



EMPLOYMENT TRIBUNALS

Claimant: Mr C Htwe
Respondent: Runwood Homes Ltd

Heard at: East London Hearing Centre
On: 21 October 2022
Before: Acting Regional Employment Judge Burgher

Appearances

For the Claimant: Mr N Gray (Solicitor)
For the Respondent: Mrs J Temple (Solicitor)

PRELIMINARY HEARING JUDGMENT

1. The Claimant's claim for disability discrimination is struck out on the basis it has not reasonable prospects of success.
2. This judgment does not impact on the Claimant's remaining claims which will be heard on the 19, 21, 25, 26, 27 and 28 July 2023.

REASONS

1. The matter was listed before me to consider whether to strike out the Claimant's claim that he was disabled by reasons of hearing impairment on the basis that the allegation had no reasonable prospect of success alternatively whether to order the Claimant should pay a deposit as a condition of proceeding with the allegation on the basis that it had little reasonable prospective success
2. Mrs Temple, on behalf of the Respondent, took me through the law and summarised that in the ET1 the Claimant alleged that he was unable to hear a buzzer ringing 6 feet away from him 120 decibels which amounted to severe deafness. At the preliminary hearing before Employment Judge Elgot on 22 March 2022 the Claimant stated he was partially deaf. At the preliminary hearing before Employment Judge

Moor on 16 June 2022 he stated that he had below average hearing and he did not have severe deafness.

3. Separately, the Claimant had obtained an audiology report on the 16 February 2022 that showed that he had normal hearing in both ears.

4. Mrs Temple referred me to the Claimant's underlying GP and hospital medical records from 2017 to 2022 which were provided in disclosure. It was accepted that there was no evidence at all that the Claimant had any hearing difficulties raising such matters.

5. Mr Gray accepted that there was no medical record to establish the Claimant's assertion that he has a hearing impairment. However, he contended that the Claimant ought to be able to proceed with the disability discrimination claim by giving evidence on the steps he took to manage his hearing difficulties such as lip reading when he had difficulty hearing conversations, and his concerns that he could not use the bathroom at work without worrying that he would not hear the work buzzer. Mr Gray submitted that the Claimant would give evidence that he had difficulty adjusting his voice appropriately to background noise meaning he would either be too loud or too quiet without realising. Mr Gray emphasised that the Claimant would give evidence that he purchased body motion sensor equipment to address his hearing difficulties at work and that he purchased another mobile phone so he could hear the alarm bell at work whilst he went to the restroom.

Law

6. The legislation is as follows:

Strike Out

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

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

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Deposit

39 (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal’s reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

7. In Zeb v Xerox (UK) Ltd UKEAT 0091/15 Simler J gave a summary of the relevant application of the legislation.

The Employment Tribunal's power to strike out a claim at a preliminary stage is derived from Rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. That Rule enables a Tribunal to strike out a claim that has "no reasonable prospect of success". This power has rightly been described as a draconian one, and case law cautions Employment Tribunals against striking out a claim in all but the clearest cases, particularly where that claim involves or might involve allegations of discrimination. Cases in which a strike out can properly succeed before the full facts have been found are rare. As Lord Steyn explained in Anyanwu v South Bank Students' Union [2001] IRLR 305:

"24. ... For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. ..."

In the same case at paragraph 37 Lord Hope made the following observations:

"37. I should like first to say that, if I had reached the view that nothing that the university is alleged to have done could as a matter of ordinary language be said to have aided the students' union to dismiss the appellants, I would not have been in favour of allowing the appeal. I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence. ..."

8. In Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 in the Court of Appeal, Maurice Kay LJ said:

"29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. ... It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

9. In the case of Ahir v British Airways Plc [2017] EWCA Civ 1392 Underhill LJ said:

"As I already said, in a case of this kind, where there is on the face of it a straightforward and well documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced"

10. In the case of Van Rensberg v Royal Borough of Kingston Upon Thames UKEAT/0096/07, Elias J stated that a Tribunal has greater leeway when considering whether or not to order a deposit to make a provisional assessment of the credibility of a parties case.

11. When considering the amount of a deposit the case of Hemdan v Ishmail [2017] ICR 486, EAT Simler J stated

“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...the purpose is emphatically not...to make it difficult to access justice or to effect a strike out through the back door”. (para. 10-11)

“Accordingly, it is essential that when such an order is deemed appropriate it does not operate to restrict disproportionately the fair trial rights of the paying party or to impair access to justice. That means that a deposit order must both pursue a legitimate aim and demonstrate a reasonable degree of proportionality between the means used and the aim pursued” (para. 16)

Conclusion

12. When considering the allegation that the Claimant has a physical hearing impairment he bears the burden of proving this on the balance of probabilities.

13. The absence of any supporting medical information or medical record of hearing difficulties, combined with the, albeit later, audiological evaluation on 16 February 2022 that he has normal hearing leads me to conclude that the Claimant has no reasonable prospect of establishing, on the balance of probabilities, before a Tribunal that he had a disability by reason of hearing impairment at the relevant time. There is no medical evidence to establish this.

14. Whilst the Claimant may be able to establish that there were obstructions to his hearing things in the workplace due to COVID mask wearing requirements in the care home he worked in and the location of buzzers, the available documentary evidence does not support his contention he had a hearing impairment at all.

15. In these circumstances the Claimant’s claim for discrimination arising from disability is struck out on the basis it has no reasonable prospect of success. This claim is therefore dismissed.

16. This judgment does not affect the Claimant’s other claims which will be heard as listed on 19, 21, 25, 26, 27 and 28 July 2023.

**Acting Regional Employment Judge Burgher
Dated: 3 November 2022**