



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms L Quine

**Respondent:** Tiger North Ltd

**HELD AT:** Manchester

**ON:** 20 March 2017

**BEFORE:** Employment Judge Franey  
(sitting alone)

## REPRESENTATION:

**Claimant:** Written representations only

**Respondent:** Ms L Gould, Counsel

# JUDGMENT

The following complaints are struck out because they have no reasonable prospect of success:

- (a) The complaint of direct disability discrimination contrary to section 13 Equality Act 2010 in relation to the grievance outcome of 1 June 2016.
- (b) The complaint of discrimination arising from disability contrary to section 15 Equality Act 2010 in relation to the grievance outcome of 1 June 2016.
- (c) The complaint of harassment related to disability contrary to section 26 Equality Act 2010 in relation to the grievance outcome of 1 June 2016.
- (d) The complaint of discrimination arising from disability contrary to section 15 Equality Act 2010 in relation to contact between Mr Boyd and the claimant's General Practitioner in August 2016.

# REASONS

## Introduction

1. On 31 August 2016 the claimant presented a claim form in which she complained of disability discrimination since being employed by the respondent in November 2015. She alleged that she was a disabled person by reason of depression and anxiety, and set out in her claim form how a colleague she had recruited was promoted over her during her absence on annual leave, how she was bullied and harassed by that colleague and another manager, and how she had a covert recording of a discussion between the two of them on 11 May 2016 (“the May discussion”) in which comments which amounted to harassment were made. A grievance about these matters had been rejected by the respondent’s proprietor, Mr Boyd, on 1 June 2016, and she complained about how Mr Boyd had pressed her General Practitioner for a response to queries despite having had a report from the GP already. The complaints pursued were direct disability discrimination, discrimination arising from disability, harassment and victimisation.

2. The response form of 5 December 2016 resisted the complaints on their merits. The respondent denied that the claimant was a disabled person, and denied any unlawful treatment. The grievance outcome was said to be a proper conclusion against which the claimant had not appealed, and the additional questions to the GP were because the initial report was too vague.

3. The matter came before Employment Judge Porter at a telephone preliminary hearing on 6 January 2017. Case Management Orders were made providing for a final hearing between 13 and 15 June 2017. Whether the claimant was a disabled person was to be determined at that final hearing. Some further particulars of the claim form were to be provided.

4. Those further particulars were provided on 27 January 2017. The claimant confirmed that the matters for which she sought a remedy were restricted to Mr Boyd’s decision to reject her grievance, and to his contact with her GP in August 2016. The treatment about which she complained in that grievance, including the May discussion, was therefore only background to her pleaded complaints.

5. Upon receipt of that information the respondent applied for an order striking out her claims, or in the alternative for a deposit to be required. The application was made by email of 7 February 2017. By a letter of 23 February 2017 the parties were notified that Employment Judge Porter had decided that there should be a preliminary hearing to consider those applications, and that the Case Management Orders were suspended in the meantime. The date of 20 March 2017 was notified.

6. On 13 March 2017 the claimant’s solicitors sought a postponement of the preliminary hearing on the basis that the claimant was still in Saudi Arabia with her husband. Because of her disability she would not be able to attend the hearing on her own, and her husband had not been able to secure permission to take annual

leave and return to the UK. That application was rejected by Regional Employment Judge Robertson on the basis that no evidence would be required from the claimant; she was legally represented and could make written submissions if so advised.

7. In the early hours of 20 March 2017 her solicitors submitted written representations in the form of a skeleton argument running to 37 paragraphs. Helpfully that skeleton argument was cross referenced with the bundle of documents (see below). There was no renewal of the application for a postponement.

### **The Hearing**

8. At the hearing the respondent was represented by counsel. I had the benefit of an indexed and page numbered bundle of documents running to 226 pages. I also had the benefit of oral submissions from Ms Gould.

9. From the claimant I had the claim form and further particulars, the correspondence on file and the skeleton argument which was cross referenced with the bundle.

10. I heard no evidence. I proceeded on the basis that the claimant would prove the primary facts asserted in her claim form.

### **Relevant Legal Principles**

11. The power to strike out arises under what is now rule 37 of the Employment Tribunals Rules of Procedure 2013. Rule 37 so far as material provides as follows:

**“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...”**

12. As far as “no reasonable prospect of success” is concerned, a helpful summary of the proper legal approach to an application to strike-out is found in paragraph 30 of **Tayside Public Transport Co Ltd v Reilly** [2012] CSIH 46, a decision of the Inner House of the Court of Session:

**“Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (*Balls v Downham Market High School and College* [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (*ED & F Mann Liquid Products Ltd v Patel* [2003] CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Mann Liquid Products Ltd v Patel*, supra; *Ezsias v North Glamorgan NHS Trust* [[2007] ICR 1126]). But in the normal case where there is a “crucial core of disputed facts,” it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias v North Glamorgan NHS Trust*, supra, Maurice Kay LJ, at para 29).”**

13. There is no blanket ban against there being a strike-out, for instance in particular classes of cases such as discrimination, although in **Lockey v East North East Homes Leeds** UKEAT/0511/10/DM, a decision of 14 June 2011 before HHJ Richardson sitting alone, the EAT said at paragraph 19:

“...In cases of discrimination and whistleblowing there is a particular public interest in examining claims on their merits which should cause a Tribunal to consider with special care whether a claim is truly one where there are no reasonable prospects of success: see *Ezsias* at paragraph 32, applying *Anyanwu v South Bank Student’s Union* [2001] IRLR 305. ....The Tribunal is in no position to conduct a mini-trial; issues which depend on disputed facts will not be capable of resolution unless it is clear that there is no real substance in factual assertions made, as it may be if they are contradicted by contemporaneous documents.”

14. In **Chandhok v Tirkey** [2015] IRLR 195, at paragraph 20 the Employment Appeal Tribunal observed that there were occasions when a claim could properly be struck-out where, for instance, on the case as pleaded, there was really no more than an assertion of a difference of treatment and a difference of protected characteristic, which according to Mummery LJ, at paragraph 56 of his Judgment in **Madarassy v Nomura International plc** [2007] ICR 867:

“... only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”

15. The EAT in **Chandok** went on to add that the general approach was nonetheless that the exercise of a discretion to strike-out should be sparing and cautious, adding:

“... Nor is this general position affected by hearing some evidence, as is often the case when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision.”

16. In addition to the above I also took into account the relevant provisions of the Equality Act 2010.

### **Discussion and Conclusions – Grievance Outcome**

17. The claimant's grievance of 17 May 2016 appeared at pages 94 and 95 in the bundle. It plainly contained an allegation of disability discrimination by way of harassment. Three matters were raised. They were that the claimant had been ostracised by colleagues in decision making matters in the store, that she had been described as “insensitive” and as someone who needed to “lighten up”, and that in the May discussion she had been described in offensive and derogatory terms relating to excessive alcohol consumption.

18. Mr Boyd met the claimant on two occasions. He interviewed members of staff at the Preston branch. He had a ten page typed statement of events from one of the main protagonists. By a letter of 1 June 2016 he set out his conclusions. It was confirmed that a manager had known that the claimant had clinical depression and was on antidepressants, but he rejected the allegations of disability related

harassment. He found that there had been no bullying and harassment in the management of the store, and in relation to the May discussion he found that it was not related to disability. However, he recognised that the terms in which the claimant had been discussed were derogatory, foul mouthed, inappropriate and ugly, and both participants were given disciplinary warnings.

19. The grievance outcome letter invited the claimant to contact him if she wanted to make an appeal, but she did not do so.

#### Direct discrimination

20. In order to have any reasonable prospect of success in a direct discrimination complaint, the claimant must identify something which suggests that there is a link between the protected characteristic and the treatment in question. In my judgment the grounds of claim and the further particulars do not identify any factor which might shift the burden of proof. The suggestion in paragraph 17 of the grounds of claim that it was significant that Mr Boyd was “disappointed” that the claimant had complained of disability discrimination is at best supportive of a victimisation claim, not a direct discrimination complaint. Further, the claimant has not identified any comparable grievance brought by a person without a disability which was treated in a more favourable way. Even assuming that the facts pleaded by the claimant are true, therefore, this complaint in my judgment has no reasonable prospect of success.

#### Discrimination arising from disability

21. The claim form does not identify the “something” required by section 15 which is said to be the reason for the treatment and which itself arose in consequence of disability. If it is the claimant's case that it was the allegation of disability discrimination which arose in consequence of her disability and was the reason for the rejection of her grievance, that is a victimisation complaint. Effectively all the claimant has done in her pleading is to apply the label of section 15 without analysing the constituent requirements. There is no reasonable prospect of success.

#### Harassment related to disability

22. In my judgment the claimant has reasonable prospects of establishing that the rejection of her grievance was unwanted conduct and that it was related to her disability. However, in my judgment she has no reasonable prospect of success in establishing that the rejection of her grievance violated her dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her. She does not identify any evidence which would support a contention that this was the purpose behind the rejection of her grievance, and whether it had that effect would be decided taking into account the factors in section 26(4). The grievance was properly investigated. It was the subject of a detailed response after two meetings and other interviews. Mr Boyd took pains to explain his conclusion. His reading of the transcript of the May discussion appears entirely sensible. The claim form does not allege that the claimant's consumption of alcohol was something arising in consequence of her disability. The claimant declined to contact Mr Boyd about the possibility of an appeal. In those circumstances it seems to me the claimant has no

reasonable prospect of establishing that this rejection of her complaint created the proscribed environment.

**Discussion and Conclusions – GP Contact**

23. In my judgment the complaint that the contact between Mr Boyd and the GP in August 2016 was discrimination arising from disability has no reasonable prospect of success. The claimant has not actually pleaded a case on this. Her case (grounds of claim paragraph 25) is that he took this action to mount a defence against the Employment Tribunal complaint which he believed the claimant was going to bring. That is a victimisation complaint and is best addressed as such.

**Outcome**

24. The complaints set out in the judgment were therefore struck out.

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Employment Judge Franey

20 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
24 March 2017

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FOR THE TRIBUNAL OFFICE