EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Ellingham	v	Tempur UK Limited

Heard at: Watford (in public; by CVP) **On**: 22 November 2022

Before: Employment Judge George

Appearances
For the Claimant: in person
For the Respondent: Mr M White, counsel

JUDGMENT

1. The claim of indirect discrimination on grounds of religion or belief is struck out under rule 37(1) of the Employment Tribunals Rules of Procedure 2013 to the extent that it is based upon the claimant being Christian because it has no reasonable prospects of success.

2. The claims of indirect discrimination based on Covid-sceptic beliefs and constructive unfair dismissal continue.

REASONS

This has been a remote hearing not objected to by the parties. The form of remote hearing was CVP. A fully face to face hearing was not held because it was not practicable and the purposes of the hearing could be achieved remotely.

1. This claim arises out of the claimant's employment as a warehouse operative by the respondent company who manufacture and supply mattresses. The employment lasted between 1 May 2015 and 19 July 2021, when the claimant resigned.

2. After a period of conciliation which lasted between 30 July 2021 to 1 September 2021, the claimant presented a claim form on 6 September 2021. The respondent defended by an ET3 form presented on 15 November 2021.

3. The claim was case managed at a preliminary hearing in private by telephone that took place on 4 July 2022 and was conducted by Employment Judge Alliott. He listed this preliminary hearing in public. I have had the benefit of an electronic file of relevant documents of 61 pages and page numbers in these reasons refer to that file. The order made by Judge Alliott is at page 24. I also was provided with and took account of a written skeleton argument by Mr White. The claimant had been sent the documents in advance of the hearing and had been aware of the date of the hearing since July but volunteered that he was not well prepared for it. He asked for and was given time to access the relevant documents on his laptop so that he was able to access them on a different device to that used to access the video hearing. When he had difficulty scrolling through them I read out the draft List of Issues to assured myself that the substantive clams and issues in dispute were clear. Where necessary in the hearing I read out sections of relevant documents (for example the claimant's resignation letter) if he was unable to find them.

4. After discussing the claimant's claims at the hearing on 4 July 2022, one of the orders that Judge Alliott made was for the parties to seek to agree a List of Issues by 15 August 2022. A draft list of issues was sent by the respondent to the claimant on 11 August 2022. Page 59 is the email which asked the claimant whether or not it could be agreed. A few days later, the respondent's representative telephoned the claimant and left a message (page 60) asking him to check his emails to see if he had received that of 11 August. No response was received to that and the respondent filed the draft List of Issues that they believed represented the discussion that had been conducted in front of Judge Alliott.

5. At the outset of this hearing I talked through that draft list of issues (page 45) with the claimant, who has been acting in person throughout. I wanted to see whether he accepted that it accurately set out the factual allegations that he makes. I explained in plain non-technical language, as far as I was able, the legal tests which have been incorporated into the draft List of Issues. The claimant confirmed that it did accurately represent what he said to Judge Alliott at the preliminary hearing in private and the way in which he had then explained his claim.

6. Judge Alliott listed this open preliminary hearing to consider the respondent's applications for the claims to be struck out on the basis that they have no reasonable prospects of success under rule 37 Rules of Procedure 2013, or, alternatively for deposit orders to be made under rule 39 on the basis that they have little reasonable prospects of success. See para.1 on page 24 for the issues which are before me today.

<u>Substantive claims and issues</u>

7. The substantive claims and issues are as set out in the list of issues at page 45 save that para.13 is incorrectly phrased. The question of ground disadvantage

in respect of the claims of indirect discrimination on grounds of religion or belief should be phrased to be,

> "Did these PCPs put people who were (i) Christian and/or (ii) had the belief alleged above at a particular disadvantage compared with (i) non-Christians and/or (ii) those who do not share that belief?"

Law applicable to rule 37

8. The Employment Tribunals (Rules of Procedure) Regulations 2013 Sch.1 include the following:

> "**37.— Striking out**
> (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."

9. The power to strike out a claim under that Rule is one that should be exercised sparingly, particularly in a case such as the present where there are allegations of discrimination. That has been emphasised in a number of authorities, notably in the well-known case of Anyanwu v South Bank University [2001] IRLR 305 HL where it was emphasised that the power should only be used in the plainest and most obvious of 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 its merits or de-merits of its particular factors is a matter of high public interest." (per Lord Steyn para.24)

10. Having said that, where it is plain that a discrimination claim has no reasonable prospects of success applying that high threshold appropriately the Tribunal has the power and may use the power to strike out a claim. I also quote from paragraph 39 of Anyanwu where Lord Hope said:

> "I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospects of succeeding at trial, the time and resources of the Employment Tribunal ought not to be taken up by having to hear evidence in cases that are bound to fail."

11. In commenting upon the introduction of the threshold of "no reasonable prospects of success" into the then 2001 Rules of Procedure, Maurice Kay LJ in Ezsias v North Glamorgan NHS Trust [2007] I.C.R. 1126, CA accepted it as meaning that the claim had "a realistic as opposed to merely a fanciful prospect of success" (para.26). He went on to add in para.29:

> "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."

12. Mr White, for the respondent, referred me to Ahir v British Airways plc [2017] EWCA Civ 1392 where, Underhill LJ, while citing with approval the passages from Anyanwu and Ezsias quoted above, said (para.16)

> "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 that they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored …"

Discussion and conclusions

13. The factual matrix of the claim arises out of the Covid-19 pandemic, and in particular, out of practices and policies put in place by the respondent in their warehouse and office premises which they would say were for the control of coronavirus and the protection of their workforce. The period relevant for the claim dates from a time when the pandemic was in its early stages through to the middle of 2021 when the claimant resigned.

14. Judge Alliott clarified there to be broadly two types of claim: constructive unfair dismissal and indirect discrimination on grounds of religion and belief. However, the claim of indirect discrimination on grounds of religion and belief is made on two bases. First the claimant alleges that he, as a Christian was put at a particular disadvantage and that Christians generally were put or would be put to a particular disadvantage by specific practices.

15. Secondly, the claimant relies on the protected characteristic of religion and belief in respect of his Covid-sceptic beliefs. When I asked the claimant to explain the core elements of the belief that he holds and which he considers should have protection under the Act he stated:

"I believe in personal responsibility for my own health and free will not to have to do something I don't want to do."

16. However, when I read out to him the specific elements identified by the respondent as appearing to them to be the alleged protected belief the claimant agreed that they had accurately set out the particular beliefs he holds which are relevant for the purposes of the claim. They are that: Covid-19 testing is flawed; face-masks do not work and are unhealthy; disinfecting surfaces, including light switches, does not work and/or is dangerous. It is specifically these three elements of the belief that I mean when I refer to "Covid-sceptic beliefs" in these reasons.

17. The claimant argues that Christians generally and those who share the claimant's specific Covid-sceptic beliefs would suffer a particular disadvantage as a result of certain practices imposed by the respondent. It is common ground that the respondent adopted certain practices which would amount to a provision, criterion or practice under s.19 of the Equality Act 2010 (see the list of issues para.12). Those practices are that employees should wear face coverings; that certain surfaces should be wiped down with disinfectant; and that employees be tested periodically for Covid 19.

18. As explained to me in this hearing, all of those three practices were subject to a more nuanced explanation and may have changed at different times during the course of the pandemic. For example, it appears that at certain times employees were required to wear face coverings unless they were within a particular group of individuals. This is the sort of level of granular factual detail that it would be necessary for a Tribunal to go into at a final hearing.

19. For the purposes of a strike out application, I should consider the case at its height. The claimant is arguing that those who were Christians or those who shared his Covid-sceptic beliefs would be put to a particular disadvantage in that they (and he)

    a. Would not be allowed to go upstairs on site (on the basis that their beliefs meant that they would decline to be regularly tested for coronavirus);

    b. Had their (or his) free will and ability to manage his own health impeded; and

    c. Would have their (or his) forklift steering wheel sticky and unpleasant for him to touch because of the disinfectant used.

20. Although, if the matter were to come to a final hearing, the respondent contests Mr Ellingham's assertion that he is a Christian, for the purposes of this application, it was not argued that there are no reasonable prospects of

him proving that to be the case. It is also accepted that the provision, criteria and/or practices he describes were imposed.

21. In relation to the indirect discrimination based on grounds of the Christian religion, the next matter that the claimant would need to show is that Christians generally would be put to a particular disadvantage by reason of the practices introduced by the respondent for the protection of their workforce. When the claimant was asked to explain how Christians as opposed to non-Christians would be put to a disadvantage he did not articulate any particular article of faith that is impacted by the requirements for face coverings or for services to be wiped down with disinfectant or by the requirement for periodic Covid-19 testing. Going beyond any particular article of faith, there was no connection at all, that the claimant was able to articulate, between the Christian religion and the prospect that an individual would be put to the disadvantages relied on by reason of those requirements.

22. I have come to the conclusion that there are no reasonable prospects of the claimant showing that Christians generally are put to a particular disadvantage and by any of those requirements compared with non-Christians. These restrictions are very similar or identical to those in place nationally during the pandemic – including in places of worship – and there is nothing relied on by the claimant to suggest, for example, that Christian churches sought to opt out of the restrictions or failed to comply *en masse*. This claim requires the claimant to show that, in the respondent's workplace, Christians generally considered themselves to be disadvantaged in some particular way that was not felt by the workforce as a whole. There is nothing that has been alleged about Christianity that makes it more likely that someone who adheres to the Christian religion would object to being required to comply with the particular requirements that the respondent thought necessary during the pandemic than would someone who followed any other religion or none. The claimant almost seem to accept that that was the case because the way that he explained his claim was more based upon it impacting on him as someone who believes that one should be able to exercise free will.

23. For that reason, I conclude that there are no reasonable prospects of the claimant succeeding in his indirect discrimination claim insofar as it based on the religion of Christianity. It is proportionate in the interests of simplifying and streamlining the issues and of avoiding unnecessary time being spent on plainly hopeless cases that head of claim be struck out under rule 37 on the basis that it has no reasonable prospects of success. This does not depend upon a disputed area of fact; it is simply that the claimant has been completely unable to articulate more than a bald assertion that Christians are more likely than non-Christians to feel themselves unable to comply with the requirements.

24. So far as the other aspect of the indirect discrimination claim is concerned, the respondent argues that the Covid-sceptic views that are articulated by the

claimant and are reflected in the list of issues would not meet the test for a protected religion and belief set out in the case of Grainger plc v Nicholson [2010] ICR 360. In that case, the then President of the EAT analysed the caselaw in the area and summarised it into 5 criteria which a belief must satisfy in order to be protected in the same way as a religion is protected under the Equality Act 2010. They are replicated in the EHRC Code of Practice para.2.59 and provide that the belief should:

a. Be genuinely held

b. not simply be an opinion or viewpoint based on the present state of information available

c. concern a weighty and substantial aspect of human life and behaviour

d. attain a certain level of cogency, seriousness, cohesion and importance, and

e. be worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.

25. It has been emphasized in a number of cases, such as Harron v Chief Constable of Dorset Police [2016] IRLR 481, EAT and Forstater v CDG Europe [2022] ICR 1, EAT that the Grainger criteria should not set the bar too high or demand too much of those professing to have philosophical beliefs worthy of protection under the Act.

26. I have set out in para.15 & 16 above the way in which the Covid-sceptic beliefs were articulated before me. Unlike in the case of a religion, it can be difficult accurately to encompass an allegedly protected belief succinctly in only a few words. In addition to the above, the claimant described a somewhat nebulous belief in free will; that each person has personal responsibility to make their own decisions about their health. He also talked about having a belief the people should not change their minds and clearly feels let down and by restrictions having been reimposed in the workplace in the middle of July 2021, at a time when the national government was lifting some restrictions.

27. I remind myself that we are at an early stage in the litigation and the claimant is self-representing. There is quite a lot of factual analysis to be gone into about the details of what the alleged belief amounted to before considering whether it fulfils the Grainger criteria. Whether it does or not is not for me to decide today. For the purposes of a strikeout application, it seems to me that I should weigh up and take into account everything that the claimant said about the way that he articulates his beliefs. The decision for me is whether there are no reasonable prospects of the alleged belief meeting the Grainger criteria.

28. Presuming in the claimant's favour that he would establish that he genuinely holds the professed belief, I have doubts that the belief as articulated will be shown to have the cogency or coherence necessary to amounts to a protected belief. It also appears to be more in the nature of an opinion or view as to whether the government policy on restrictions, or the interpretation of them by the respondent, was justified at any particular point in time, rather than a belief that affected a more weighty aspect of the claimant's life more broadly. I reject the argument that the claimant's Covid-sceptic beliefs, as expressed, are likely to be found to conflict with the right of others. The claimant's behaviour (which he states to be as a result of his beliefs) may be considered in the eyes of some to put other individuals at increased risk of coronavirus, but there is nothing inherently abhorrent about the belief itself.

29. I bear in mind that it is not for me to make a value judgement about the belief but to consider objectively whether there are no reasonable prospects of the belief meeting the Grainger criteria. Despite the doubts I have expressed, I do not think it is possible to reach that conclusion.

30. The respondent then argues that it cannot be said that people who share Covid-sceptic beliefs would in general suffer a particular disadvantage. I refer back to the particular disadvantages relied on (para.13 page 47 in the List of Issues). I accept that the phrase "particular disadvantage" in s.19 EQA is not likely to be engaged by the truly trivial, such as being required to put up with sticky forklift steering wheel. However, in my judgment, it is not possible to say that the remaining two alleged disadvantages are trivial to a person with the beliefs that are described. If the Covid-sceptic beliefs are found to be protected under the EQA, then a person with those beliefs would be faced with the choice between agreeing to a medical test they believed to be flawed and to involve the taking of a personal sample or accepting less freedom of movement at work than those who agreed to the test. There is a reasonable prospect of a Tribunal finding that this would be a particular disadvantage.

31. I have concluded that it is not possible to say that the claimant has no reasonable prospects of succeeding on the indirect discrimination on grounds of belief claim even though I am of the view that the respondent's argument on justification is strong. I do not find the test in rule 37(1)(a) to be met because my analysis of the merits of the claim relies heavily on the respondent proving the factual basis of their defence. Although they are likely to prove their aim and that it was legitimate, when it comes to questions of proportionality the Tribunal has to weigh up and objectively balance the needs of the business and the discriminatory impact on the claimant and others sharing his belief. This is extremely fact sensitive and not so clear cut that I can confidently say there are no reasonable prospects of the respondent failing to prove their defence.

32. I turn finally to the constructive unfair dismissal case. The reason for the resignation has been evidenced before me in the resignation letter at page 57. In it, the claimant describes a "multitude of reasons" and refers to a

culmination of restrictions and poor management and states that the final straw was the U-turn of tightened restrictions made the previous Friday. Among other things, the claimant describes symptoms of poor mental health which he attributes to these matters.

33. The respondent argues that the timing of the resignation letter coincides so closely with them initiating disciplinary action against the claimant that there are strong prospects that a Tribunal would find that it was the instigation of disciplinary action and not the matters set out in the resignation letter that were the reason for the claimant's resignation.

34. That seems to require me to engage with the disputed facts in a way that is quite inappropriate at the hearing of this kind. The fact of the initiation of the disciplinary action is not disputed, but taking his case at its height, there is a real prospect that the claimant will show that the reasons for his resignation included those in the resignation letter. They only have to be an effective cause of his resignation or among the reasons for his resignation.

35. When the claimant articulated his reasons for resignation to me, he expressed, relatively convincingly, that the reintroduction of restrictions by the respondent at that time was something the trigger for his resignation. This is the first thing cited in the resignation letter. He goes on in the letter to cite disagreements with his line manager, the impact of restrictions on him and the alleged refusal of his line manager to accept that he had an exemption to wearing a face covering. The medical basis for that was not and still has not been explained. He also complains about not being put on furlough leave and he disagrees with the efficacy of the measures that were adopted. He complains that CCTV was be used to observe individuals. The gravamen of the details in the resignation letter concerns the Covid restrictions, but there are other matters referred to.

36. It is not for me this hearing to conduct a mini trial and it would require me to engage with disputed facts more than proper at a preliminary hearing for me to be able to conclude there are no reasonable prospects of the claimant being able to show that he resigned for reasons which included those that are set out in the list of issues.

37. Assuming that element of a constructive dismissal claim in the claimant’s favour, he would then have to go on to show that those actions by the respondent happened as a matter of fact. He would also need to show that they amounted to a breach of the implied term of mutual trust and confidence.

38. The test for conduct which amounts to such a breach was set out in Malik v BCCI [1998] AC 20 HL. The claimant must show that the respondent, without reasonable and proper cause, behaved in a way that was intended to and likely to undermine the relationship of trust and confidence between employer and employee. That will be judged objectively by the Tribunal.

39. Again this is fact sensitive. In particular, the question of whether there are no reasonable prospects of a Tribunal at final hearing concluding that there was reasonable and proper cause for the respondent's actions seems to me to something which it is not right to judge without detailed findings of fact, in the circumstances of the present case. I reject the argument that there are no reasonable prospects of the claimant succeeding on his constructive unfair dismissal claim.

40. A separate order will be made on the application for deposit orders.

41. Judge Alliott made comprehensive case management orders and no application for them to be varied or supplemented was made at the hearing before me. I advised the claimant that if there was any change that he wished to make to the way his claim was articulated and, in particular, to the way his belief was described then he would need to make an application in writing on notice to the respondent's to amend the claim. The list of issues at page 45 of the preliminary hearing bundle should be amended to remove the claim based upon the claimant being Christian but is otherwise now final unless an employment judge gives permission to amend it.

_____

Employment Judge George

Date: 16 February 2023……..

Sent to the parties on: 16 February 2023

For the Tribunal Office