 June 2019 with stress/anxiety which continued until her resignation on 11 October 2019. The dates of the alleged acts are understood to be March, April and May 2019, if these dates are correct, there is no evidence to support that the stress, anxiety/depression had an adverse effect on her ability to carry out normal day to day activities, the effect of which was substantial and long term. The claimant in evidence said that she had been prescribed Prozac [64]. She was unable to be specific about the date or the period she was referring to.

20. As part of her direct disability discrimination claim, the claimant has alleged that she was subjected to less favourable treatment due to her disability by way of a letter dated 12 July 2019 inviting her to an investigation meeting relating to her conduct and behaviour (paragraph 6(iv)(b) of the Order of 4 May 2020). The respondent is unable to understand how the sending of this letter, which was related to the claimant's failure to book a cancer patient's follow up appointment as directed by a Consultant on 20 July 2018, amounts to less favourable treatment relating to disability. In addition, if it is alleged, this letter did not prevent or deter the claimant from taking part in the activities of an independent trade union at an appropriate time or penalising her for

doing so. The claimant has provided no information to support any allegation that this letter had any such detrimental effect related to her trade union activities.

21. It appears that the claimant alleges she was subjected to less favourable treatment on the basis of disability when she was accused of having made “mistakes” in March, April and May. Regardless of the year in which these events are alleged to have taken place, this claim is out of time. If these three alleged incidents are linked to her claim for detriment related to trade union activities, they are also out of time. The isolated incidents alleged to have taken place on three discrete dates between March and May are not likely to be continuing acts for the purposes of section 123(1) Equality Act 2010 nor section 147(1) Trade Union and Labour Relations (Consolidation) Act 1992.

22. The claim for failure to make reasonable adjustments is out of time. The claim is that the respondent applied a PCP on or around March 2019 of providing an excessive workload to the claimant and others. Although the respondent denies providing an excessive workload to the claimant, steps were taken by the respondent in May and June 2019 to alter the claimant’s workload.

23. There was no basis provided by the claimant to decide that it would be just and equitable to extend time. It was reasonably practicable for the claimant to present and particularise these claims in time.

Relevant Legal Framework

24. Section 6(1) of the Equality Act defines a disabled person as a person with a disability. A person has a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Each component of the definition is subject to further elucidation within the Act.

Requirement of fair notice of a claim

25. It is trite to say that parties should know, in advance, reasonable details of the nature of the complaints that each side is going to make at the hearing, see **White v. University of Manchester** [1976] ICR 419 EAT.

STRIKING OUT

26. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v. St Christopher’s Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

Rule 37 of the Employment Tribunal Rules 2013 provides materially:-

“(i) At any stage in 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) Where it is scandalous or vexatious or has no reasonable prospect of success...”

55. The words are “no reasonable prospect”. Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in *Balls v Downham Market High School and College* [2011] IRLR 217, EAT (paragraph 6):

“The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words “no” because it shows the test is not whether the Claimant’s claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects...”

56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

27. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

“There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach.”

28. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

29. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

- (i) Ordinarily, the Claimant’s case should be taken at its highest.
- (ii) Strike out is available in the clearest cases – where it is plain and obvious.
- (iii) Strike out is available if the Claimant’s case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

30. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

31. In **Ahir v. British Airways plc** [2017] EWCA Civ 1392 CA, Lord Justice Underhill reviewed the authorities in discrimination and similar cases and held at paragraph 18, that:

"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."

Amending the claim

32. Employment tribunals have a general discretion to grant leave to amend the claim. It is a judicial discretion to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions'. General guidance on making amendments to a claim is contained in **Selkent Bus Co Ltd v. Moore** [1996] ICR 836 EAT and **Cocking v. Sandhurst (Stationers) Ltd** [1974] ICR 650 NIRC. There is a distinction which requires to be drawn between:

- (i) Amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint. Amendments falling within this category are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based, i.e. re-labelling.
- (ii) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim. As Harvey notes at paragraph 312.01 in relation to this type of amendment: "So far as category (ii) is concerned, the tribunals and courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded.
- (iii) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

33. In essence, **Selkent** said that whenever the discretion to grant an amendment was invoked, "a tribunal should take into account all the circumstances, [including but not limited to the nature of the amendment, the applicability of time limits and the timing

and manner of the application]” before balancing “the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.” This approach was approved by the Court of Appeal in **Ali v. Office of National Statistics** [2005] IRLR 201.

34. There is also Presidential Guidance.

35. In **Galilee v. Commissioner of Police of the Metropolis** [2018] ICR 634, the Employment Appeal Tribunal examined the authorities on the effect of granting an amendment on the time limits for claims.

36. When considering whether to allow an amendment, an employment tribunal should analyse carefully the extent to which the amendment would extend the issues and the evidence. Although the allegations in the original claim and in the amendment were not identical, Rimer LJ, giving the only reasoned judgment of the Court, held that ‘the thrust of the complaints in both is essentially the same’. The fact that the whistleblowing claim would require an investigation of the various component ingredients of such a case did not mean that ‘wholly different evidence’ would have to be adduced. **Evershed v. New Star Asset Management Holdings Ltd** [2010] EWCA Civ 870 at para 50.

Time limits and extension

Not reasonably practicable to present claim in time

37. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable. The leading authority on the subject is the decision of the Court of Appeal in **Palmer and Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA.

Just and equitable extension

38. The EqA permits the Tribunal to grant an extension of time ‘if, in all the circumstances of the case, it considers that it is just and equitable to do so’. They entitle the [employment] tribunal to take into account anything which it judges to be relevant’: **Hutchison v. Westward Television Ltd** [1977] ICR 279, EAT. Notwithstanding the breadth of the discretion, it has been held that ‘the time limits are exercised strictly in employment cases’, and that there is no presumption that a tribunal should exercise its discretion to extend time on the ‘just and equitable’ ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, ‘the exercise of discretion is the exception rather than the rule’ (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ).

DEPOSIT ORDERS

39. A deposit order can be made if the specific allegation or argument has little reasonable prospect of success. In **Hemdan v. Ishmail** [2017] IRLR 228, Simler J, pointed out that the purpose of a deposit order 'is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails' (para 10), she stated that the purpose 'is emphatically not to make it difficult to access justice or to effect a strike out through the back door' (para 11).

40. As a deposit order is linked to the merits of specific allegations or arguments, rather than to the merits of the claim or response as a whole, it is possible for a number of such orders to be made against a claimant or respondent in the same case.

CONCLUSION

41. The Tribunal decided to refuse the claimant's application to amend her claim to add a claim for failure to allow her time off for her trade union activities. The claimant has provided no particularisation of these claims making it not possible for the respondent to respond and for the complaint to be determined by a Tribunal.

42. There is no dispute that the impairments of arthritis and hypertension are disabilities for the purpose of section 6(1) of the Equality Act 2010. The question which arises is whether the claimant is disabled for the purposes of section 6(1) of the Equality Act 2010 by way of stress/anxiety/depression. On the evidence narrated in paragraph 19, she does not meet the statutory definition.

43. The claimant has provided inadequate particularisation of her allegations of direct disability discrimination making it not possible for the respondent to respond and the complaint to be determined by a Tribunal.

44. The claimant alleges that the respondent applied a PCP in or around March 2019. As identified at paragraph 22, this claim has no reasonable prospects of success. In addition, this claim is out of time for the purposes of section 123(1) of the Equality Act 2010.

45. The claimant alleges that she suffered detriment on grounds relating to trade union activities. The claimant has provided no particularisation of these claims making it not possible for the respondent to respond and the complaint to be determined by a Tribunal.

46. The Tribunal concluded that the respondent is prejudiced by its continuing inability to understand the case it is required to meet in relation to these allegations. Elements of the claim are time barred and any extension of time would further prejudice the respondent, given the time which has now passed since these alleged incidents took place. At least one of the individuals named in other parts of the claimant's claim has now left the respondent's employment.

47. The Tribunal concluded that these elements of the claimant's claim are out of time, inadequately particularised, and have no reasonable prospects of success.

48. Although the claimant has also failed to comply with an order of the Tribunal dated 4 May 2020 to particularise her direct discrimination and trade union detriment claims, the Tribunal did not consider it appropriate to strike the cases out for non-compliance under Rule 37(1)(c). The claimant would have complied if she could.

49. The Tribunal considered whether it should make a deposit order rather than strike out the claims but the claims are incurably deficient.

50. The Tribunal then took on board the authoritative exhortation about not striking out discrimination cases and sought not to be too pedantic about the pleadings when weighing up the appropriate course of action as the claimant was a party litigant. The Tribunal exercised its discretion considering the claims in the round and also individually. The Tribunal concluded that the claims based on disability and trade union activity as detailed in the judgment had no reasonable prospects of succeeding and should be struck out under Rule 37(1)(a) of the Employment Tribunal Rules.

Employment Judge Truscott QC

1 October 2020