



EMPLOYMENT TRIBUNALS

Claimant: Mr J Morley

Respondent: B Conway Group

HELD AT: Manchester **ON:** 13 February 2018

BEFORE: Employment Judge Feeney

JUDGMENT

having been sent to the parties on 13 February 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant issued his claim on 18 September 2017 claiming disability discrimination. Following a CMD it was identified that he had two direct discrimination claims, one in relation to the respondent bullying him into answering questions about his disability and also he says he was dismissed of his disability. In addition the respondent did not concede that the claimant was disabled. The claimant's disability was Post Traumatic Stress Disorder.

2. In addition the respondents raised the question of jurisdiction stating that neither the ACAS certificate nor the ET1 reflected the true name of the respondent which was B Conway (Trailers) Limited and therefore the claimant's claim was technically incompetent. The Tribunal had no jurisdiction to hear it.

Pre-amble

3. The case today was listed for a Preliminary Hearing to decide:-
 - (i) whether the claimant was disabled within the meaning of the Equality Act 2010 and
 - (ii) whether the claimant's claims should be struck out on the respondent's application either as having no reasonable prospect of success or because the Tribunal did not have jurisdiction.
4. The claimant was ordered to provide an Impact Statement and relevant medical records.
5. There was some correspondence before the hearing between the parties regarding the submission of the impact statement. The impact statement was extremely succinct and limited and different versions had been sent to the respondent, it was not clear which version the claimant wished to rely on.
6. At 10.00am when the hearing was scheduled to begin I advised the respondents that I would wait 20 minutes to see if there was any communication from the claimant or whether he attended, meanwhile I would read the respondent's documentation, the respondent providing a bundle. My clerk checked all the emails and telephone calls in order to be certain that there had been no communication and there was no evidence of any. We therefore began the case, the respondents speaking to its written submissions.
7. Towards the end of the respondent's submissions my clerk attended and advised me that the claimant had rung and said what time does the case start. As the claimant had been clearly had received the notice of hearing which stated the time the tribunal began. I decided to continue the hearing because the claimant had given no prior warning that he was not attending, he offered no reason for not attending, and the respondent's application was almost complete. Further if the claimant did have a good reason for not attending he could apply for a reconsideration, however if he did and his reasons were unconvincing or blameworthy he could be at risk of costs being awarded against him. If I had simply adjourned to another date the respondent would inevitably have applied for the costs of today.

Respondent's Submissions

8. The respondent submitted:
 - (1) The claimant had been dismissed for unsatisfactory performance irrespective of whether the respondent knew or did not know of his alleged disability.
 - (2) That they did not know of his alleged disability.
 - (3) That the claimant has not submitted sufficient evidence to establish a disability. His impact statement was insufficient and there was no

proper evidence of any official diagnosis of Post Traumatic Stress Disorder.

Striking out

9. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 rule 37 gives the Tribunal power to strike out claims at any stage of the proceedings. Rule 37(2) states that:

“A party cannot be struck out without being given reasonable opportunity to make representations.”

10. In **Abertawe Bro Morgannwy University Health Board v Ferguson [2013]** the EAT remarked that:

“In suitable cases applications for strike out may save time, expense and anxiety. However, in cases that are likely to be fact sensitive such as those involving discrimination or public interest disclosures the circumstances in which a claim will be struck out are likely to be rare. The grounds for striking out are as follows:

(1) That it is scandalous or vexatious or has no reasonable prospect of success.”

11. Rule 37(1)(a) is the relevant ground in this case.

12. The respondent relies on no reasonable prospect of success. It is not a question of balance of probabilities but is a high test of no reasonable prospect of succeeding. This was stated in **Ezsias v North Glamorgan NHS Trust [2007]** Court of Appeal and **Balls v Downham Market High School and College [2011]** EAT.

“Where factual disputes are critical and can only be resolved by oral evidence, either that evidence could be taken at the preliminary hearing or the claim should not be struck out or should proceed to a hearing.”

Findings of the Tribunal

13. The claimant was employed by the respondent on an apprenticeship. On March 2017 he was attending Oldham College undertaking a Business Administration course that was linked to his employment and a learning agreement was signed between the claimant, the respondent and the College. This required him to be actively involved in productive learning, take responsibility for all aspects of his study, attend lessons as required and inform his Tutor if he was unable to attend lessons in advance.

14. The respondents submitted that the reason the claimant was dismissed was because they had a number of difficulties with him – on 27 March for accessing non work related websites constantly during the day; on 31 March for attending work late on 29 March because he had not attended work and had not given advance notice of an appointment to the respondents.

15. It was at this meeting to discuss this that the claimant said he was bullied regarding his disability. However Mr Conway, Director and Ms Kate Lever, Office Manager who attended stated that their witness evidence would be that this was not the case and they were just trying to obtain information about when the claimant would attend appointments. They also would say that the claimant only told them that he was receiving counselling for trauma.

16. On 1 June the claimant was spoken to about his behaviour towards a female colleague Ashley Young. The claimant was absent from College on 22 June and this was reported to the respondent by his Training Assessor. The claimant stated he had a burglary at his home and could not attend College. He advised the respondent he had contacted College on that day. The respondent learnt that the claimant had been absent on 15 June also without informing the respondent. The claimant stated his absence was due to a tooth abscess however the respondent's witness evidence would be that he had not advised them of this. The claimant's attendance according to the College register was 62%.

17. On 3 August the claimant had to be spoken to again in relation to lateness.

18. On 15 August the claimant was asked by Ms Lever to provide his call log and he agrees he provided the call log from the previous day rather from that day as he had failed to complete one that day. The respondent was upset by this which they regarded as an act of dishonesty and in view of all the other difficulties they had had with the claimant decided to terminate the claimant's employment. They emailed the College to ask about the procedure for doing this but did not receive a reply as his Assessor was absent. As they had arranged to see the claimant at 9.30 am they continued with the meeting with the claimant. They were dissatisfied with his explanation but did not dismiss him on that day as they wished to speak to the College first and on 17 August it was confirmed that it would be possible to terminate the claimant. They also discovered that the claimant had contacted the College on 16 August to say he wished to transfer to another company or withdraw his apprenticeship. In this request the claimant asserted that Mr Michael Conway had stated the claimant would not have been employed had his mental health issues been known about.

19. The claimant attended work on 18 August and was informed by Andrew Conway of the decision to terminate his employment.

20. The respondent provided evidence in the form of file notes of occasions when they had had to speak to the claimant on 27 March and 31 March. There was evidence of Kate Lever emailing the claimant regarding his doctors appointment in a perfectly friendly fashion, there was a note of the claimant being spoken to about antagonising Ashley Leigh on 1 June, on 26 June there was an email regarding the claimant's absence from his College course, on 27 June there was a note regarding the failure to notify absence and on 3 August there was an email regarding the lateness.

21. On 16 August Kate Lever emailed the claimant's assessor stating "since Jordan has started employment with us we have come across a lot of issues, we

have been trying to iron these out with him and wanted to give him a fair chance to improve however it has got to the point now where we think that he is not the right fit for us at Conway's, we haven't spoken to him as regards to this yet and wanted to go through the correct channels and speak to you first so that you can advise us on how we go about terminating his employment, do we have to go through College or would we just go about it as if he was a normal employee. We are looking to replace him with another apprentice as we have had really good experience with everyone we have employed through the College before, all of these who are still working with us, we just feel as if Jordan is not appreciating the opportunity he has been given".

22. There was also a note from the meeting on 16 August headed "falsifying company documents". This said "Jordan was reminded on 15 August to make sure he completes his call log, Kate asked him to send it over at the end of the day, Kate has been keeping her own log of Jordan's calls and upon opening the call log found that Jordan's had been falsified, Jordan was told that the issue was not that he hadn't completed the call log it was the fact that he was dishonest about it and that he had falsified the documents, he was given a verbal warning.

23. On 16 August he contacted Stephanie Tutman at Oldham College and said "I am wanting to transfer to another company or I am actually thinking of withdrawing this apprenticeship, I haven't given my notice at the moment until I determine what to do, I'll give my reasons when I get a chance to speak to Siobhan".

24. The claimant then set out a letter to the college which was similar to his claim form, he stated "Work Director insists he should know about the reason why I took time off when I started, I had a hospital appointment, I explained I had been referred to mental health, Michael and Kate was in the office conducting this meeting, the assessor had already told me the employer does not need to know why I am referred to mental health. I stated this to both Michael and Kate and Michael said he holds the right to know this information and he will contact the company solicitors. Towards the end of the meeting Michael asked me if I mentioned this in the interview where they would have known and wouldn't have took me on. I found this comment discriminatory as I started these appointments on 28 March 2017, my start date was 20 March 2017, I was diagnosed with PTSD via the mental health. Another time I took off was in college when I rang the absence line when I had an abscess on my gum and was in pain and couldn't go to the dentist due to the infection not being able to fight the fluid, I was asked to come into the office where again Kate and Michael were in the meeting, I explained I followed college procedure to ring the absence line where I gave my details over the automatic line, I didn't register my badge number and therefore it didn't process to my assessor". Michael stated we should have been informed about being absent, I said I was sure due to the handbook not stating anything about being off sick or being absent, the reply was shouting saying "this is Conway's policy you will ring in if you are off College or work". I was asked to come in the office regarding my call logs which Kate said they were falsified and they are not completed. Kate said that these logs should be completed, my reasons for this was no one else picks up the phone up where work distribution is set up equally between the office staff, I said I don't have the time to constantly answering and logging as I got my own work to finish, Kate replied "I can understand that but you lied and the trust is broken", Michael jumped in and said "it is the biggest mistake you will make and I wanted you out but I said Kate can deal with it whether she

wants to keep you or not". I accepted that the trust was broken because it was the only way I could get my point across that no one else doesn't answer the phone, I asked Ashley if she had had a call log and she said yes but I not logged it because I don't pick the phone up, Kate then also said "I will tell Ashley and the others to start making call logs", I thought is it just me that gets the blame, why no one actually does these calls logs even though I am picking up forty to fifty calls a day. I started the apprenticeship at B Conway on 20 March 2017 and I already had three meetings here, it's a small business and will be hard to grow into the business and I am thinking whether this job is right for me or not, I get on with the staff but it is just whether how I could grow here within the next five to ten years". This was corroborative to the fact the respondent had raised issues with the document previously.

25. The respondent also included some material which they said they would cross examine on which showed that the claimant appeared not to have any problems with social interaction contrary to his impact statement. One was from 19 August at 3.42 communicating with fellow workers, one was referring to "lets get steamy with cocktails" to fellow workers on 5 May 2017. However this was not evidence I felt weighed very heavily against the claimant establishing disability.

26. The claimant's evidence regarding his disability comprised of extracts from his GP records which was heavily redacted. They recorded that on "12 May 2017, seen by Geoff Cullen six weeks ago with PTSD having sessions every ten days in Harpurhey Medical Centre", there was then a letter from Mr Cullen who was described as Counsellor/EMDR Therapist (High Intensity) he was not a Psychiatrist, G.P. or Psychologist. There was no other reference to Post Traumatic Stress Disorder.

27. As referred to above there were three impact statements, they were very short, one said "I was diagnosed with PTSD on my first session with a Psycho Therapist Geoff Cullen on 28 March 2017". My treatment was interrupted due to a reaction of my employer, this disability affects me in most areas of my life and were in effect at the time I was employed by B Conway Group. My symptoms including sleeping (no pattern), anxiety panic attacks, low confidence, flashbacks, social situations can be daunting, angry outbursts at home, depression, poor concentration in commodious rooms. Although I have these symptoms I try and function the best way I can, I do my best to not let my disability interfere in the workplace and my work although this can be extremely difficult if the employer is unsupportive".

28. A second version added feelings of intense distress when reminded of the trauma and sleeping/insomnia (no pattern) and added to this was "I found B Conway discriminating in how they dealt with my disability, I felt victimised and harassed, I was worried and anxious about attending work due to how the respondent was treating me, I felt low in mood and my confidence was affected more when I was working there. I was extremely embarrassed and humiliated how they dealt with my disability, I felt like an alien. This continued throughout my employment with insulting and hurtful remarks which brought me more distress and exasperated (i.e. exacerbated) my symptoms, angry outbursts at home had been removed".

29. Finally in respect of the comparator relied upon Ashley Young. The claimant said that she was not dismissed for not making call logs however the respondents stated that the comparison was not correct because Ashley Young did not falsify call logs or admit to falsifying call logs and did not have a similar history of conduct at work problems. She had longer service and undertook a different role as a permanent member of staff.

Conclusions

30. I have decided to strike out the claimant's claim of having no reasonable prospects of success for the following reasons.

31. The respondent has produced documentary evidence to show that they spoke to the claimant on numerous occasions regarding problems with his conduct at work.

32. They can evidence they contacted the claimant's College with a view to terminating his employment for reasons unconnected with his disability.

33. The claimant's named comparator is inappropriate for the reasons given in the respondent's submissions. A hypothetical comparator would be no different.

34. The only real evidence that there was some negative reaction to the claimant concerned the meeting on 26 April when the claimant spoke with Mr Conway and Ms Lever, both of whom will give evidence to deny the claimant's allegations and will say that the only reason they wanted to know about his hospital appointments was to ensure they had notice of them and they were entered into the diary. The email from Kate Lever of 16 August date supports this.

35. It is likely the respondent will be able to establish they did not have the requisite knowledge that the claimant was disabled.

36. The claimant has no reasonable prospect of success of establishing he was disabled, his impact statement is extremely limited, he has given no information on how long his alleged condition has lasted and the respondent have documentary evidence on which they can challenge some of the statements in the impact statement.

37. Further, the claimant has very limited evidence that there has been a diagnosis of Post Traumatic Stress Disorder. There is certainly no diagnosis from a GP or a Consultant to that effect and whilst not determinative it makes it significantly harder for the claimant to establish disability.

38. To summarise the main reason I have decided to strike out the claimant's claim as having no reasonable prospect of success is because the respondent has produced reliable evidence of non disability related reasons to justify the claimant's dismissal and although there are clearly some disputes about what was said which can only be resolved by oral evidence the factors above outweigh what can be established by oral evidence .

Employment Judge Feeney

Date: 1st May 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 May 2018

FOR THE TRIBUNAL OFFICE