Case Number: 2208307/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr J Pimienta	**v**	**The Commissioner of Police of the Metropolis**

Heard at: London Central **On**: 5 May 2017

Before: Employment Judge Lewis

Representation

For the Claimant: Mrs S McLaughlin, solicitor

For the Respondents: Mr P Mead, Counsel

PRELIMINARY HEARING JUDGMENT

1. The claims are struck out as having no reasonable prospect of success.

2. I do not grant leave to amend to add in new matters from the draft list of issues.

REASONS

1. The claimant brought claims for race and disability discrimination. The claim for race discrimination was withdrawn today. The claims for disability discrimination and for victimisation are maintained.

2. The ET1 was presented on 17 November 2016. Today, the claimant presented the respondents with a proposed list of issues. It is accepted these would require amendment of the claim. The claimant seeks leave to amend.

3. The respondents accept the claimant has a mental disability, ie severe anxiety and depression. The claimant says it has in the past been necessary to call out the Mental Health Crisis Team. He is taking

medication which itself causes problems. The respondents do not accept that the claimant's back issues, to put it neutrally, amount to a disability.

4. This is the sixth tribunal claim which the claimant has brought against the respondents. The first two claims were settled via mediation. The third claim in 2010 was purely for race discrimination. It was not upheld. The tribunal made findings that most or all of the claims were founded upon wrong perceptions by the claimant. Costs were awarded against the claimant, who had been given a costs warning half way through the case.

5. The claimant's fourth claim was for disability and race discrimination. Further particulars had to be ordered and then further further particulars. At a preliminary hearing before EJ Grewal, the claims were managed into 10 allegations. A £200 deposit was ordered in relation to each such allegation. The claimant paid the deposit and continued. Prior to the full merits hearing, a fifth claim was issued for victimisation. Seven of the ten allegations from claim number 4 were withdrawn. The remaining three allegations were then consolidated with claim number 5. On the second day of the full merits hearing in June 2016, the first day having been a reading day, the claimant withdrew all his outstanding claims in return for repayment of his deposit on the three outstanding allegations from claim 5.

6. Meanwhile a joint expert report had been prepared on the tribunal's orders regarding whether the claimant had a physical disability. The report, dated 15 July 2015, was written by Mr Robert Carew, a consultant orthopaedic and spinal surgeon. His view was that at no time since September 2010 (the earliest date of records) did the claimant meet the threshold for disability. He said the evidence indicated that the chronic lower back and sciatic lower limb symptoms were 'at a nuisance or minor level' and on no occasions since 2010 had the claimant suffered any restriction or disability in respect of his ability to perform activities of normal daily living.

7. On 21 October 2016, an OH report from Dr Phillips said that the claimant had told her that, although he can experience pain, he is not currently restricted in his day-to-day activities. In response to a management question about adjustments for an office-based role, she recommended that the claimant mobilised regularly and avoided prolonged sitting as much as possible. She identified the claimant's mental health condition as likely to be covered by the Equality Act 2010, subject to a tribunal's view. She did not identify his back issues as a likely disability.

8. The claimant accepts he has not produced or pointed to any medical evidence to counteract the opinion of Mr Carew or OH. He has not told me that anything has changed or worsened since July 2015. The claimant considered he had a disability in 2015 and he still believes that is the case, but he puts forward no evidence of any change from the position considered by Mr Carew. Moreover, Dr Phillips was relying on what the claimant himself told her. I therefore find there are no reasonable prospects of a tribunal finding that the claimant had a physical disability as at 3 November 2016 (the date in the ET1) or indeed over the period covered by the proposed amendments.

9. The only disability discrimination complaint in the ET1 is that the claimant's physical disability had not been recognised. The claimant has no reasonable prospects of proving this was disability discrimination because he has no reasonable prospects of proving he had a disability. Moreover, the respondents were relying on medical information that the claimant did not have a physical disability.

10. The race discrimination claim has been withdrawn.

11. That leaves the victimisation claim. This is incoherent. It appears to refer to an alleged failure to receive a proper induction. The respondents state that it is not normal to offer a formal induction on transferring an individual. The claimant did not say otherwise. I was shown a series of emails including one showing there was a two and a half meeting shortly before the claimant started. The tone from the Sergeant in charge is friendly and welcoming. The claimant is referred to on-line training packages.

12. The claimant does not argue that the friendly tone was false. Indeed he seems to be happy with his new line manager. His complaints are about having been referred to the unit in the first place and about comments allegedly made by some junior officers there. He says the main problem regarding the induction was that he was given only a refresher course on the COPA case management system when he had never been trained on it in the first place, so it is only in the last couple of months that he has come to understand how it works.

13. The claimant was unable to explain how the alleged induction failure as described above might be victimisation. He puts forward no evidence of any hostility whatsoever from his line manager. Indeed, he describes his line manager in a way which appears sympathetic. Looking at the claimant's case at its highest, and making no findings on any disputed evidence, I see no reasonable prospects of the claimant proving the pleaded victimisation.

14. I do not accept the claimant can now bring in further examples of alleged victimisation which have not been pleaded simply by virtue of stating 'the above are just examples'. Amendment is required. I therefore strike out the claim in its entirety as having no reasonable prospects of success.

<u>Amendment</u>

15. I do not grant leave to amend. The draft list of issues, essentially containing the new claims, was served on the respondents only yesterday, more than 5 months after the ET1. I appreciate the claimant wrote the claim form himself and that English is not his first language. I also very much take into account his mental disability and inability to function at various times. However, I was given no medical evidence that the claimant was unable to function to the extent of getting legal advice as at 17 November 2016 or from then until yesterday. He has been able to work at

some points through that period. Moreover, he has used his present solicitors before, in claims 4 and 5.

16. What has happened is that the claimant has substantially varied his complaints between the issuing of the claim and now. The race discrimination claim has been entirely withdrawn. The disability discrimination claim has been vastly expanded as has the victimisation claims. This is a consistent pattern with the claimant. It has happened in previous cases as set out above. Very possibly it is the result of his mental impairment, and I give him certain latitude for that reason. But I cannot entirely ignore the impact on the respondents who incur time and costs as a result. The claimant seems to be managing his day-to-day work concerns as they come and go through tribunal proceedings which are lodged, varied and withdrawn accordingly.

17. When I consider the balance of hardship of allowing or not allowing the amendment, I consider the hardship to the respondents of allowing the amendment far outweighs the hardship to the claimant of refusing it. Matters have moved on since November 2016 in respect of many matters in the draft list of issues. A further OH report has been arranged. There is a sympathetic line manager who now knows of the claimant's issues and concerns. From the respondents' point of view, allowing the amendment would start off a claim which again is likely to shift and change as it goes along. Already Mrs McLaughlin is talking about the possibility of narrowing the focus. I accept the claimant is unhappy where he is, but bringing repeated tribunal claims with little foundation has not so far produced any solution.

Law

18. I had regard to the following principles of law in reaching the following decision.

Strike out

19. Under Schedule 1, rule 37(a) of the ET Rules of Procedure 2013, the tribunal can strike out all or part of a claim on the grounds that it is scandalous or vexatious or has no reasonable prospect of success. However, the case law is very clear that a tribunal must be extremely slow to strike out a discrimination claim at a preliminary hearing on grounds that it has no reasonable prospect of success.

Deposit orders

20. Under Schedule 1, rule 39 of the ET Rules of Procedure 2013, if a tribunal at a preliminary hearing considers that any allegation or argument in a claim has little reasonable prospect of success, it can order the claimant to pay a deposit up to £1000 as a condition of continuing to advance that allegation or argument. The tribunal must make reasonable enquiries into

the claimant's ability to pay and take account of any information obtained in that respect when deciding the amount of the deposit.

Amendment

21. The principles relevant to the granting of an amendment are set out in particular in Selkent Bus Co Ltd v Moore [1996] ICR 386. As confirmed and expanded by subsequent cases, these essentially are as follows. In exercising its discretion whether to allow an amendment, the employment tribunal should take into account all the circumstances and balance the injustice / hardship to each party of allowing or refusing the amendment. The relevant circumstances include

21.2 The nature of amendment, ie whether it is a minor relabelling or, on other hand, new facts and a new cause of action are involved.

21.3 The timing of application and why it was not made earlier, particularly if the claimant knew all the relevant facts.

21.4 Where a new complaint or cause of action is proposed, the tribunal must consider whether the complaint is out of time and if so, whether the time-limit should be extended under the applicable statutory provisions. This is not the only consideration, but it is important in respect of a new cause of action. It is far less important where only a minor relabeling is involved.

21.5 The balance of hardship from the viewpoint of the respondents could entail, for example, more costs, especially if these are unlikely to be recovered; witnesses having disappeared or documents disposed of; faded memories and concessions made on the basis of the case as previously pleaded.

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Employment Judge Lewis
5 May 2017