Case Number: 3201614/2017

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EMPLOYMENT TRIBUNALS

Claimant: **Mr V Pareek**

Respondent: **Department for Work & Pensions**

Heard at: **East London Hearing Centre** **On: 3 May 2018**

Before: **Employment Judge Prichard (sitting alone)**

Representation

Claimant: In person

Respondent: Ms L Robinson (counsel instructed by Ms M Morjaria, GLD, London WC2)

JUDGMENT

The judgment of the Employment Tribunal is that:-

(1) The claimant's current claim in respect of having his chair moved from the 5th to the 4th floor of the building in which he worked on 3 July 2017 is hereby struck out under Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 as having no reasonable prospect of success.

(2) Of the claim in respect of delays in provision of the claimant's sick records by the DWP to the Home Office, thereby blocking his promotion for some 5 months, no strike out or deposit order is made. It shall proceed to a final 3-day hearing on the merits on 7 to 9 November 2018.

(3) 6 and 13 November 2018 are now vacated as hearing days.

(4) The remainder of the complaints in 3201614/2017 are dismissed as an abuse of process under Rules 51 and 52 of the Employment Tribunals Rules of Procedure 2013 following from the dismissal upon withdrawal of an identical claim - 3201254/2017.

REASONS

Abuse of process / *res judicata*

1 The claimant has brought 4 disability discrimination claims against the DWP and now other respondents. They are all brought from within employment. I must give the full history and chronology.

2 Claim 1 which is 3200788/2016 was presented on 27 August 2016 and was dismissed following a withdrawal, by a judgment on 13 October 2016.

3 The same claim re-emerged as Claim 2 with extra allegations on 30 September 2017 (3201254/2017) which, as the judgment states, was dismissed upon withdrawal by the claimant on 3 November 2017.

4 Unlike Claim 1, Claim 2 was dismissed so soon that the respondent was not put to the trouble of presenting an ET3 response. In the first claim I am given to understand that the respondent actually attended for a case management preliminary hearing, needlessly as it turned out.

5 The claimant stated that the reason he withdrew Claim 2 was that he considered it might be better to take an internal process up instead. However he says his grievance was effectively ignored which is why he brought Claim 3 (3201614/2017) in an identical form on 28 November 2017.

6 From the passages I have seen (on careful manual comparison of the pages, with minor additions and some omissions), the claims are more or less identical i.e. a copy and paste. Several pages are wholly copy and paste. The differences seem merely for the sake of clarification, or later updating information.

7 When the Claim 2 was dismissed Ms Morjaria for the Government Legal Department asked the tribunal several times for details of the notice of withdrawal and the tribunal studiously ignored those. A copy will be given to the respondent's representative today. But it was by email of 26 October 2017 and I quote it in full from file 3201254/2017:

> "Hi
>
> I wish to withdraw the captioned case (case number 3201254/17) with immediate effect.
>
> Please close the case.
>
> Kind regards
> Vivek Pareek"

And that was all that was written there. It was simple enough.

8 Despite the fact I have been shown case precedent authorities on issue

estoppel, *res judicata*, and *Henderson v Henderson*, I am not going to rely upon or cite those cases. The most recent was *Thomas v Devon County Council* UKEAT/0513/07 and *Johnson v Gore Wood & Co* [2002] 2 AC 1. The reason I do not do so is the Tribunal Rules underwent a substantial change for the better and the less complex in 2013. I can deal with this without resort to the difficult and quite tedious appeals in the EAT and above on *res judicata* under the 2004 rules. There have been no such cases since the Rules were reformed.

9 The rules are very simple now. Rules 51 & 52 of the 2013 rules state simply:

> "**End of claim**
>
> 51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.
>
> **Dismissal following withdrawal**
>
> 52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall [my emphasis] issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless –
>
> (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
>
> (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice."

10 The practice in all tribunals now is that dismissal is the default position unless some ambivalence is shown in the notice of withdrawal e.g. distress, duress and conscionable conduct by the other side etc. If this is the case the tribunal corresponds with the would-be withdrawers of the claims asking them to clarify the position and if they really do wish to withdraw the claim. In the above short notice of withdrawal there was absolutely no hint of ambivalence or reserving of a right.

11 The Rules have not caused injustice in practice and have saved an enormous amount of parties' and tribunals' time. It could not be easier for a claimant to indicate ambivalence or caution in the notice of withdrawal, but that was not done. The claim seemed to be withdrawn confidentially and cheerfully.

12 The claimant told this tribunal today that he withdrew the claim in circumstances where he thought it preferable to pursue an internal grievance. That is undoubtedly true, but if he had asked anyone who any remote idea of employment tribunal procedure, the difficulty with time limits, and the difficulty with *res judicata*, and now these Rules, he would have been advised under no circumstances to withdraw his claim but to ask for a stay of the claim instead, in order to pursue an internal process.

13 The tribunal (and any respondent) is entitled to take correspondence such as

this email of 26 October at face value. And so we did. Judge Jones signed a dismissal judgment very soon thereafter, given that otherwise the respondent would have had to submit an ET3 response.

14 This was one of two ways in which I was asked to deal with the claims in Claim 3 and I have no hesitation in doing it.

The claimant's sickness records

15 The claimant's background is complicated. He worked continuously for the DWP from 15 December 2008 to 10 September 2017 when he was given a transfer to Defra. The background is complicated here. He had had a good deal of unhappiness at DWP centring on poor performance assessments and difficulties in particular with 3 managers within the disabled benefits section. He worked then in Basildon. The managers with whom he had problems were Dorinda Sexton the Senior Executive Officer, Sarah Hole and Lisa Mahoney. As a result of various grievances he transferred. They all worked on the 4th floor.

16 Having brought a grievance one resolution was that he was transferred out of that team to a different team on the 5th floor who undertook disability workplace assessments for disabled people with a view to getting them back into work. There he had a different line manager, Peter Morgan, with whom he was perfectly happy. He still wanted to apply for jobs elsewhere in the civil service and, on 18 August, he was informed he had been successful in an application to work for Defra, at a higher grade with more pay.

17 The next move was that he had to provide certain documentation. He had filled out various forms and he needed to provide or obtain the provision of a salary slip, and his sickness record with the DWP. That proved extraordinarily difficult to obtain in circumstances which nobody in this room today understands. As far as the claimant was concerned he could only telephone HR who simply gave him a reference number for his call to them and say that they would set the enquiry in train after which he heard absolutely nothing. It was not until November apparently that the sick records were provided. When that happened he had already booked annual leave to take the whole month of January off to stay in India. He went ahead with that holiday, still on his existing lower salary.

18 As an Executive Officer, as he was in Basildon, he was earning £25,000 per annum. When he moved across to Defra on a level transfer that salary persisted. The role to which he was promoted for the Home Office was as an HEO, a Higher Executive Officer, which attracts an extra £11,000 per annum i.e. from £25,000 to £36,000 per annum. It is a substantial difference. Had his sick record come through earlier it is likely he would have got his feet under the table at the Defra / Home Office before he took a month's leave at the higher rate of holiday pay. It is not the way it turned out.

19 That is now a new claim in this Claim 3 which did not feature at all in Claim 2 which was dismissed on withdrawal. I simply do not know enough about this claim to

make any order striking it out or dismissing it, or ordering a deposit on it. Relative to the date of ACAS reference for early conciliation which is 30 September 2017 it is obviously in time. He requested the records in mid-August 2017 as soon as he heard that he was eligible for promotion on 18 August. That claim is not struck out and, as the judgment states, must go to a final hearing before a full tribunal panel.

20 It is put as a claim of victimisation. To say that the claimant has established protected acts under section 27 of the Equality Act 2010 would be an understatement as, at the time, he had had 3 disability discrimination claims before the tribunal, under the Equality Act.

21 The claimant also has a money claim for arrears of pay. It would be a head of discrimination, but the way it is coded on the tribunal file and claimed in the ETI claim form it is also expressed as a claim for arrears of pay, reflecting the stalling of his promotion from August to February which would represent approximately 4½ months at an annual rate of £11,000 gross. It is part of the same sick records complaint.

22 The claimant informs the tribunal that now he is at the Home Office he is happy. That is extraordinarily good news given the duration and the intensity of his previous unhappiness.

<u>The claim about the 4th / 5th floor</u>

23 The other claim about moving floors in Basildon is troublesome and this is struck out as having no reasonable prospect of success. I take some courage from a recent Court of Appeal authority which reminds tribunals that the power to strike out in Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013, is simply expressed as a claim may be struck out if it "… has no reasonable prospect of success". The hurdle is lower than "no prospect of success" (as it was in previous Rules) but higher than "little reasonable prospect of success" which is the level appropriate to make a deposit. (See *Ahir v British Airways* 2017 EWCA Civ 1392). I consider that there is no reasonable prospect of this succeeding. Why so?

24 As a result of his grievance, the claimant had been moved up to the 5th floor to the disability assessment section. The claimant informed the tribunal today that there were later moves between the floors, due to overcrowding on the 5th with the effect that he ended up back on the 4th floor in the same open plan office with the 3 managers who had allegedly given him so much stress and anxiety - Dorinda Sexton, Sarah Hole and Lisa Mahoney.

25 At the time the claimant stated that he never raised a query or complaint about this. It strikes me that any tribunal would ask if Peter Morgan was made aware of how strongly the claimant allegedly felt that even to be in an open plan office with these managers would make this workplace a ".. an intimidating, hostile, degrading, humiliating, or offensive environment" for the purpose of s 26 of the Equality Act 2010.

26 The claimant puts his case that the respondent should simply have been aware from an old occupational health assessment, without his raising it, that this would be a

humiliating workplace environment for him notwithstanding that he was not working on the same section as these managers and that they would have no part in his line management. I cannot see how any tribunal would accept that argument. I would go further to say I consider if a tribunal accepted such an argument on the facts it might be vulnerable to appeal on perversity grounds. It would be a bizarre conclusion. The claimant contends that somehow the respondent had a proactive duty to be omniscient about his case history without him raising even a hint of a query or a complaint.

27 It strikes me from what he has told the tribunal today that if the claimant had raised it with Peter Morgan, some way might have been found to accommodate him. For instance he might have let him work on the ground floor. Apparently there were disabled Executive Officers within that team who were working on the ground floor by reason of mobility problems. The respondent had been accommodating before in moving him away from these managers.

28 Further, from what he told the tribunal today, the claimant worked there for some 2 months from 3 July to his move to Defra during which time he had absolutely no problems with any of the 3 managers whom he dreaded being in the same room as. (It must anyway have been a lot easier for him knowing that his time in that section anyway was limited as he had been informed on 18 August that his application for promotion to the Home Office had been accepted).

29 As a claim of "victimisation", which usually involves some sort of singling out, it is a bizarre claim, when all the other Executive Officers within that section were moved down to the fourth floor from where the claimant had originally come.

30 The claimant mentions reasonable adjustments but it is important to appreciate that this is put as a claim for (1) harassment and (2) victimisation. It is too late to change it again. There is no indication that the move back to the 4th floor with those managers was conscious or deliberate at all.

31 Even if it was put as a reasonable adjustments claim. I find the fact that the claimant did not raise any suspicion of a complaint or concern tells against it very strongly and I would not consider it had a reasonable prospect of success before any tribunal panel I can imagine.

32 Conceptually, reasonable adjustments might have been a better fit for a claim but at this stage of the proceedings it is too late. The case has already been managed extensively including the hearing on 19 February 2018 before Judge Hyde. That was not the way he put at that hearing. Ms Robinson attended then, and the claimant was in person, both as today. Judge Hyde asked that her draft list of issues be amended to incorporate everything that the claimant had said at that hearing, which did <u>not</u> include enlarging the 4th floor allegation to a claim of failure to make reasonable adjustments. There comes a time when a party is expected to be committed to its statement of case.

<u>Claim 4</u>

33 Claim 4 is truly bizarre. It was presented on 9 February 2018. It is a disability

discrimination claim, again. The primary respondent is the Department for Work & Pensions. The address of the Department is given as Tothill Street, Westminster, SW1.

34 There is a secondary respondent cited - Civil Service Resourcing in Benton Park View, Newcastle-Upon-Tyne. The claim, of course, being a claim relating to a workplace in SW1 is now pending before Central London Employment Tribunal. Its number is 2200477/2018. Case numbers that start "22" are Central London Tribunal case numbers. A request has been made to transfer it to this tribunal which, for whatever reason, has not yet been actioned. There is actually a copy of the ET1 claim and an ET3 response to the claim in the bundle for this hearing. The problem is that the claimant did not fill out box 2.4 where he should have stated his place of work, if different from Tothill Street. As I understand the claimant never has worked in Tothill Street. It is just an administrative headquarters of the DWP in London. Civil Service Resourcing in Newcastle appears to handle all civil service staffing - internal transfers, promotions, and external recruitment.

35 It appears from the face of the ET1 that there is only one early conciliation certificate on Claim 4 and that EC certificate probably relates, as I surmise, to the DWP. If there was to be a second respondent there would have needed to be a second EC certificate as the rules provide. That is the usual reason that a tribunal will not accept a claim – no EC certificate.

36 The claimant unhelpfully has objected to the claim not being accepted. He has also objected to the claim being transferred to this region which I cannot understand at all. It would have been easier for me to have had that claim before me today officially. I know quite a bit about it now and I have done a rough textual comparison between it and Claim 3.

37 Claim 4 was presented on 9 February 2018. It is possible now that it will not need to be transferred particularly if the Central London tribunal is referred to a copy of this judgment in Claim 3. No detailed analysis has been asked of me today as to what is new in claim number 4. I take it that the main burden of it is the claim which I have just allowed to proceed to trial, namely the delay in the provision of the sick records which stalled the promotion process which is currently shrouded in mystery.

Disability

38 The claimant says he has a disability. I am virtually ignoring an earlier heart condition. He had a collapsed lung in 2012 secondary to TB. I would have anyway held that this relatively circumscribed episode was extremely out of time and should not be allowed to count as a dis. There is no telling which of the people accused of discrimination is still employed by the DWP anyway and see no good reason to argue continuing acts arising out of that.

39 The current alleged disability relied upon is more borderline - stress and anxiety. "Stress" is utterly notorious. It is not a diagnosis. It might be a symptom.

40 On a few of my researches today and upon examining the medical records the claimant is prescribed an extremely low dose 20mg of Amitriptyline, a tricyclic antidepressant, which has a major function controlling pain and anxiety. He has to take 2 x 10mg pills at night because it could make him drowsy. As I state this is a low dose, several patients are prescribed something like 250mg. That may or may not mean that the claimant's alleged anxiety is borderline.

41 I have been shown some sickness details from a letter from the respondent to the tribunal dated 17 April indicating the longest period of absence related to "stress" was 6 September to 24 October 2016 - 1½ months. It is quite likely that there would be a quite strongly contested hearing anyway on disabled status, but the claims are out of time.

42 I cannot accept the claimant's generalised assertion that there is continuing act of discrimination. He attempts to draw some sort of golden thread through Civil Service Resourcing to the DWP. They both actually occupy offices in Benton Park View in Newcastle but the thought of there being collusion between these departments strikes as fanciful and far-fetched. They are not in the same room as the claimant contended today. I cannot see how they would be when they are given different room numbers and different post codes. These are all weaknesses.

43 (It is possible that the DWP may have to obtain records and information from other parts of the organisation e.g. Civil Service Resourcing so indirectly they may become involved when the respondent properly investigates this claim with a view to its being tried).

44 As I say I am not seized of claim number 4. That will be for the respondent to deal with, probably elsewhere.

45 The sick record delay is the only claim that is now surviving in this region after today.

Consequential case management orders

46 The final hearing has now been adjusted from 5 days down to 3. The dates 13 and 6 November have been cancelled. It is now a 3 day trial from **Wednesday to Friday 7 to 9 November 2018** at East London Tribunal Service, 2nd Floor, Anchorage House, 2 Clove Crescent, London, E14 2BE starting at 10am.

47 The parties have to understand that that time estimate must include time for the tribunal panel to deliberate upon and give a judgment on liability and quite possibly remedy because it is only injury to feelings and an easily calculable pay differential claim limited to a finite period.

48 Judge Hyde made case management directions on 19 February sent to the parties on 28 March. I vary those as follows for now.

30.1 There is no need for an updated schedule of loss at all.

30.2 Disclosure originally set for 17 May will now take place on **14 June 2018**, allowing the respondent more time to investigate and prepare their response to this claim arising from the sickness records.

30.3 Copy documents by **28 June 2018**.

30.4 Witness statements are still to be exchanged on **9 October 2018**.

Employment Judge Prichard

27 June 2018