



EMPLOYMENT TRIBUNALS

Between

Claimant: Mr L Samuels

Respondent: Solstice Limited

Heard at London South Employment Tribunal on 1 June 2017

Before Employment Judge Baron

Representation:

Claimant: The Claimant was present in person

Respondent: Ian Meth - Consultant

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal that no order be made on the applications by the Respondent for an order under either or rule 39 or 37 of the Employment Tribunals Rules of Procedure 2013.

REASONS

- 1 On 17 March 2017 the Claimant presented a claim form ET1 to the Tribunal, and on 4 April 2017 the Respondent presented a response in which it was stated that the Respondent intended to defend the claim. The claim is one of disability discrimination based upon the impairment of epilepsy. In paragraphs 30 and 31 of the details of the response the Respondent sought an order under rule 37 of the Employment Tribunals Rules of Procedure 2013 striking out the claim on the ground that it had no reasonable prospect of success, or in the alternative an order under rule 39 for the payment of a deposit as a condition of being allowed to continue with the claim. This hearing was listed to consider such applications.
- 2 Mr Meth quite properly accepted that the Tribunal should be slow to strike out any claim, especially where there is a dispute as to a material fact or facts. He also acknowledged that it is recognised that discrimination cases are generally very fact sensitive. Mr Meth accepted that the Claimant's case should be taken at its highest as set out in the claim form. Nevertheless, he submitted, this claim did have no reasonable prospect of success, and should be struck out.
- 3 It is agreed that the Claimant sought employment with the Respondent and was offered an interview on 7 February 2017. He arrived some 15 minutes early for the interview, but nevertheless he was seen by the interviewer, Ms Chloe Cleverly. It is at this juncture that the versions of

events set out by the Claimant and the Respondent diverge spectacularly.

- 4 In the claim form the Claimant stated that he had an epileptic seizure just as he entered the room for the interview, and lost consciousness. When he regained consciousness he realised colleagues in the business were asking him to leave the building, and that they were not prepared to talk to him. The Claimant said that he then went to Croydon University Hospital for a check-up.
- 5 In the response form ET3 the Respondent said that as soon as the Claimant sat down for the interview he started chanting and undressed down to his boxer shorts. The Claimant was told to get dressed, upon which he became aggressive. He eventually got dressed again and was then accompanied from the office.
- 6 There is agreement between the parties that the Respondent did not thereafter take any further steps to pursue the Claimant's application for employment.
- 7 In the claim form the Claimant said that he had received an email from the General Manager making an allegation that he had taken his clothes off. Mr Meth pointed out the following sentence in the details of the claim:

These are all false allegations just because they think they can't work with someone who will be having epileptic seizures from time to time at their workplace.
- 8 Mr Meth submitted that if the Claimant had been unconscious as he alleges then he would not be able to give a factual account of what happened. He would not be able to say that the accusation that he was taking his clothes off was false, as he alleges. The Respondent's witnesses were the only credible ones, said Mr Meth.
- 9 Mr Meth then addressed the legal position. He referred to the apparent conflict between section 6 of the Equality Act 2010 which defines a disability (supplemented by Schedule 1 to the Act) and regulation 4 of the Disability Discrimination (Meaning of Disability) Regulations 1996.¹ That regulation provides that certain conditions are not to be treated as impairments for the purposes of section 1, and thus cannot be a disability.
- 10 Mr Meth referred me to the judgment of the Employment Appeal Tribunal by HHJ Peter Clark sitting with lay members in *Edmund Nuttall Ltd v. Butterfield* [2005] IRLR 751.

A claimant may have both a legitimate impairment and an excluded condition. The critical question is one of causation: what was the reason for the less favourable treatment? If the reason was the legitimate impairment, then that is prima facie discrimination. If the reason was the excluded condition and not the legitimate impairment, then the claim fails. Where both the legitimate impairment and an excluded condition form the employer's reason for the less favourable treatment, if the legitimate impairment was a reason, and thus an effective cause of the less favourable treatment, then prima facie discrimination is made out notwithstanding that the excluded condition also forms part of the employer's reason for that treatment. However,

¹ The regulation was set out in the ET3 and it need not be repeated here for the benefit of the Claimant.

where the excluded condition is the reason for the less favourable treatment, that there is an underlying legitimate medical impairment does not mean that disability is a reason for the less favourable treatment. That would render the effect of the Regulations nugatory.

- 11 Although I was not referred to the authority, I note that *Butterfield* was considered in some detail by Lloyd Jones J in the High Court in *Governing Body of X Endowed Primary School v. Special Needs and Disability Tribunal* [2009] IRLR 1007. The relevant part of the headnote is as follows:

It follows that it is necessary in cases involving reg. 4(1) to examine whether discrimination relates to a protected disability, or an excluded condition, or to both. If the discrimination relates to a protected disability, or to both a protected disability and an excluded condition, then the discrimination is unlawful under the 1995 Act.
- 12 Mr Meth submitted that the reason for the Respondent's failure to consider the Claimant's application for employment further was because of the taking off of his clothes, which was exhibitionism and so an excluded condition within regulation 4, and was not because of any disability. The Claimant was not in a position to assert that the allegation that he had taken off his clothes was a false one, said Mr Meth, because his assertion was that he was unconscious at the time. Therefore, he said, the claim had no reasonable prospect of success. In the alternative, it had little reasonable prospect of success.
- 13 The Claimant addressed the Tribunal. It is no criticism of him to say that he did not address the legal issues – he is not a lawyer. He gave a history of the onset of his epilepsy in 2007. He said that he had never take his clothes off during a seizure.
- 14 My conclusion is absolutely straightforward. I take the claim at its face value. There is a stark conflict of evidence as to what occurred. That can only be decided by a Tribunal having heard all the evidence. Following findings of fact then the Tribunal must decide what are the legal consequences, and *Butterfield* and *The Governing Body of X* then potentially become relevant.
- 15 The fact that the Claimant stated in the claim form that the allegation that he took his clothes off was false cannot in my judgment have the significance that Mr Meth sought to put upon it. As mentioned, the Claimant told me that he had never taken clothes off during an epileptic episode. It is not surprising therefore that he described the allegation as a false one.
- 16 I decline to make either of the orders sought by the Respondent for the above reasons. I do comment, however, that because the versions of events given by each of the parties are so different then it is at least possible that the Tribunal may make an order for costs against a party if his or its version of events is found to have been concocted.
- 17 The matter will be listed for a preliminary hearing by telephone to consider further case management.

Case No: 2300734/2017

Employment Judge Baron

05 June 2017