EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122941/2018

Held in Aberdeen on 29 March and 22 May 2019

Employment Judge N M Hosie

Mr P Wealleans — **Claimant**
Represented by
Mr W McParland, Solicitor

Noble Resources Limited — **Respondent**
Represented by
Ms M Gibson, Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. the claimant has complied with the Tribunal's Order of 30 January 2019 and the respondent's strike-out application is refused;

2. the Tribunal does not consider that the claim has, *"no reasonable prospect of success"* and the respondent's strike-out application is refused; and

3. the claim should now proceed to a Final Hearing.

REASONS

1. On 19 November 2018, the claimant's solicitor submitted a claim form in which he intimated complaints of unfair dismissal, disability discrimination (discrimination arising from disability in terms of s.15 of the Equality Act 2010 ("the 2010 Act") and a failure to make reasonable adjustments in terms of s.20).

2. In the response form, the respondent's solicitor admitted the dismissal but claimed that the reason was capability (ill health) and that it was fair; so far as the discrimination complaints were concerned, she accepted that the claimant was disabled in terms of the 2010 Act. Otherwise, the claim was denied in its entirety.

Preliminary Hearing on 28 January 2019

3. I conducted a Preliminary Hearing to consider case management on 28 January 2019. In my Note, which is dated 30 January 2019, I ordered the claimant to provide Further and Better Particulars of the claim.

4. The claimant's solicitor responded to the Order by email on 18 February 2019.

5. On 18 February 2019 the respondent's solicitor wrote to the Tribunal to request that the claim be struck out as the claimant had failed to comply with my Order.

6. I decided that a Preliminary Hearing should be fixed and on 5 March a Notice of Hearing was sent to the parties to advise that the Preliminary Hearing would be heard on 29 March 2019 to consider the following issues:-

> *"(i) Whether the claimant has complied with the Tribunal Order of 30 January 2019.*

(ii) Whether the claim should be struck out in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure").

(iii) Whether the claimant should be required to pay a deposit as a condition of continuing with the claim in terms of Rule 39.

Preliminary Hearing

7. It was not necessary to hear any evidence at the Preliminary Hearing. I heard submissions from the parties' solicitors and a Joint Inventory of documentary productions was also lodged ("P"). After the Hearing, the claimant's solicitor made further submissions by email on 12 April and the respondent's solicitor replied by email on 24 April. I was able to consider all of the parties' submissions and reach a decision on 22 May.

Respondent's Submissions

8. At the Preliminary Hearing, the respondent's solicitor spoke to a written *"Skeleton Argument",* in support of her submissions that the claimant had (i) failed to comply with the Tribunal's Order of 30 January 2019; and (ii) the claim had no reasonable prospect of success.

9. She referred to the following cases:

General Dynamics Ltd v Carranza UKEAT/0107/14/KN
Weir Valves & Controls (UK) Ltd v Armitage EAT/0296/03/MA
Baber v The Royal Bank of Scotland Plc UKEAT/0302/15/JOJ
Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330
NCH Scotland v McHugh UKEATS/0010/06/MT
The Environment Agency v Rowan UKEAT/0060/07/DM
Azhar v Dundee City Council [2007] SC DUN 32

10. The claimant's solicitor referred to the pleadings and detailed the following "agreed facts":-

- The claimant was employed by the respondent as an Offshore Installation Manager.

- The claimant was off sick from 14 January 2015 until the date of his dismissal on 10 July 2018, a period of 3½ years.

- Until 11 January 2018 the claimant was in receipt of long-term disability benefits in terms of an insurance policy put in place by the Group of Companies of which the respondent formed part.

- At no time between 14 January 2015 and the cessation of benefit on 11 January 2018 did the claimant suggest that he was in any way fit to return to work.

- At all material times the claimant had been permanently unfit to return to his pre-absence role as Offshore Installation Manager and there are no adjustments which could be put in place that would permit a return to that role

- The claimant was dismissed on ill health grounds on 10 July 2018.

"Claimant's state of health from April 2018 onwards"

11. The respondent's solicitor referred to the prognosis in the most recent medical report dated 24 May 2018 (P9):-

> *"Due to the unpredictable nature of CFS/ME, it is not possible to predict a patient's full or even partial recovery at any point in time. As of today, there are no clinical markers to predict the progression and/or the final outcome of CFS/ME. For this reason, it would be unrealistic and unhelpful to Peter to set a date on his return to work".*

12. In the "Further Particulars" (P1), which the claimant's solicitor submitted on 18 February 2019 in response to my Order of 30 January 2019, it was averred at para 2 that: *"On 19 April 2018 the claimant, in discussions with Dr Luis Salayandia (CFS specialist) indicated that he could return to work with support and several adjustments from his employer. These adjustments were raised with the respondent as set out below. The respondent refused to engage with the claimant regarding the adjustments".*

13. However, it was submitted that the claimant had failed to respond to a *"call"* by the respondent's solicitor to provide evidence of these *"discussions"* and to specify the *"support"* and/or *"several adjustments"* suggested, and nor had he indicated when they were, as alleged, *"raised with the respondent".*

14. The claimant's solicitor also referred to the averments in the claim form in para 7 of the paper apart (P1) that, *"The claimant will at times be lethargic and unable to concentrate, these conditions have a significant, adverse impact upon the claimant's ability to perform day to day activities".*

15. It was submitted that the issues with which I was concerned at the Preliminary Hearing, *"require to be set against the background of the undisputed facts and the contemporaneous documentation relative to the claimant's state of health as at the date of dismissal".*

"Strike Out Rule 37(1)(c) – Compliance with the Tribunal Order of 30 January 2019"

16. The respondent's solicitor referred to the Order at para 5 of my Note.

Unfair Dismissal Complaint

17. The respondent's solicitor accepted that the claimant had complied with the terms of para 5(1)(i). The details are to be found in paras 3 and 4 of the Further Particulars.

Reasonable Adjustments

The PCP

18. The respondent's solicitor referred to para 5(1)(i) in relation to this complaint. The PCP averred in the claim form was, *"a requirement that the claimant must be fit to do the job"* (P1 para 17 of the paper apart).

19. It was submitted that an Order was issued as this was inadequate as it was "very generic". In support of her submission in this regard she referred to ***General Dynamics***.

20. In response, in the Further Particulars the claimant averred at para 10 that the PCP was that, *"in order to continue in employment you must be fit to carry out duties of job in particular requirement to work offshore".*

21. It was submitted that the amended PCP was, *"simply a re-statement of the PCP identified as inadequate".* This meant that the claimant had failed to set out a PCP, *"sufficient to allow a relevant case of alleged breach of s.20 of the 2010 Act*" and that accordingly the complaint of a failure to make reasonable adjustments should be struck out as it has, *"no reasonable prospect of success".*

"The type of onshore work he alleges he advised the respondent he was able to do"

22. This was ordered at para 5(1)(ii) of my Note.

23. The respondent's solicitor accepted that the claimant had suggested, *"3 types of work"* he advised the respondent he was able to do.

24. However, it was submitted, that only point 1 should be allowed: *"Working on certification manuals and policy and procedures"* as this was the only one which involved onshore work and the claimant accepts that he could not work offshore.

25. In this regard, the respondent's solicitor referred to the final bullet point in the claimant's email of 4 August 2018, in which he intimated he wished to appeal against the decision to terminate his employment due to ill health (P15).

"Whether he wished to work full-time or part-time"

26. This was ordered at para 5(1)(iii).

27. It was submitted that there was, *"a complete failure in respect of this part of the Order"* as the Further Particulars, *"simply repeat the material criticised at the Preliminary Hearing (Case Management) in which a variety of wholly unspecific adjustments are suggested, see paragraph 13, the claimant was ordered to and has not said in terms whether he wanted to return full-time or part-time and if part-time he was obligated to specify the extent to which he was able to undertake part-time work, that is to say on a days per week or hours per week basis".*

"Whether he proposed he worked from his home in Alnwick or whether he was prepared to relocate"

28. This was ordered at para 5(1)(iv).

29. It was submitted that, *"this part of the Order has in addition been ignored in its entirety".* At para 13 of the Further Particulars, the claimant does not set out whether the only basis on which he would be able to return to work would be if he was allowed to work from home.

"The reasonable adjustments he contends the respondent should have made"

30. This was ordered at para 5(1)(v).

31. It was submitted that this had also not been complied with as, the claimant had not set out specific adjustments as he is required to do, *"in essence the claim insofar as set out is a contention that some job and some terms probably at home and probably on some form of part-time basis should have been contrived by the respondent to avoid dismissal".*

32. It was submitted that this was, *"wholly inadequate".*

"The claimant's fitness for work in an alternative position and its likely duration had he not been dismissed and supported if possible by medical evidence"

33. This was ordered at para 5(1)(vi).

34. It was submitted that: *"This order arose out of a discussion at the Hearing that the Tribunal, if the claimant was successful, would require to determine the "what if" question. That "what if" question requires identification of the role (if any) into which the respondents should (if at all) have placed the claimant and importantly the terms including pay which would have applied. It also involves the determination of whether the claimant would have had further periods off sick and if so for how long given that the claimant had no entitlement at this point to sick pay. Thus if, in fact, there was some form of reasonable position into which the claimant should have been placed and, in fact, he would not have been fit to undertake that post, no loss arises.*

No medical evidence of any sort has been produced. Indeed the claimant's agent wrote to the respondent's agent on 25 February 2019 in the following terms:

> *"It is not necessary for us to disclose our client's medical records from date of termination to date. We confirm our client's position that he would have been fit to return to work in an alternative position at date of termination. Our client has indicated that there is no specific medical evidence but will follow up with Dr Salayandia and confirm same. We can confirm that he did not apply for any benefits but is actively seeking work. He will collate evidence of attempts to find work and we will send that across to you in due course"*

Strike Out

35. In support of her submission that the claim should be struck out in respect of the claimant's failure to comply with the Order, the respondent's solicitor referred to the guidance in ***Weir Valves*** and ***Baber***. She referred in particular to para 12 in ***Baber***. When considering striking out a claim in respect of a party's non-compliance with an Order Tribunals must have regard to the *"overriding objective"* in the Rules of Procedure. One of the considerations is whether a fair Hearing is still possible and that requires *"fair notice"* which, it was submitted, was, *"the point of the Order".*

36. It was also submitted, with reference to ***Weir Valves***, that the failure to comply with the Order was "wilful". It was submitted that "no law arises" in relation to Orders (iii)-(vi). *"The claimant is asked only to set out in simple terms what it was, over what period and from where he says he was fit to do".*

37. She submitted further that:-

> *"The claimant it appears having actively opposed the Order has then actively determined that he will not comply with it. It seems at least possible that the reason for the deliberate decision not to answer the questions is because the claimant in fact has no answer. The contemporaneous material supportive of an individual who was not at the time of dismissal and has not at any point since been fit to come back to any form of meaningful work and sought some form of therapeutic activity hence the absence of any suggestion of fitness in the appeal against dismissal and the suggestion of activity based therapeutic work in the email further in connection with the appeal dated 4 August"* (P15).
>
> *Strike out is of course a draconian remedy but it is an appropriate remedy in this case where there has been wilful failure against the backdrop that this is a case with no reasonable prospects. A fair trial is not possible – the respondents don't know what it is the claimant argues for".*

"No Reasonable Prospects"

38. In support of her submission that the claim has no reasonable prospects of success and should be struck out for that reason, the respondent's solicitor accepted, with reference to ***Ezsias***, that the threshold for striking out a claim is high. However, as there was no dispute, *"in respect of the central facts"*, the claim should be struck out on this basis.

39. It was submitted that, *"the claimant has (a) not put before the Tribunal any averments even taken at their highest that established fitness to return in any capacity, (b) any relevant PCP or (c) reasonable adjustments".*

Unfair Dismissal

40. It was submitted that dismissal could only be unfair if there is identifiable employment which a reasonable employer would have offered to the claimant and that is not suggested. *"The only alternative advanced is not one which the claimant himself argues he could have undertaken without adjustments. That is sufficient to dispose of the unfair dismissal case. It has no prospects".*

S.15 discrimination arising from disability

41. It was submitted that the same logic falls to be applied to this complaint as it does to the unfair dismissal complaint. It is accepted by the respondent that the claimant was treated less favourably and that his dismissal was due to his ill health and it is accepted that he was disabled at the material time. The issue, therefore, is whether in all the circumstances the dismissal was *"proportionate"*. Absent a role which the claimant could take up and with an acceptance that there was a complete and permanent unfitness to return to work, there can be no s.15 finding.

s.20 Duty to make reasonable adjustments

42. The respondent's solicitor made the following submissions in this regard:-

> ***"The PCP point***
>
> *The claimant accepts that he could only return if he was able to be afforded a role other than his former role which itself had been adjusted. A s.20 case requires a valid PCP. However in this case there is no relevant PCP.*
>
> *Firstly the PCP is one that applies equally to disabled and non-disabled people and therefore cannot form the basis of a claim of substantial disadvantage.*
>
> *Moreover the PCP referring as it does to fitness to return to work offshore cannot be adjusted in the context of this claimant who accepts that he would under no circumstances be fit to return to work offshore. On that basis there is no reasonable adjustment that could be undertaken and the case then falls.*
>
> ***The Time Point***
>
> *The obligation of adjustment is only triggered when the claimant is actually fit to return or at the very least has given a firm indication of that fact (**McHugh**). At no point was there any genuine evidence of fitness. The s.20 trigger had not been reached at date of dismissal.*
>
> *What adjustments?*
>
> *Can a claim be said to have reasonable prospects when the claimant puts forward no identifiable adjustment to which the tests in the EHRC Code can be applied. The respondent's simple answer to this is no. The recent albeit Sheriff Court case (**Azhar**) puts it well – once some adjustment has been suggested the respondent must explain why it is not reasonable – it is after all the claimant who knows what he or can or cannot do. The only adjustment actually suggested – ad hoc, activity work at home was reasonably rejected. If the claimant limited his case to that it could proceed to a Hearing once the extent of the activity (in temporal terms was determined).*
>
> *The claimant argues that the obligation rests with the employer to consider if there were adjustments that could be put in place but then equates that with an absolute obligation to find some adjustment – here of course the respondent reflects on onshore work and rejects it – they are after all an Offshore Drawing Company – the Tarbuck authority makes clear there has to be a reasonable adjustment that could be made for the duty to bite.*
> *No reasonable prospects*

This case has no prospects – the claimant should not be allowed to take a case to trial on the basis that something might turn up".

Claimant's Submissions

43. In support of his submissions, the claimant's solicitor referred to the following cases:-

Hasan v Tesco Stores Ltd UKEAT/0098/16/BA
Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] CSIH 46
Blockbuster Entertainment Limited v James [2006] EWCA Civ 684
Balls v Downham Market High School & College UKEAT/0343/10/DM
Ezsias

Alleged failure to comply with the Tribunal Order

44. It was submitted that there was no suggestion of *"wilful disobedience".* The claimant's solicitor submitted that he had complied with the Order, *"so far as we can. The substance is there".* The principle is fair notice and it was submitted that the respondent is on notice of the claim: the respondent did not make any reasonable adjustments. The claimant said he was fit to return to work, subject to adjustments but the respondent failed to make any adjustments and he was dismissed.

45. Nor was there any reluctance on the part of the claimant to respond, as the respondent's solicitor alleged.

46. The claimant's solicitor submitted that the PCP was satisfactory. It was submitted that this put the claimant at a disadvantage which triggered a responsibility on the part of the respondent to make adjustments.

Unfair Dismissal

47. It was submitted that there had been compliance with Order 5.1(i) in paras 3 and 4 of the Further Particulars (P1) (this was accepted by the respondent).

Reasonable Adjustments

48. The claimant's solicitor submitted that he had complied with Order 5.1(i) by specifying the PCP at para 10 of the Further Particulars.

49. He also submitted that sub-para (ii) had been complied with, as at para 3 of the Further Particulars he made reference to, *"working on the Liberian certification manuals and Noble's Policies and Procedures".* However, there was no consultation with him and he would be, *"looking for information about jobs which were available*". While it is accepted that he wasn't fit to return to work offshore, he was keen to get back to work onshore and, with reference to paras 3 and 4 of the Further Particulars, the claimant's solicitor disputed that the claimant had failed to make it clear to the respondent what sort of work he was prepared to do.

50. Further, at para 7 he avers that he, *"suggested flexible working and/or working from home and with reference to sub-para (iv) he was prepared to consider full-time or part-time work"*. Also, at para 7, he makes reference to *"job share".*

51. So far as sub-para (v) was concerned, the claimant's solicitor submitted that the obligation was on the respondent to consider reasonable adjustments. It was submitted that the claimant *"made suggestions".*

52. So far as sub-para (vi) was concerned, it was submitted that there was not a "wilful disregard" of compliance with the Orders. The claimant's solicitor explained that he was advised by the claimant that there was no medical evidence available after he was dismissed.

53. It was submitted, therefore, that "f*air notice"* of the claimant's position had been provided to the respondent. *"The Tribunal should be testing the evidence. Striking out would be draconian and disproportionate and should be refused".*

"Prospects/Further submissions

54. Notwithstanding the terms of the Notice of Hearing, the claimant's solicitor maintained that he was not aware that the Preliminary Hearing would also consider the "prospects" of the claim succeeding.

55. Accordingly, I allowed the claimant's solicitor the opportunity of making further written submissions in this regard, which he did by way of an attachment to his email of 12 April 2019, which is referred to for its terms.

56. Although I had anticipated that these further submissions would relate to "prospects" only, he made further submissions concerning the application by the respondent to strike out the claim in respect of a failure to comply with a Tribunal Order, in terms of Rule 37(1)(c).

57. He disputed the contention by the respondent that the claimant had agreed that he was permanently unfit to return to work and submitted that, *"the contemporaneous medical evidence does not support the conclusion that the claimant was at 24 May 2018 unfit to return in any capacity. The focus of the medical evidence is a return to work offshore. The questions to be addressed require to be set against all the facts and circumstances of the case as set out in the pleadings."*

58. He further submitted that, "*the claimant responded to the Order as far as he could*" and that *"the outstanding points raised at the Hearing have since been addressed*. *Even if the Tribunal was of the view that there had been a failure to comply with the Order it was submitted that it did not follow that the claims should be struck out".*

59. The claimant's solicitor referred to the "overriding objective" in the Rules of Procedure, submitted that any default was "*de minimis*" and that *"there is no disruption, unfairness or prejudice to the respondent".*

60. He submitted again that the PCP was sufficient to allow a relevant claim. In this regard he referred to the Code of Practice which, *"states that the phrase 'provision, criterion or practice' should be construed widely to include, by way of example, any formal or informal policies, rules, practices, arrangements or qualifications, including one-off decisions and actions and discretionary decisions. In essence trying to identify what it is that is making the disabled person's ability to carry out their job impossible or unusually difficult".*

61. He further submitted, with reference to **Archibald v Fife Council [2004] IRLR 651**, that the PCP *"can even extend to the core elements of the job itself".*

62. He submitted again that there was, *"a positive duty on the respondent to* make *reasonable adjustments".* He referred to the Code of Practice at para 6.24, *"which provides that there is no onus on a disabled worker to suggest what adjustments the employer should be making. Where the worker does suggest reasonable adjustments, the employer should consider whether such adjustments would help overcome the substantial disadvantage. It is amply clear from the lack of justification which has been put forward by the respondent to date that the respondent did not consider adjustments ….."*

63. The claimant's solicitor reminded me that, *"the threshold to strike out a claim is high".* He submitted that, *"it is clear from the pleadings that the central facts are in dispute. The claimant's case must be taken at its highest. There is nothing exceptional about this case. The claimant has a stateable claim that has good prospects of success. It is accepted that he does not have documentary medical evidence re fitness to return to work. The reason for that is because he was never required to produce such evidence. The claimant will give oral evidence that he was fit to return with adjustments and the respondent will be given the opportunity to test that evidence".*

Unfair Dismissal

64. It was submitted that there was no proper consultation with the claimant about alternatives. *"The respondent didn't engage with the claimant about alternatives so the claimant was not in a position to say what alternatives he could or could not do".*

S.15(2)(a)

65. It was submitted that, *"the respondent concedes that 'the claimant was treated less favourably for a disability related reason in that his dismissal was for ill health and he is as a matter of admission disabled".*

66. It was submitted that there is a *"prima facie"* case, which means that the onus will shift to the respondent to establish that the claimant's dismissal was, *"a proportionate means of achieving a legitimate aim".*

67. He submitted that **Hasan** was, *"a useful starting point*". He referred in particular to paras 16-20.

68. He submitted, with reference to ***Anyanwu***, that the House of Lords had, *"ruled that the discrimination claims should not be struck out as an abuse of process for having no reasonable prospect of success, except in the plainest and most obvious cases".* He referred to the Judgment of Lord Steyn at para 24 and of Lord Hope at para 37.

69. So far as ***Tayside Public Transport*** was concerned, he referred to the following passage from the Judgment of Lord Carloway: *"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 in crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts … but 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".

70. Finally, the claimant's solicitor submitted Further Particulars in addition to the Further Particulars which he had already submitted.

71. By way of further response to sub-para (iii) of my Order, he averred that, *"The claimant wished to work part-time basis"* (sic).

72. So far as sub-para (iv) was concerned, it was averred that, *"The claimant contends that if adjustments put in place (sic) then he would have been prepared to relocate to work in the respondent's offices in Aberdeen".*

Respondent's Response

73. The respondent's solicitor replied to the claimant's written submissions by way of an attachment to her email of 24 April, which is referred to for its terms. She submitted that the answers to the Orders were still *"defective",* in particular the responses to sub-paras (v) and (vi).

PCP

74. It was submitted that the PCP identified by the claimant applied equally to both disabled and non-disabled employees who must be considered, *"fit to carry out duties of the job in particular the requirement to work offshore".* Accordingly, there was no *"substantial disadvantage".* The only potential adjustment is that an employee should be allowed to continue in employment while 'unfit'.

75. In support of her submission in this regard the respondent's solicitor referred to ***Griffiths v Secretary of State for Work & Pensions*** UKEAT/0372/13/JOJ.

"The Positive Duty Point"

76. The claimant's contention that he was not required to give notice of what he contended he was or was not fit to do, was disputed. It was submitted that, *"ultimately if the claimant is to succeed a Tribunal requires to identify a positive adjustment, that is to say (assuming the claimant overcomes the PCP point) which specific job should the claimant have been offered, at what location, over what hours and at what salary".* It was submitted that, *"no such notice is given".*

"The Consultation or Pleading Point"

77. It was submitted that, *"the claimant's argument falls as it proceeds on the basis that there was an absolute duty on the respondents to find a role – any role. The claimant does not allow for the negative that there is no onshore role even with reasonable adjustments which the claimant could take up".*

"Response to "Legal Analysis" re Rule 37(1)(A)"

78. It was submitted as there was an admitted failure to comply with the Order the matter is one for the discretion of the Tribunal. It was submitted that ***Anyanwu*****,** ***Tayside Public Transport and Balls*** were not in point and that ***Blockbuster*** adopted the *"wilful test"*, established in ***Weir***.

Prospects

Adjustments

79. The respondent's solicitor submitted that *"the central facts"* were not in dispute: so far as the allegation of a failure to consult was concerned, she submitted that there was no relevant PCP and no factual dispute as to whether a *particular* adjustment was reasonable.

80. So far as the claimant's state of health was concerned, the respondent's solicitor referred to the medical report of 24 May (P9) and the absence of any averments as an alternative to the claimant's unfitness expressed in that report.

81. At the relevant time, the claimant suggested an *ad hoc* role in Alnwick where he stays, but he is now suggesting that he would have considered a part-time role in Aberdeen.

Unfair Dismissal

82. While it is accepted that there is a dispute in fact in relation to consultation, it was submitted that, "*The position remains, however, that the claimant accepts he could neither return to his pre-illness position nor to any other role unless that role was adjusted. That is not an obligation in an unfair dismissal case. Consultation therefore would have made no difference".*

"Case under section 15(2)(a)"

83. It was submitted that the issue with this complaint was whether the claimant's dismissal was *"proportionate".*

84. It was submitted that the respondent took the view that the claimant's suggestions about a return to work were unreasonable and *"it seems"* that this is now accepted by the claimant. This claim proceeds only on the basis that, *"the creation of a claimant specific role ad hoc, activity by activity basis at home, should have been attempted".*

85. In light of this it was submitted that the s.15 complaint "must fail".

86. Accordingly, it was submitted that the claim should be struck out both under Rule 37(1)(c) and Rule 37(1)(a).

"Respondent's Fall Back"

87. In the alternative, the respondent's solicitor submitted that if I was not with her on the entirety of her submissions that, *"the respondent's fall back is that only the s.20 case should remain"* and she went on to submit that in that event further Orders should be issued requiring the claimant to provide further specification.

Discussion and Decision

Rule 37(1)(c) Strike Out Application – Failure to comply with the Tribunal Order of 30 January 2019

Unfair Dismissal Complaint

88. It was not disputed that the claimant had complied with the Order with regard to this complaint.

Reasonable Adjustments

89. The respondent's solicitor challenged the PCP which was identified by the respondent: *"In order to continue in employment you must be fit to carry out duties of job in particular requirement to work offshore".*

90. The duty to make reasonable adjustments in terms of s.20 of the Equality Act 2010 arises where a *"provision, criterion or practice*" ("PCP") of the employers puts a disabled person at a substantial disadvantage in relation to a matter in comparison with persons who are not disabled.

91. Although not defined in the 2010 Act, some assistance as to the meaning of a PCP is afforded by the EHRC's Employment Code, which states that the term, *"should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A [PCP] may also include decisions to do something in the future such*

as a policy or criterion that has not yet been applied – as well as a 'one-off' or discretionary decision (para 4.5).

92. In ***Lamb v Business Academy Bexley*** EAT0226/15 the EAT said that the term PCP is to be construed broadly, *"having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".*

93. I was not persuaded that the fact that the fact that the PCP identified by the claimant's solicitor applied equally to everyone meant that the complaint would fail necessarily. The claimant's position, as now pled, is that he was not unfit for any work with the claimant and that he was prepared to work **onshore**, either from his home in Alnwick or in Aberdeen and either on a part-time or full-time basis.

94. While recognising the importance of identifying the PCP (***Griffiths***), in all the circumstances and construing the PCP broadly, I was satisfied that the submissions by the claimant's solicitor were well-founded and I arrived at the view that the Order had been complied with.

95. I also wish to record, for the sake of completeness, that while there was some delay in the claimant's solicitor finalising his pleadings and complying fully with my Order, I was not persuaded that this was "wilful", as the respondent's solicitor maintained. It made no sense for him to do so and I am satisfied that the respondent has not been prejudiced by the delay.

Prospects

96. In considering whether the complaints comprising the claim should be struck out on the basis that they have *"no reasonable prospect of success"*, in terms of Rule 37(1)(a) I was mindful this is a very high test, the leading authority ***Ezsias***, essentially holding that cases which are fact sensitive should not be struck out unless the facts as asserted would clearly not establish an actionable claim.

97. I was also mindful of what Lord Steyn said in ***Anyanwu***, that as discrimination cases tend to be *"fact sensitive",* strike out should only be ordered, *"in the most*

obvious and clearest cases". Lord Hope also expressed the same view in that case.

98. I was also required to take the claimant's case at its highest: for the purposes of the issues with which I was concerned at the Preliminary Hearing, I accepted that the claimant would be able to prove all that he avers. The claimant's position is that no consideration was given to the issue of adjustments at all, an assumption being made by the respondent that he was not fit for work either offshore or onshore. The respondent's position is that there was no requirement to consider adjustments on the basis of the medical evidence which they had available at the time whereas the claimant maintains he was able and willing to return to work, albeit onshore.

99. The claimant was only required to identify, in broad terms, the adjustments the respondent could reasonably have taken to prevent him suffering the disadvantage in question. Indeed, as the claimant's solicitor drew to my attention, the Code of Practice on Employment at para 6.24 states that, *"There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask)".* The claimant's case, as now pled, is that he would have been able to work onshore (if any work was available, either from his home in Alnwick or in Aberdeen) which he was prepared to do, either on part-time or full-time basis. However, according to him these options were never discussed. Whether, in all the circumstances, there were, as a matter of fact, any such discussions and, if not, whether there should have been are matters which require evidence. There are *"central facts"* which are in dispute and the only way in which these facts can be established, which will then allow the issues to be properly determined, is by hearing evidence. It is impossible to say, as the respondent's solicitor submitted, that *"consultation would not have made any difference",* without hearing evidence and making findings in respect of all the material facts.

100. In light of that and the clear guidance in the case law, I could not say that the discrimination complaints comprising the claim have, *"no reasonable prospect of success".* This is not one of *"the most obvious and clearest cases"* where strike-out is appropriate.

101. I was of the same view regarding the unfair dismissal complaint. I did not feel that it could or should be distinguished. Dismissal is admitted and the fairness or unfairness in terms of s. 98(4) of the Employment Rights Act 1996, can only be determined properly once all the relevant facts are established.

102. Accordingly, I am of the view that the claim should now proceed to a Final Hearing on the merits. That course of action, in my view, is required in the interests of justice.

Further procedure

103. In her written submissions, the respondent's solicitor maintained that were I to arrive at this view I should order further specification of the claim. Before making a decision in this regard, I direct the claimant, within the next 14 days, to comment, in writing, to the Tribunal and at the same time copy the respondent's solicitor, on the 5 numbered paragraphs in her written submissions under the heading "Respondent's Fall Back".

Employment Judge: **Nicol Hosie**
Date of Judgment: **03 June 2019**
Entered in the Register: **05 June 2019**
And Copied to Parties