EMPLOYMENT TRIBUNALS

Claimant: **Mr F Yousafzai**

Respondent: **Government Digital Service**

Heard at: **East London Hearing Centre**

On: **1 August 2022**

Before: **Employment Judge Gardiner**

Representation

Claimant: No attendance

Respondent: Mrs Jennifer Gray

JUDGMENT

The judgment of the Tribunal is that:-

The Claimant's disability discrimination claim is struck out as having no reasonable prospect of success under Rule 37 Employment Tribunal Rules 2013.

REASONS

Introduction

1. This hearing has been listed to decide a Preliminary Issue. The issue is "whether to strike out the claim as having no reasonable prospect of success and/or to order a deposit order to be made". It was listed as an "in-person" hearing at the East London Employment Tribunal starting at 10am, with a time estimate of 1 day.

The Claimant's non-attendance

2. The Claimant has not attended the hearing. Mrs Jennifer Gray, counsel, has represented the Respondent. The first issue to decide was whether it was appropriate to proceed with the hearing in the Claimant's absence. The start of the hearing was delayed was 15 minutes to see whether the Claimant had been delayed in his journey to the Tribunal building. By 10.15am the Claimant had still

not arrived. There had been no communication from the Claimant to explain why he was not present. It was not possible to telephone the Claimant because he had not included a telephone number on the ET1 form.

3. The Respondent had prepared a bundle of documents comprising 123 pages which was provided at the start of the hearing. In advance of the hearing, I had also read the Tribunal file to ensure I had read all potentially relevant documents.

4. This hearing was originally listed to be heard as a telephone preliminary hearing for case management. The Claimant and the Respondent were told this in a letter dated 17 February 2022. On 7 March 2022, the Claimant asked for a direction, under Rule 42, for the hearing to be conducted in writing/email format. On 10 May 2022, Acting Regional Employment Judge Russell asked the Respondent to tell the Claimant and the Tribunal if it objected to the Claimant's suggestion that the hearing on 1 August 2022 should be conducted in writing. On 7 June 2022, the Respondent lodged a detailed Response in which it applied for the claim to be struck out. It also wrote to the Tribunal objecting to the preliminary hearing being held in writing.

5. On 6 July 2022, Employment Judge Burgher directed that the hearing on 1 August 2022 would take place in person to identify the issues. On 12 July 2022, the Claimant emailed:

> "I would have to ask for the hearing to be conducted in a written format as to whether in-person, via that video link, which, in itself, as if and whenever asked for, I would show and prove, is in violation of those aforementioned laws/acts"

6. On 18 July 2022, the Tribunal notified the parties that the hearing on 1 August 2022 would be held in person at the East London Tribunals. The notification provided the address of the hearing venue. It confirmed that the hearing would consider whether to strike out the Claimant's claim as having no reasonable prospect of success.

7. On 28 July 2022, the Claimant emailed the Tribunal again, referring back to his email of 12 July 2022. He wrote:

> "So to say, after my email, as of 12 July, not only all this matter/case should have been halted till those concerns raised have been given their due legal consideration, respect and appreciation, also, as previously mentioned by me, for this case having been going on for months now there shouldn't even be a PH now"

8. Given the wording at an earlier point in this email, I find that the Claimant was aware of the day long hearing scheduled to take place at the East London Employment Tribunal. I also find that the Claimant was continuing to argue that his complaints should be decided in writing rather than at an oral hearing. His stance was that proceeding with the Preliminary Hearing was inappropriate.

9. I have considered all the Claimant's correspondence with the Tribunal. I have not been able to identify any sufficient basis provided by the Claimant for adjourning or postponing the hearing. It has been listed as a Preliminary Hearing and both Claimant and Respondent have been properly notified of what would be decided at this Preliminary Hearing. The broad nature of the Claimant's claim and the nature of the Respondent's Response to that claim have been identified in writing. The Claimant has clarified he is not and never has been an employee or job applicant of the Respondent.

10. As a result, exercising my case management powers, I considered that it was appropriate to continue with the Preliminary Hearing in the Claimant's absence. As a reasonable adjustment, given the Claimant's condition, I have decided to send full written reasons for decisions made in the Claimant's absence, even though these have not been requested by the Respondent. In that way the Claimant ought to be able to understand why the decision has been taken.

The scope of this hearing

11. On 18 July 2022, the Tribunal listed this hearing "to decide whether to strike out as no reasonable prospect of success and/or to order a deposit to be paid". It ordered that the Respondent must list the allegations that the Respondent says should be struck out and explain why. The Respondent did this in a three-page letter dated 25 July 2022. Under the heading "Complaints brought by the Claimant" it repeated the eight bullet points contained in the document attached to the Claimant's Claim Form. These were as follows:

    - Some pages and document attachments are not written in plain English
    - Some tables do not have row headings
    - Some documents have poor colour contract
    - Some heading elements are not consistent
    - Some images do not have image descriptions
    - Some buttons are not correctly identified
    - Some error messages are not clearly associated with form controls
    - Many documents are in PDF format and are not accessible

12. It noted the Claimant's view that the Employment Tribunal website fails to meet accessibility standards. The Respondent's conclusion was that the Claimant's claim "is one which the Tribunal has no jurisdiction to consider and should be dismissed, alternatively struck out under Rule 37 … as an abuse of process/having no reasonable prospect of success".

13. The Tribunal has restricted itself to considering whether to strike out the Claimant's claim as having no reasonable prospect of success. The notification dated 18 July 2022 did not inform both sides that it would decide whether the Tribunal has jurisdiction to consider the claim or whether the claim was an abuse of process.

14. The Claimant has had time to consider that letter and respond by email dated 28 July 2022.

15. The Claimant's claim is a detailed complaint that the Respondent has not complied with its duties under the Public Sector Bodies (Websites and Mobile Applications) (No. 2) Accessibility Regulations 2018. Whilst his claim relates to Government websites generally, he refers specifically to the website layout and content for starting an Employment Tribunal claim.

16. Regulation 6 of those Regulations is expressed in the following terms:

> "Subject to regulation 7, public sector bodies must comply with the accessibility requirement."

17. The accessibility requirement is defined in Regulation 3 as "the requirement to make a website or mobile application accessible by making it perceivable, operable, understandable and robust". Regulation 10 states that the Minister for the Cabinet Office must monitor the compliance by public sector bodies of their websites and mobile applications with the accessibility requirement, on the basis of the monitoring methodology. Regulation 11 states that the enforcement body for a website or mobile application of a public sector body that is required to comply with the Equality Act 2010 is the Equality and Human Rights Commission. Regulation 12 states that "a failure by a public sector body to comply with the accessibility requirement is to be treated as a failure to make a reasonable adjustment". Regulation 13 states:

> "(1) if a person believes that a website or mobile application of a public sector body has failed to comply with the accessibility requirement, that person may notify the public sector body of that failure
>
> (2) A person may request information in an accessible format that has been excluded from a website or mobile application of a public sector body pursuant to regulation 4(2) or regulation 7(4).
>
> (3) A public sector body must provide a response to a notification or request made by a person under this regulation within a reasonable period of time.
>
> (4) If a public sector body does not comply with paragraph (3) of this regulation, or a person is dissatisfied with the response received, that person may complain to the applicable enforcement body."

18. The Regulations provide a clear mechanism for those who are dissatisfied with a public body's compliance with the accessibility requirement. The first step is to "notify the public sector body of that failure". In addition, or alternatively, the person may request information in an accessible format. It is then for the public sector body to provide a response within a reasonable period of time. At that point, if the person is still dissatisfied, they may complain to the Equality and Human Rights Commission as the enforcement body.

19. The Regulations do not confer any jurisdiction on the Employment Tribunal to decide whether the accessibility requirement has been satisfied. The Employment Tribunal only has jurisdiction to determine a dispute if Parliament has conferred jurisdiction to decide that dispute. The Claimant has ticked the box "disability discrimination". Section 120 Equality Act 2010 confers jurisdiction on Employment Tribunals to determine a complaint relating to a contravention of Part 5 (work). In Part 5, section 39 sets out the particular duties which apply to employers not to discriminate against employees. It states that the duty to make reasonable adjustments "applies to employers". It is clear from the way the section is worded that the duties apply only to employers and only apply in relation to their treatment of job applicants or employees.

20. The wording of the Claimant's complaint to the Employment Tribunal on 11 January 2022 indicates that he has contacted the Equality and Human Rights Commission to raise his concerns and remains dissatisfied with their response.

21. On 12 July 2022, the Claimant responded to the Respondent's contention that he was "not an employee of the Respondent, former employee of the Respondent or a job applicant for a role with the Respondent. He wrote "so no, I'm not and never said I am".

Legal principles

22. Rule 37 of the Employment Tribunal Rules 2013 is worded as follows:

> (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.

23. Choudhury J summarised the current, and well-settled, state of the law on strike out in **Malik v Birmingham City Council** (unreported) 21 May 2019 :

> "30. It is well established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see **Anyanwu v South Bank Bank Student Union (Commission for Racial Equality intervening)** [2001] ICR 391 . The applicable principles were summarised more recently by the Court of Appeal in the case of **Mechkarov v Citibank NA** [2016] ICR 1121 , which is referred to in one

of the cases before me, **Revenue and Customs Comrs v Mabaso** (unreported) 27 October 2017.

31. In **Mechkarov** , it was said that the proper approach to be taken in a strike-out application in a discrimination case is that: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) 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 (5) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In **Community Law Clinic Solicitors Ltd v Methuen** (unreported) 8 April 2011, it was stated that in appropriate cases claims should be struck out and that 'the time and resources of the employment tribunals ought not be taken up by having to hear evidence in cases that are bound to fail'.

33. A similar point was made in ABN Amro Management Services Ltd v Hogben (unreported) 26 October 2009 where it was stated that, 'If a case has indeed no reasonable prospect of success, it ought to be struck out'. It should not be necessary to add that any decision to strike out needs to be compliant with the principles in Meek v City of Birmingham District Council [1987] IRLR 250 and should adequately explain to the affected party why their claims were or were not struck out."

24. I have also had regard to the guidance given by HHJ Tayler in **Cox v Adecco** [2021] ICR 1307 in the following paragraphs, having reviewed the authorities:

"28. From these cases a number of general propositions emerge, some generally well understood, some not so much.

(1) No one gains by truly hopeless cases being pursued to a hearing.

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.

(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.

(4) The claimant's case must ordinarily be taken at its highest.

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

29. If a litigant in person has pleaded a case poorly, strike out may seem like a short cut to deal with a case that would otherwise require a great deal of case management. A common scenario is that at a preliminary hearing for case management it proves difficult to identify the claims and issues within the relatively limited time available; the claimant is ordered to provide additional information and a preliminary hearing is fixed at which another employment judge will, amongst other things, have to consider whether to strike out the claim, or make a deposit order. The litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity. The employment judge at the preliminary hearing is now faced with determining strike out in a claim that is even less clear than it was before. This is a real problem. How can the judge assess whether the claim has no, or little, reasonable prospects of success if she/he does not really understand it?

30. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out or making a deposit order. In some cases, a proper analysis of the pleadings, and any core documents in which the claimant seeks to identify the claims, may show that there really is no claim, and there are no issues to be identified; but more often there will be a claim if one reads the documents carefully, even if it might require an amendment. Strike out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a

prerequisite of considering whether the claim has reasonable prospects of success. Often it is argued that a claim is bound to fail because there is one issue that is hopeless. For example, in the protected disclosure context, it might be argued that the claimant will not be able to establish a reasonable belief in wrongdoing; however, it is generally not possible to analyse the issue of wrongdoing without considering what information the claimant contends has been disclosed and what type of wrongdoing the claimant contends the information tended to show.

31. Respondents seeking strike out should not see it as a way of avoiding having to get to grips with the claim. They need to assist the employment tribunal in identifying what, on a fair reading of the pleadings and other key documents in which the claimant sets out the case, the claims and issues are. Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents, and key passages of the documents, in which the claim appears to be set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer, and take particular care if a litigant in person has applied the wrong legal label to a factual claim that, if properly pleaded, would be arguable. In applying for strike out, it is as well to take care in what you wish for, as you may get it, but then find that an appeal is being resisted with a losing hand.

32. This does not mean that litigants in person have no responsibilities. So far as they can, they should seek to explain their claims clearly even though they may not know the correct legal terms. They should focus on their core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim. The employment tribunal can only be expected to take reasonable steps to identify the claims and issues. But respondents, and tribunals, should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focused as possible."

Conclusions

25. The Claimant is not complaining about how he has been treated as an "employee", within the wider definition of that word under the Equality Act 2010, or as a job applicant. Rather he is dissatisfied with the extent to which the Employment Tribunal website complies with the accessibility requirement. It is unclear whether he has notified the relevant public body in accordance with Regulation 13(1). The route to providing this notification is not by issuing Employment Tribunal proceedings. Rather it is to notify the relevant public body and then if necessary, make a complaint to the Equality and Human Rights Commission.

26. The Tribunal's conclusion is that the claim has no reasonable prospect of success. The Claimant has no reasonable prospect of establishing that the Employment Tribunal has jurisdiction to decide his complaints on their merits:

    a. Firstly, the Claimant himself accepts he was not an employee or former employee of the Respondent or a job applicant to the Respondent.

    b. Secondly, he has not shown either on the Claim Form or in subsequent email correspondence a proper basis on which the Tribunal could conclude it has the jurisdiction to consider his complaint, even if he is not an employee or job applicant. The Claimant did not make any entry in box number 4 on the ET Claim Form which is applicable if he "was not employed by any of the Respondents he has named but was making a claim for some reason connected to employment".

    c. Finally, the particular complaints made by the Claimant are complaints about compliance with the 2018 Regulations. Those Regulations confer no jurisdiction on the Employment Tribunal to decide whether they have been breached. Enforcement is the responsibility of the Equality and Human Rights Commission.

27. If the Claimant's claim has no reasonable prospects of success, that provides the Tribunal with a discretion to strike out the claim. The Tribunal does not have to exercise that discretion. I have had particular regard to the difficulties that the Claimant may encounter in presenting his claim, given he himself refers to autism in his Claim Form and accepts that he struggles with completing online forms. He should rightly be afforded a fair and reasonable opportunity to show why his claim should proceed. As a litigant in person, the Tribunal needs to be particularly sensitive to ensure he has had access to justice. Having carefully considered the correspondence with the Tribunal, I consider he has had a fair and reasonable opportunity to explain his claim. He has made it sufficiently clear his complaint is about online forms, not about employment or an application for employment.

28. Therefore, I have concluded that it would be appropriate to strike out this claim. His complaint against the Respondent does not relate to employment. It relates in part to the accessibility of the website for issuing Employment Tribunal claims.

29. I gave my reasons orally at the conclusion of the Preliminary Hearing. Although no request was made for written reasons by the Respondent, I considered it was appropriate to set out my reasons in writing so that the Claimant could see the reasons why the hearing had proceeded in his absence and why the Tribunal's decision was that his claim should be struck out.

30. Because the claim is struck out as having no reasonable prospect of success, it is not necessary to decide whether a deposit order should be made on the basis that the claim has little reasonable prospect of success.

Employment Judge Gardiner
Dated: 1 August 2022