Case Numbers: 3331194/2018, 3331422/2018 & 3334868/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs P Scott	v	(1) Hillingdon Women's Centre (2) Ms Neeta Desor (3) Ms Angela Waterford (4) Ms Amelia Hall (5) Ms Sandra Robins (6) Ms Maureen Badu

Heard at: Watford **On**: 7 January 2019

Before: Employment Judge Hyams,
sitting alone

Appearances:

For the Claimant: In person
For the Respondents: Mr J Gray, of Counsel

RESERVED JUDGMENT

The first to fifth respondents' application to strike out the claims of direct age discrimination and disability discrimination within the meaning of section 13 of the Equality Act 2010, contrary to section 39 of that Act, succeed. Those claims do not have reasonable prospects of success and are struck out.

REASONS

Introduction; the hearing of 7 January 2019

1 On 7 January 2019 I considered an application made on behalf of the

respondents to the first two claims (numbered 3331194/2018 and 3331422/2018), i.e. respondents numbered 1-5 inclusive, to strike out the claims of age discrimination and disability discrimination (under rule 37 of the Employment Tribunals Rules of Procedure 2013), or, alternatively, for one or more deposit orders (under rule 39 of those rules). The third claim concerns only victimisation, and had been served on its respondents (those numbered 1, 5 and 6 above) only on Friday 4 January 2019. I return to that claim below, after stating my reasons for my decisions on the applications to strike out or alternatively for one or more deposit orders.

2 The claims of age discrimination and disability discrimination were definitively stated by me in paragraphs 7-10 of my case management summary sent to the parties on 1 November 2018, subject to the possibility, as permitted by the orders which I made and recorded at the end of that summary, of the claimant seeking permission to amend them. She sought such permission in an undated document sent to the tribunal on 12 November 2018. That document was not sent to me for my consideration before the hearing of 7 January 2019, but the first to fifth respondents had by then filed a response to the claims as stated by me, amended in the light of the claimant's application to amend them.

3 The first to fifth respondents' application to strike out the claims of age discrimination and disability discrimination was for the most part based on points of principle rather than on the facts relied on by the claimant. The applications to amend included an application to amend the claimant's case as stated in paragraph 10.5, i.e. paragraph 10.5 of my case management summary, and move it to paragraph 12, so that it became part of the claim of victimisation.

4 The respondent did not object to the claimant's applications to amend her claim. The proposed amendments of the claims of age discrimination and disability discrimination did not affect the strike-out and deposit order applications of the first to fifth respondents. Mr Gray invited me to consider those applications by reference to the amended versions of the claims, and I did so on the basis that they were amendments of only the detail of the manner in which it was claimed by the claimant that the respondents had acted (1) because of her age and (2) because of her husband's disability.

5 Mr Gray put before me a skeleton argument in support of the applications to strike out or for one or more deposit orders. The claimant did not put a skeleton argument before me, but she put a long witness statement before me in response to the applications. Mr Gray's skeleton argument was sent to the claimant on 6 January 2019, and I make no criticism either of that, or of the fact that the claimant did not put a skeleton argument before me. The claimant also put before me a witness statement of Parvin Akhter. The respondent put before me a witness statement of the second respondent, Ms Desor.

6 I discussed with Mr Gray and the claimant the case law which I was obliged to apply in the application to strike out the claim. I referred to the principles which

are applicable in the High Court and county courts, and Mr Gray agreed that they applied. They are stated most authoritatively in the decision of the House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, which concerned the application of the test in rule 24.2(a) of the Civil Procedure Rules 1998 ("CPR"). That provision empowers a court to give summary judgment (which is in substance what striking out a case because of a lack of a reasonable prospect of success does in the Employment Tribunal) where there is "no real prospect" of success. At page 260 of *Three Rivers*, in paragraph 93, Lord Hope set out the following key passage from Lord Woolf's judgment in *Swain v Hillman* [2001] 1 All ER 91, which concerned rule 24.2(a):

> "It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible ... Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

7 In paragraphs 94 and 95 of his speech in *Three Rivers*, at 260-261, Lord Hope said this:

> "**94** ... I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is – what is to be the scope of that inquiry?
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> **95** I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the

> factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

8 The decision on the facts before the Court of Appeal in *Swain v Hillman* is instructive. There, Lord Woolf said (at p 93e) that it was:

> "fair ... to take the view that the judge regarded this as a case where he thought that it was possible, but improbable, that the claim or defence would succeed."

9 I see no material difference between the tests in CPR r 24.2(a) and that which is in rule 37, namely whether or not a case has "no reasonable prospect of success". Even if there is a minor such difference, I see it as being possible accurately to say that while it may be improbable that a claim will succeed it may at the same time be incapable of being characterised as a claim which has no reasonable prospect of success. There is a considerable gap between a claim that has a reasonable prospect of success and a claim that has no reasonable prospect of success. The latter is a fanciful claim. The former is a substantial one. A claim which it is improbable will succeed but which might do so (i.e. it is possible will succeed) falls within the gap between a claim which is fanciful and one which has a reasonable prospect of success, even though the line between an improbable claim and a fanciful one is thin.

10 I took into account what the Court of Appeal said in *Ahir v British Airways plc* [2017] EWCA Civ 1392. Paragraphs 15 and 16 of the judgment of Underhill LJ (with whose judgment McFarlane LJ agreed) were of particular assistance. The nub of the test to be applied (in the light of the case law referred to in the earlier part of the judgment, which included *Anyanwu v South Bank Student Union* [2001] ICR 391 and *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330, [2007] ICR 1126) was stated in paragraph 16 in this way:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by

> reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'."

11 That case was, however, an unusual one, where so far as relevant the claimant (who was the appellant) asserted that the respondent's impugned acts (which it was claimed constituted victimisation within the meaning of section 27 of the EqA 2010 and "detriment as result of raising a complaint under the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002") were the result of the victimisation by one employee, employed in the respondent's legal department. As Underhill LJ recorded in paragraph 20 of his judgment):

> "It was [the appellant's] case, advanced in his particulars of claim and also in correspondence with the Tribunal prior to the strike-out hearing seeking disclosure of documents and telephone records, that a BA employee in the legal department, Mr Navdeep Deol, was already aware of the circumstances of the appellant's departure from Continental Tyres and had a copy of the Employment Tribunal judgments; that he had in that knowledge sent the anonymous letter to the HR department; and that he was motivated by one or more of the protected acts. There was, as he put it, 'a well-laid plan' to get rid of him as a troublemaker."

12 In any event, given the need to avoid a mini-trial on the papers without disclosure having taken place and without there having been cross-examination, I found it hard to see a basis on which I could properly take into account the content of the witness statements put before me on 7 January 2019 in so far as it supported the position of the party relying on the witness statement. I therefore started my consideration of the matter by ignoring the content of those witness statements except in so far as the statement of the claimant indicated her stance on the applications, i.e. except in so far as it amounted to argument rather than evidence or otherwise indicated what she was submitting to me. Having come to an initial conclusion on the application to strike out the claims of age and disability discrimination, I read the witness statements to see whether there was any indication in them that my initial conclusion was wrong. I return below to the content of those witness statements.

13 In what follows, I first state the bases of the first to fifth respondents' applications to strike out or for deposit orders as I understood them in the light of what the claimant said in response to them. I then discuss those bases. I then state my conclusions on the applications. My orders concerning the victimisation claims are recorded separately.

The reasons for seeking a strike-out or one or more deposit orders

(1) The claim of age discrimination

14 The claimant's claim of age discrimination is based on the following propositions.

14.1 Ms Zaman's surprise at the claimant's age of 70, rather than 60, as described in paragraph 7 (i.e. of my case management summary sent to the parties on 1 November 2018), was indicative of discrimination by her by reason of (old) age. The claimant does not say that Ms Zaman at any time said anything that indicated a predisposition to treat older persons less favourably than younger persons because of the older persons' age: rather, she says only that Ms Zaman changed her demeanour towards the claimant and treated her less favourably than she would have done if the claimant had been approaching 60 years of age instead of 70 years of age.

14.2 Ms Zaman then influenced Ms Desor to treat the claimant less favourably then she would have done if the claimant had been approaching 60 years of age instead of 70 years of age. Ms Zaman did so because Ms Zaman and Ms Desor are from the same cultural background. (The claimant relied in this regard in part on an article that she had found on the internet, of which there was a copy at page 178 of the bundle for the hearing of 7 January 2019. It concerned a survey carried out in Jammu & Kashmir, in India.)

14.3 Ms Desor then treated the claimant less favourably because the claimant was approaching 60 years of age instead of 70 years of age.

15 The first to fifth respondents' application to strike out that claim was based on the following propositions.

15.1 The claim is based on racial prejudice: the claimant is asking the tribunal to treat Ms Desor's Asian ethnic origin as a fact from which an inference that she holds ageist prejudices can be drawn.

15.2 An employment tribunal could not lawfully draw such an inference from such a fact.

15.3 In fact (i.e. this was based on the witness statement of Ms Desor), Ms Desor is not from the same cultural background as Ms Zaman. Thus in any event, on that basis also, there is no justification for the drawing of an inference of age discrimination.

(2) The claim of disability discrimination

16 The claimant's claim of disability discrimination is stated in paragraph 9 of my

case management summary sent to the parties on 1 November 2018. The claimant did not seek to amend that paragraph. For convenience, that paragraph is in the following terms:

> "It is the claimant's case that she was discriminated against within the meaning of section 13 of the EqA 2010 because of the protected characteristic of disability in the form of her husband's disability. Thus, the claimant claims disability discrimination by association. The claimant claims that the attitude of Ms Waterford, the third respondent, towards her (the claimant) changed when she (the claimant) told Ms Waterford about her husband's aggression towards her which resulted from his medical conditions, principally knee joint problems but also clinical depression and possible dementia. It is the claimant's case that Ms Waterford has subsequently treated her less favourably as a result of knowing about that aggression, and that since that aggression results from one or more of her husband's medical conditions, Ms Waterford has treated the claimant less favourably because of the claimant's husband's disability. It is the claimant's case that Ms Waterford has influenced other trustees to treat the claimant less favourably because of the claimant's husband's disability."

17 The first to fifth respondents' submissions in response to that case were these.

18 The claimant's claim of disability discrimination, while being pleaded (i.e. as identified by me) as a claim made under section 13 of the Equality Act 2010 ("EqA 2010") on the basis that it is only under that section that a claim of discrimination by association can be advanced, is in reality best understood as a claim of discrimination within the meaning of section 15 of that Act: it is best understood as a claim of unfavourable treatment because of something arising in consequence of a disability. That something is the claimant's husband's aggression towards her, which arises in consequence of her husband's disability Since that section (15) applies only to a claim of unfavourable treatment arising in consequence of the claimant's own disability, that claim could not succeed.

19 As for the claim as identified by me, namely of direct discrimination within the meaning of section 13 of the EqA 2010 because of the claimant's husband's disability, it is of less favourable treatment because of the claimant's husband's tendency to physical abuse of other persons, which is excluded from the protection of the disability discrimination provisions of the EqA 2010 because of regulation 4(1)(c) of the Equality Act 2010 (Disability) Regulations 2010, SI 2010/2128. It is not necessary, for that provision to be applicable, for the tendency to be free-standing: it can be a result of another condition. The claimant's husband's tendency to physical abuse of her is mentioned in her witness statement in several places. Although she refers in a number of places to emotional abuse, she also refers (for example in paragraph 25) to physical abuse (an attempt to strangle her, after which her husband admitted to the police that he had assaulted her).

20 The case of *C & C v The Governing Body of a School, The Secretary of State for Education (First Interested Party) and The National Autistic Society (Second Interested Party) (SEN)* [2018] UKUT 269 (AAC), [2018] ELR 554, where Upper Tribunal Judge Rowley concluded that regulation 4(1)(c) of the 2010 regulations is inconsistent with Article 14 of the European Convention on Human Rights, applies only to the right to education, afforded by Article 2 of Protocol 1 to that convention. It does not apply to the sphere of employment. In that regard, I noted that Judge Rowley said this in paragraph 90:

> "In conclusion, I recognise that as a matter of domestic law the current interpretation of regulation 4(1)(c) is clear and well established. It was not questioned before me. However, I am now addressing that regulation in the context of human rights law. In that context, in my judgment the Secretary of State has failed to justify maintaining in force a provision which excludes from the ambit of the protection of the Equality Act children whose behaviour in school is a manifestation of the very condition which calls for special educational provision to be made for them. In that context, to my mind it is repugnant to define as 'criminal or anti-social' the effect of the behaviour of children whose condition (through no fault of their own) manifests itself in particular ways so as to justify treating them differently from children whose condition has other manifestations."

21 I saw too that Judge Rowley summarised the position in paragraph 95 of her judgment, by saying that regulation 4(1)© "does not apply to children in education who have a recognised condition that is more likely to result in a tendency to physical abuse."

22 The claimant's response to this aspect of the respondent's arguments was that the arguments in *C v C* must be persuasive even though they were applicable to a different sector.

A discussion

(1) The claim of age discrimination

23 The only basis for the claimant's claim of age discrimination was that Ms Zaman and Ms Desor share a cultural background that is discriminatory towards older persons. That cultural background is of a shared Indian Asian ethnic origin. Taking into account that shared cultural background as a factual basis for a claim of age discrimination would require the tribunal hearing the claim to make an assumption based on a racial stereotype. That kind of stereotyping is one of the mischiefs to combat which the protection against discrimination because of race in the EqA 2010 was enacted.

24 The claimant did not rely on any particular conduct of Ms Desor as showing a tendency to treat older persons less favourably than younger persons. The only evidence on which the claimant relied as showing any such tendency was her

evidence of Ms Zaman's reaction to the claimant's revelation that she was 10 years older than Ms Zaman evidently thought she was. In fact, surprise at the claimant's age could just as easily have been seen as a compliment rather than an indication of a negative view of old age.

(2) The claim of disability discrimination

25 The claimant's husband's aggression (which included a tendency to the physical abuse of other persons) was said by the claimant to result from her husband's painful knee condition. Aggression is not a natural or likely consequence of pain (whether in the knee or otherwise). It is a possible such consequence, but it is no more than that.

26 Only if the claimant's husband's aggression was a natural consequence of his knee pain so that it was in effect part of the condition of knee pain could it be said that the claimant was discriminated against because of the disability of knee pain. However, in that event, the discrimination would be because of a tendency to physical abuse, and that (by reason of regulation 4(1)(c) of the 2010 regulations) would not be protected by the EqA 2010.

27 If the claimant's husband's aggression could properly be said to have been the result of his disability of knee pain and the tribunal hearing the claim found that Ms Waterford had indeed, as claimed by the claimant, treated the claimant less favourably because of the claimant's husband's aggression towards the claimant, then it would be possible to argue that there was less favourable treatment by Ms Waterford because of something arising in consequence of the disability. However, such a claim could not succeed as it could (as submitted by Mr Grey) be advanced only under section 15 of the EqA 2010, and it would not work as such a claim since the disability in question would not be that of the claimant.

28 I was not addressed on the extent to which Article 14 of the European Convention on Human Rights applies to claims of breaches of employment rights. However, the decision in *C & C* was expressly stated not to apply to anything other than claims concerning the education of children. In addition, the factor to which I refer in paragraph 25 above suggests strongly that it would be very difficult to say that the claimant's husband's aggression was to any extent a manifestation or result of a disability. Given those factors, I determined that I did not need to consider the case law concerning the application of the Convention to employment matters.

My conclusions on the applications to strike out

(1) The claim of age discrimination

29 It was the claimant who sought to rely on the assertion of a shared cultural background between Ms Zaman and Ms Desor. The tribunal hearing the claims

would not need to do that. However, the tribunal would, in the absence of any other evidence in support of the proposition that the claimant was treated by Ms Desor less favourably than she would have been if she had been approaching the age of 60 instead of 70, be asked to base its decision only on the shared cultural (i.e. Indian Asian origin) background of Ms Zaman and Ms Desor. It would not be obliged legally (i.e. by reason that it would be unlawful to do otherwise) to refuse to draw an inference from that shared background, but it would be a highly contentious, and in my view tenuous, assertion that it should draw such an inference from that background alone.

30 There is always a possibility of something turning up in cross-examination, but that is not enough to justify permitting a claim of unlawful discrimination to proceed if there is nothing more than a difference in treatment as compared with another person. Here, the claimant was not able to point to such a difference: she was relying on a hypothetical comparator only. She was relying in support of the assertion that she had been discriminated against because of her age on (and only on) the proposition that Ms Zaman had influenced Ms Desor in such a way that Ms Desor treated the claimant less favourably than she would have done if the claimant had been 60 years of age instead of 70 years of age.

31 In those circumstances, in my view the claim of age discrimination has no reasonable prospect of success and should therefore be struck out.

(2) The claim of disability discrimination

32 The claim of disability discrimination is based on the proposition that Ms Waterford treated the claimant less favourably because of the claimant's husband's aggression (arising from his knee pain) towards her (the claimant). Not only is that inherently unlikely given that Ms Waterford is a trustee of a women's centre which is dedicated to helping abused women, it is also a claim which can in my judgment logically be advanced only under section 13 of the EqA 2010, and only as a claim of less favourable treatment because of the claimant's husband's aggression, not his knee pain.

33 Logically, therefore, the claim of direct discrimination because of a disability is unsustainable and if only for that reason it has no reasonable prospect of success. However, if I had come to a different conclusion on the logic of the claim, or if I am wrong in coming to the conclusion which I state in the preceding sentence, then in my judgment the claim is fanciful and on that basis has no reasonable prospect of success.

<u>In conclusion</u>

34 Accordingly, it was my initial conclusion that the claimant's claims of both age discrimination and disability discrimination should be struck out. Having come to that conclusion, I read the parties' witness statements. The claimant's witness statements contained nothing that cast doubt on the correctness of my initial

conclusion that the claims of age and disability discrimination should be struck out.

35 For the above reasons, I concluded that the claimant's claims of age and disability discrimination should be struck out.

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Employment Judge Hyams

Date: 28 January 2019

Sent to the parties on: .....

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For the Tribunal Office