



EMPLOYMENT TRIBUNALS

Claimant

Mr. L. Mirador

v

Respondents

**Motus Commercials
Limited**

Heard at Birmingham

On: 7 November 2022

Before: Employment Judge Wedderspoon

Representation:

Claimant: In person

Interpreter : Mr. Gilbert Babida

Respondent: Mr. J, Turney, Counsel

JUDGMENT

1. The claimant was disabled at the relevant time (February 2020 to July 2021) by reason of diabetes within the meaning of section 6 of the Equality Act 2010.
2. The Tribunal is not satisfied that all of the claimant's claims have no reasonable prospect of success and accordingly refuses to strike the claims out pursuant to section 37 (1)(a) of the Employment Tribunal Rules;
3. The Tribunal is not satisfied that all of the claimant's claims have little reasonable prospect of success (except for one allegation) and accordingly refuses to make a deposit order in respect of all claims pursuant to section 39 of the Employment Tribunal Rules.
4. The claimant must pay a deposit of £500 as a condition of continuing with the allegation that he was automatically unfairly dismissed by reason of making an alleged public interest disclosure in his grievance dated 22 June 2021.

REASONS

Background

1. The claimant was employed by the respondent from 8 or 9 July 2010 to 16 July 2021. By claim form dated 19 September 2021 the claimant claimed unfair dismissal, age discrimination, race discrimination, disability discrimination, notice pay and public interest disclosure.
2. This claim came before Employment Judge Kelly on 18 February 2022. Unfortunately, it could not proceed because there was no interpreter available to assist the Tribunal. The claimant's language is the Filipino language of Tagalog.

Issues

3. An open preliminary hearing was listed today to deal with the following issues (if time permitted) :-
 - (a) Did the claimant have a disability under the Equality Act 2010 at the relevant time which the claimant says is February 2020 to July 2021. The claimant relies upon the disability of diabetes. The particular issue to be determined as identified by the respondent is whether the claimant's diabetes had a substantial adverse effect on the claimant's ability to carry out normal day to day activities at the relevant time. (The respondent does not dispute that the claimant had diabetes or that the condition was long term);
 - (b) Does the Tribunal allow the claimant to amend his claim to bring the claims referred to in his handwritten document headed 2.2/2.3 Amendment Additional information of my claim
 - (c) Should the Tribunal strike out the following of the claimant's claims on the grounds that they have no reasonable prospect of success
 - (i) the claim of age discrimination;
 - (ii) the claim for race discrimination;
 - (iii) the claim for public interest disclosure.
 - (d) Alternatively should the claimant be required to pay a money deposit not exceeding £1,000 to the Tribunal as a pre-condition of being allowed to continue with the claims listed above on the grounds that they have little reasonable prospect of success.

The Law

Strike out/Deposit

4. Pursuant rule 37 of 2013 rules, a tribunal has a discretion to strike out a case 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 a number of grounds including that the case has no reasonable prospect of success.
5. Rule 39 of the 2013 Rules deals with deposit orders. Where a Tribunal considers that any specific allegation or argument in the claim or response has little reasonable prospect of success it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
6. Rule 34 (2) states that enquiries should be made into a party's means before the order is made. Rule 34 (5) addresses the position where the sum is paid in compliance with a deposit order and the allegation or argument

does not succeed at the merits hearing for substantially the reasons given in the deposit order. The paying party is treated as having acted unreasonably for the purposes of costs consequences unless the contrary is shown and the deposit is paid to the other party/parties. If this scenario does not eventuate then the deposit is refunded to the paying party.

7. In the case of the **Garcia v the Leadership Factor Limited (2022) EAT 19** it was stated that deposit orders (paragraph 36) have a valuable role to play in discouraging claims or defences that have little reasonable prospects of success without adopting the far more draconian sanction of dismissing the claim or response altogether. The deposit order affords a paying party the opportunity for reflection.
8. In the case of **Hemdan v Ishmail & Al-Megraby (UKEAT/0021/16)** it was stated 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. Further it was stated that claims or defences with little prospect, cause costs to be incurred and time to be spend by the opposite party which is unlikely to be necessary. They are likely to cause both wasted time and resource and unnecessary anxiety. They also occupy the limited time and resources of courts and tribunals that would otherwise be available to other litigants and do so for limited purpose or benefit. Mrs. Justice Simler stated
“The purpose is emphatically not in our view ..to make it difficult to access justice or to effect a strike out through the back door. The requirement to consider a party’s means in determining the amount of a deposit order is inconsistent with that being the purpose..Likewise the cap of £1000 is also inconsistent with any view that the object of a deposit order is to make it difficult for a party to pursue a claim to a Full Hearing and thereby access justice..”
9. Evaluating the likelihood of success for these purposes entails a summary assessment intended to avoid cost and delay and a mini trial of the facts to be avoided (see paragraph 13 of **Hemdan**). If the tribunal considers that an allegation has little reasonable prospects of success the making of a deposit order does not follow automatically but involves discretion which is to be exercised in accordance with the overriding objective having regard to all the circumstances of the particular case.
10. The extent to which the tribunal may have regard to the likelihood of disputed facts being established at the full merits hearing has been considered by the EAT in **Jansen Van Rensburg v Royal Borough of Kingston Upon Thames UKEAT/0096/07**; the assessment by the Tribunal is a broad one and there is no justification to limit matters to be determined to purely legal ones. In **North Galmorgan NHS Trust v Ezsias (2007) IRLR 603** it was held that *“a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.”*

11. In the case of **Anyanwu v South Bank Student Union (2001) ICR 391** it was stated by Lord Steyn at paragraph 24 *“For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process*
 12. The approach to be adopted by the Tribunal in a strike out application is to take the claimant’s case at its highest.
 13. In the case of **Mechkarov v Citibank NA (2016) ICR 1121** the proper approach to a strike out application is that (a) only in the clearest case should a discrimination claim be struck out (b) where there are core issues of fact that turn to any extent on oral evidence they should not be decided without hearing oral evidence (c) the claimant’s case must ordinarily be taken at its highest (d) if the claimant’s case is “conclusively disproved by” or is “totally and inexplicably inconsistent” with undisputed contemporaneous documents it may be struck out and (e) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.
 14. In the case of **Madarassy v Nomura International Plc (2007) EWCA Civ 33** it was held that there is a need for something more than just a difference in status and a difference in treatment.
 15. In the case of **Malik v Birmingham City Council (UKEAT/0027/19)**. The President stated that the Tribunal should carefully consider the claim as pleaded and as set out in relevant supporting documentation before concluding there is nothing of substance behind it. Insofar as it concludes that there is nothing of substance behind it, it should in accordance with the obligation to adequately explain its reasoning set why it concludes that there is nothing in the claim.
- Disability
16. For the purposes of section 6 of the Equality Act 2010 (EqA) a person is said to have a disability if they meet the following definition:
*“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.”*
 17. The burden of proof lies with the claimant to prove that he is a disabled person in accordance with that definition.
 18. The term “substantial” is defined at section 212 as *“more than minor or trivial”*. Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socializing (see D2 to D9 of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)).
 19. In the case of **Chief Constable of Norfolk v Coffey (2019) IRLR 805** the Court of Appeal held that the phrase “normal day to day activities” should be given an

interpretation which encompasses the activities which are relevant to the participation in professional life or working life. In the case of **Igweike v TSB Bank plc (2020) IRLR 287** it was held that the Tribunal must engage with the evidence about what were said to be the effects in the work context.

20. Further clarity is provided at Schedule 1 which explains at paragraph 2:
*“(1) The effect of an impairment is long term if –
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.
(2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”*
21. Likely should be interpreted as meaning “it could well happen” rather than it is more probable than not it will happen; see **SCA Packaging Limited v Boyle (2009) ICR 1056**. In the case of **Patel v Metropolitan Borough Council (2010) IRLR 280** the EAT stated that the issue of whether the effect of an impairment is long term may be determined retrospectively or prospectively. A claimant must meet the definition of disability as at the date of the alleged discrimination.
22. As to the effect of medical treatment, paragraph 5 provides: -
*(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day to day activities if- (a) measures are being taken to treat or correct it and (b) but for that it would be likely to have that effect.
(2) Measures include in particular medical treatment...*
23. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government’s office for disability issues entitled “Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability” The guidance should not be taken too literally and used as a check list (see **Leonard v Southern Derbyshire Chamber of Commerce (2001) IRLR 19**).
24. Some guidance is given in paragraph B1 as to the meaning of “Substantial adverse effects” namely,
“The requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect.”
25. Pursuant to paragraph B7 it is stated that *“account should be taken of how far a person can reasonably be expected to modify his or her behaviour for example by use of a coping or avoidance strategy to prevent or reduce the effects of an impairment on normal day to day activities. In some instances a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances even with the coping or avoidance strategy there is still an adverse effect on the carrying out of normal day-to-day activities.”*

26. Paragraph B13 and 14 states

“This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined or if it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of schedule 1.

For example if a person with a hearing impairment wears a hearing aid the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid. Similarly in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition could be if he or she were not taking that medication or following the required diet.

The Hearing

27. Following swearing in the interpreter, Mr. Babida spoke to the claimant to ensure they could understand one another.
28. Prior to dealing with the issues above, the Tribunal took some time to clarify the claimant’s originally pleaded case. The Tribunal explained the types of discrimination and the claimant confirmed his case as set out below. The respondent accepted that the claimant was simply providing further and better particulars of his original claim for clarification.
29. The respondent provided a 9 page skeleton argument titled “Respondent’s note for the preliminary hearing”. The Tribunal gave the claimant and the interpreter the requested time of one hour for the interpretation of the document and for a rest break for the interpreter.
30. The claimant relied upon a disability impact witness statement p.70-1. The Tribunal was provided with an agreed electronic bundle of pages 422.
31. Following discussion with the claimant he stated that the document called “Amendment and Additional Information of my claim” was not an application to amend his case at all. He said it set out the background of ill treatment he suffered in the course of his employment with the respondent and he would seek to rely upon these instances so show his dismissal was based on a discriminatory and unfair reason.

The original claim/clarification at OPH

32. The claimant clarified his original claim as
 - (a)Unfair dismissal – the focus of the claimant’s case is that the sanction of dismissal was too harsh. He had been employed for 11 years; had a clean disciplinary record and the incident for which he was dismissed was a one off and may have justified a warning but not a dismissal sanction;
 - (b)Direct race discrimination – the harshness of the dismissal sanction has led the claimant to believe that part of the reason behind it was his race. He says he was dismissed because he is Fillipino;
 - (c)Age discrimination – the claimant was aged 54 at the time of his dismissal and he believes that the respondent took the view he was getting old and could not do heavy difficult jobs. He brings an indirect age discrimination complaint.

(d)Discrimination arising from disability – the claimant says he is disabled by reason of disability – he says he was dismissed because the respondent took the view he could not do heavy difficult jobs and this was related to his disability of diabetes;

(e)Notice pay – the claimant was dismissed summarily- he says that this was not an incident where he should have been dismissed without notice;

(f)Automatic unfair Dismissal because of a public interest disclosure- the claimant said he raised a public interest disclosure in his grievance dated 22 June 2021 page 153 (4) of the bundle when he raised a health and safety concern that Tanya, a manager and Adam a supervisor were smoking outside the smoking designated area and near to the entrance of the building which contained inflammable products; he alleges this presented a health and safety risk.

The issue of disability

33. The respondent having accepted that the claimant has the long term condition of diabetes, the issue to be determined by the Tribunal was whether it had a substantial adverse effect on the claimant's ability to carry out normal day to day activities between February 2020 and July 2021.
34. The claimant provided a two page document pages 70 to 71 in support of his case. Although the claimant also referred to other conditions including psoriasis and high blood pressure, he confirmed at the hearing he was relying upon diabetes for the disability in this case but stated under cross examination that he believed his psoriasis (diagnosed in 2015/16) was related to his diabetes; he was not so clear about the relationship between his high blood pressure and diabetes but says he was diagnosed with this condition along with his diabetes in 2006. The claimant described urinating more frequently a lot at night; having disturbed sleep; suffering from fatigue which slows light activities and stops him performing heavy activities. He described that his diabetes has more than a minor effect; although it doesn't stop him doing something completely it does make it more difficult for him.
35. He described taking the medication of metformin of 500mg 2 tablets twice per day with food. He also takes gliclazide 80mg 2 tablets to be taken twice per day with food for his diabetes and empagliflozin 25 mg taking 1 tablet daily for his diabetes. He modifies his diet so to exclude sugars and sweets and limits his alcohol. The claimant gave evidence that if did not take these medications or modifications to his lifestyle his blood sugar would be affected. He altered his medication to control his diabetes and regularly checked his blood sugar level which could go up or down.
36. He said he felt fatigued by reason of his diabetic condition. He found heavy work difficult such as working on bull joints on heavy vehicles with large wheels when he had to use a hammer with force. It was suggested to the claimant in cross examination that prior to the incident for which he was dismissed he had a cold which could have affected his energy levels. The claimant stated by reason of his diabetes his immunity was affected and he easily got colds.
37. Sometimes his vision was affected and he struggled reading details. Under cross examination it was suggested in accordance with this statement that vision issues were related to blood pressure. The claimant said if his blood sugar was high or his blood pressure was high it affected his vision.
38. Mr. Tunley on behalf of the respondent relied upon his skeleton argument and submitted that the claimant had failed to establish at the material time that diabetes had a substantial effect on everyday activities. He described the

medical picture as being confused; there was no direct medical evidence to establish a link between the claimant's diabetes and psoriasis. Further the claimant also suffered from high blood pressure and osteo-arthritis which may impact on his ability to undertake heavy manual work. Dizziness too could be related as suggested in the claimant's witness statement as related to his high blood pressure.

39. The claimant submitted that he has a life long condition of diabetes; as a result he felt weak at times; thirsty and his body was affected.

Conclusions

40. The starting point is that the claimant has the burden of establishing that he met the definition of disability at the relevant time in accordance with section 6 of the Equality Act 2010. The Tribunal takes account of the fact that the claimant is a litigant in person and has not provided direct medical evidence about the connection between his various conditions and diabetes. The Tribunal accepts that the medical picture is not straightforward but has had the benefit of hearing from the claimant himself who was diagnosed with this condition since 2006 and is under the care of his G.P.
41. The Tribunal accepts the claimant's evidence that by reason of his diabetes his immunity is affected and he is liable to suffer from colds and that his G.P. has advised him that his skin condition is related to his diabetic condition.
42. In the absence of taking his regular medication and adopting other measures such as the modification of his diet the Tribunal accepts the claimant's evidence that his blood sugars would be out of control with the inevitable consequence that his symptoms of lethargy. Lethargy means that the claimant is able to carry out heavy manual work but with difficulty. The impact of his diabetic condition is that he requires to toilet more frequently which disturbs his sleep which has an impact on his energy levels so that heavy work remains difficult.
43. The Tribunal notes that the claimant has osteo-arthritis (which is not relied upon as a disability in this case) which will also impact on his ability to undertake physical tasks. The Tribunal has to consider whether the impairment of diabetes had a substantial (that is more than minor or trivial) affect on normal day to day activities. The Tribunal identifies the normal day to day activities as including sleeping, toileting, and manual work.
44. On the basis of the claimant's oral evidence which the Tribunal finds honest this claimant's normal day to day activities of sleeping, toileting and manual work were affected by more than a trivial degree by his diabetic condition which made him fatigued. In the absence of his medication or measures in relation to his diet, the effect would have been more pronounced. However, the evidence of the claimant is accepted by the Tribunal and although the claimant's high blood pressure and osteo-arthritis would also have had an impact on energy levels and consequent manual work, the Tribunal determines that the claimant's diabetes had a more than minor effect on these everyday activities over the relevant period. The Tribunal is satisfied that the claimant was a disabled person by reason of diabetes for the relevant period.

Amendment application

45. The claimant had prepared a document at pages 42 to 52. During discussion with the claimant, he clarified that he did not seek to add these matters as allegations to his claim but rather they were clarification of the way he feels he was treated unfairly in the disciplinary process and by way of background of discriminatory

treatment during his employment with the respondent; namely he will be relying upon this information so for the Tribunal to infer that his dismissal was discriminatory.

46. On this basis the Tribunal determined that an application to amend his claim was not actually pursued by the claimant. The claimant was informed that if he is seeking to rely upon these matters for background or as a basis for inference of a discriminatory dismissal he should set them out in his witness statement.

Strike out/deposit

47. The respondent applied to strike out/seek a deposit order for the complaints of discrimination and public interest disclosure. Although the respondent recognised the claimant had clarified his complaints today and a cautious approach should be made to strike out discrimination claims at an early stage following **Ezsisas**, it was submitted that the claims had no reasonable prospect of success. The respondent relied upon the fact that the claimant had the burden of establishing a prima facie case and that the claimant must establish more than a difference in status and a difference in treatment before the Tribunal could decide that an act of discrimination had occurred following **Madarassy v Nomura International plc (2007) IRLR 246**. Further it was submitted that even if the Tribunal found that the conduct complained of requires explanation before the burden of proof shifts there must be something that the treatment was due to the relevant protected characteristic. If the Tribunal was against him the respondent sought a deposit order.
48. In respect of the automatically unfair dismissal by reason of a public interest disclosure the respondent submitted that this claim had no reasonable prospect of success or little reasonable prospect of success. The claimant first made a "protected interest disclosure" in his grievance dated 22 June 2021. This was at a time when he was investigated for a misconduct matter; had been suspended and had been invited to a disciplinary hearing. He submitted even if the claimant could establish that he had made a public interest disclosure there was no reasonable prospect or little reasonable prospect of establishing that he was dismissed for it. Pursuant to section 103A of the ERA 1996 for the claimant to succeed the reason or the principal reason has to be making a public interest disclosure. The claimant here was subject to a disciplinary process for misconduct before the alleged disclosure. In any event the respondent argued that the claimant had not made a disclosure; he complained about smoking near the entrance of the building; it was disputed that he could have reasonably believed that this was a disclosure made in the public interest.
49. The claimant did not make a submission but simply stated that he had already set out in writing how he had been treated and he had been discriminated against. He further informed the Tribunal about his outgoings per month (approximately £1000); his financial liabilities of approximately £30,000 and his monthly net salary of £2,200. He has no savings.

Conclusion

50. The higher courts have warned the Tribunal against dismissing discrimination complaints save for in the clearest cases. The Tribunal notes

that the respondent's submission that it is not sufficient to succeed at final hearing in a discrimination complaint where the claimant relies upon a difference in status and difference in treatment. However, the Tribunal does not consider that the claimant does simply rely upon that; he informed the Tribunal today that there was a context of poor treatment during his employment; he had a clean disciplinary record and long service the sanction of dismissal was far too harsh. His case was that the sanction was so out of proportion with his conduct other factors namely discrimination were at play taking account the context of ill treatment. This can only be determined upon hearing the detailed evidence of the parties. In the circumstances the Tribunal can not be satisfied that the claims have no reasonable prospect of success and declines to strike out the discrimination complaints.

51. Similarly, the Tribunal undertaking its summary assessment of the case can not say that the claims have little reasonable prospect of success. The claimant in his background document relies upon a history he says of ill treatment which he will request the Tribunal to consider in inferring his dismissal was for a discriminatory reason. Therefore the Tribunal determines it can not be said that such claims have little reasonable prospect of success. Evidence must be heard prior to making a determination. The Tribunal declines to make a deposit order for the discrimination complaints.
52. In respect of the public interest disclosure claim, the claimant has made a potential public interest disclosure in his grievance document. In the case of **Chesterton Global Limited v Nurmohamed (2017) EWCA Civ 979** Lord Justice Underhill gave some guidance as to what might be considered to in the public interest; which includes the number of the group whose interests the disclosure served; the nature of the interests affected; the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing and the identity of the wrongdoer. The Tribunal needs to hear evidence to determine whether the claimant reasonably believed that the disclosure was made in the public interest. The Tribunal notes that the disclosure was allegedly made at a grievance hearing when the claimant had been suspended and facing a disciplinary hearing but the Tribunal can not say at this preliminary stage without hearing all of the evidence that the claimant has no reasonable prospect of success.
53. However, the Tribunal does determine that the automatic unfair dismissal claim had little reasonable prospect of success. The Tribunal makes this finding because the grievance was dated 22 June 2021 when the claimant alleged a supervisor and manager were smoking near the entrance of the workplace and not in the designated area which potentially was a health and safety concern. However, at the time of the alleged disclosure the claimant had already been suspended for misconduct and had been invited to a disciplinary hearing when he made this allegation. The Tribunal determines that this allegation has little reasonable prospects of success because there is a difficulty in establishing that the reason or principal reason for the dismissal was the disclosure and makes a deposit order.

54. The deposit order will be made in the sum of £500. The Tribunal determines that this is a fair sum taking account of the claimant's means and the guidance given in the case of **Hemdram** that a deposit order should send a signal to the claimant as to the little reasonable prospects of this claim without deterring him totally from bringing it.

Employment Judge Wedderspoon

10 November 2022

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