EMPLOYMENT TRIBUNALS

Claimant: **Ms Senka Besirevic**

Respondent: **Birmingham City Council**

Heard at: **Birmingham** **On:** **21 June 2019**

Before: **Employment Judge Coghlin QC** (sitting alone)

Appearances
For the claimant: Mr W Horwood (counsel)
For the respondent: Ms S Garner (counsel)

JUDGMENT

The bolded parts of Allegations 1.a, 3, 5, 7, 9, 12, 13, 22, 27, 29, 30, 31, 32, 33, 34 and 35 in the attached Annex are struck out since they have no reasonable prospects of success.

REASONS

Introduction

1. This is a claim of disability discrimination and constructive unfair dismissal. The claimant was employed by the respondent from 2013 until 11 January 2018 as a case management clerk. In support of her claim of constructive dismissal the claimant relies on a series of alleged acts and omissions on the part of the respondent, many of which she says amount to acts of unlawful disability discrimination.

2. By a letter dated 10 June 2019 the respondent applied to strike out parts of the claim as having no reasonable prospects of success.

The tribunal's power to strike out

3. Rule 37(1) of the ET Rules provides that at any stage of the proceedings the tribunal may strike out all or part of a claim on the ground that it has no reasonable prospect of success.

4. The relevant law was set out by Ms Garner in her skeleton argument, by reference to **North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603; **Anyanwu v South Bank Students Union** [2001] IRLR 205; **Hawkins v Alex Group Ltd** [2012] IRLR 807; **Ahir v British Airways plc** [2017] EWCA Civ 1392. The following principles emerge from those authorities:

   (1) The question posed by rule 37(1) is whether the allegation has realistic as opposed to a merely fanciful prospect of success.

   (2) While the tribunal clearly has a power to strike out a discrimination case, it should exercise caution in striking out discrimination claims due to the public interest in such cases being determined on their merits and since such cases are generally fact-sensitive.

   (3) Where the facts are in dispute, it would only be in an exceptional case that a strike out application should succeed. But tribunals should not be deterred from striking out discrimination claims in appropriate cases.

   (4) It may be appropriate to strike out a case where the dispute does not relate to the facts but to whether there is any basis for establishing a causal connection between the proscribed ground and the treatment complained of.

5. I add that the primary facts relied on by a claimant must be taken to be provable, unless the opposite can be shown by clear evidence which is not seriously disputable: **A v B & C** [2010] EWCA Civ 1378 at [11].

6. Mr Horwood, for the claimant, took no issue with Ms Garner's summary of the relevant legal principles. However he also submitted that even if I considered that any part of the claimant's claim had no reasonable prospect of success, I should nevertheless not to strike that part of the case out. While I accept that such a discretion in principle exists, given the permissive wording of rule 37, I cannot conceive of any circumstances in which it would be an appropriate exercise of the discretion to refrain from striking out an allegation which had been determined to have no reasonable prospects of success[1], and such circumstances are anyway not present here: Mr Horwood did not offer any reason why that course would be warranted here beyond saying that the facts in question would need to be considered at trial anyway since they form part of the basis for the claim of constructive dismissal. I do not consider that to be a good reason to refrain from striking out claims which have no realistic prospect of success.

<u>The relevant allegations</u>

7. The claim is listed for trial between 2 and 17 December 2019. It has a long procedural history. The ET1 was presented on 7 February 2018. It attached particulars of claim ("POC") running to 37 paragraphs. At a preliminary hearing on 16 August 2018 EJ Battisby noted that further particulars had been provided of the claimant's claims, but that it was agreed by counsel that these further particulars were insufficient. EJ Battisby also by consent gave permission the claimant permission to amend the POC so as to:

   (1) add a claim under section 15 of the Equality Act 2010 ("EqA"), "as long as no new factual allegations are added." The order stated that the amended POC must specify the "something" arising from disability in relation to this claim;

   (2) make clear in relation to each relevant allegation the provision, criterion or practice ("PCP") relied on. This clearly was a reference to the claimant's claim for failure to make reasonable adjustments under sections 20 and 21 of the EqA.

8. By the time of the next preliminary hearing on 18 October 2018 (heard by EJ Dimbylow) the claimant amended her POC and the respondent amended its response, and a Scott Schedule had been provided by the claimant and responded to by the

[1] See **ABN Amro v Hogben** UKEAT/0266/09 at [16].

respondent. However it seems that there was still a lack of clarity in the claimant's claims, which was referred to by EJ Woffenden at a further preliminary hearing on 14 January 2019. At a yet further preliminary hearing on 12 February 2019, it was agreed and ordered that a further, amended Scott Schedule would be produced and responded to.

9. The current version of the Schedule is attached at Annex A below. The parts in bold are those which are the subject of the respondent's application for strike out / deposit orders. Where I refer below to numbered Allegations, that will be a reference to the bolded part of the relevant Allegation using the numbering in Annex A.

10. Mr Horwood confirmed to me that Allegations 25, 26 and 27 had been omitted from the schedule because these allegations are not pursued by the claimant. I have accordingly marked them as withdrawn in Annex A.

Section 15

11. The allegations on which the respondent's application focusses are allegations of discrimination as defined in section 15 of the Equality Act 2010 ("EqA") ("discrimination arising from disability"). Section 15 provides:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> > (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> >
> > (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

12. In **Pnaiser v NHS England** [2016] IRLR 170 Simler P summarised the proper approach to s15 as follows.

> "(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that

causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her skeleton).

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that 'a subjective approach infects the whole of section 15' by virtue of the requirement of knowledge in s.15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26–34 of *Weerasinghe* as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages – the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'.

> Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

The respondent's submissions

13. The respondent makes an overarching argument which applies to almost all of the impugned Allegations (specifically Allegations 1-10, 12, 13, 17, 18, 20, 22, 27, 29, 30, 31, 32, 33, 34 and 35). This is that that the claimant's case on the "reason why" question (the step described at points (b) and (c) of Simler P's analysis in **Pnaiser**) is misconceived.

14. I will take Allegation 7 as an example. The "thing arising" from disability is said to be the claimant's request to change her manager.[2] The "unfavourable treatment" is said to be the refusal to change her manager. The respondent's position is that the request to change manager cannot sensibly be regarded as the "reason why" the manager was not changed: the respondent says that, properly analysed, the claimant's case in essence is that the respondent did not change her manager not <u>because of</u> her request, but <u>in spite of</u> it. This, says the respondent, is to misunderstand the causation test required by section 15. The respondent says that while such complaints might work as complaints of failures to make reasonable adjustments, they are not viable section 15 claims.

15. In **A v Chief Constable of West Midlands Police** UKEAT/0303/14, Langstaff P considered a similar point in the context of a victimisation claim under 27 EqA. The "reason why" questions in the two types of claims, under s15 and s27, are essentially the same, the question in each case being whether the relevant factor – be it the "thing arising" or the "protected act" – was a material reason for the treatment in question. Langstaff P observed as follows.

> "21. The context is this. The right to complain of victimisation is designed to protect those who genuinely make complaints. They may not be made in bad faith. The act has to relate to a protected characteristic once such an act is done. The effect of the section is, as it were, to place complainants in a protective bubble. They may not be penalised. The response of the person to whom the complaint is made may not be such as to treat the person adversely. Though the wording of section 27 suggests that "subjecting to a detriment" may be by positive act, Miss Banton submits, and I accept, that it may also arise by an omission to act. But omissions to act must be carefully scrutinised in this regard. The purpose of the victimisation provision is protective. It is not intended to

[2] There are other links in the causal chain which must be established in order to show that the request was a "thing arising", but that is not necessarily fatal: see points (d) and (e) in Simler P's analysis in **Pnaiser**.

confer a privilege upon the person within the hypothetical bubble I have postulated, for instance by enabling them to require a particular outcome of a grievance or, where there has been a complaint, a particular speed with which that particular complaint will be resolved. It cannot in itself create a duty to act nor an expectation of action where that does not otherwise exist.

22. It follows that in some cases - and I emphasise that the context will be highly significant - a failure to investigate a complaint will not of itself amount to victimisation. Indeed there is a central problem with any careful analysis and application of section 27 to facts broadly such as the present. That is that, where the protected act is a complaint, to suggest that the detriment is not to apply a complaints procedure properly because a complaint has been made, it might be thought, asks a lot and is highly unlikely. The complaints procedure itself is plainly embarked on because there has been a complaint: to then argue that where it has not been embarked on with sufficient care, enthusiasm or speed those defects are also because of the complaint itself would require the more careful of evidential bases.

23. Here, therefore, there was significant work to be done, one might think, to get a victimisation claim off the ground where the essential complaint was that the Force narrowed the scope of the complaint because the Claimant had made a complaint. Put that way, it is not very promising. It might be different in some circumstances. An example might be if the particular nature of the complaint meant that it would not be discussed or dealt with in a way in which other complaints of a different nature would. For instance, if a particular employer found the prospect of dealing with a complaint of sexual harassment embarrassing to the extent that it took no action on such a complaint when otherwise it would have a duty to do so, or there was a well-established expectation that the complaint would be dealt with, it is in my view possible that a Tribunal might conclude that the omission to act, if it caused the victim of the alleged harassment a detriment in terms of the particular effects of her disappointed expectations, could conceivably come within the scope of victimisation. But it has to be said that regard to the section and words itself suggests that this is likely to be a rare event, for it postulates no particular adverse response to the making of a complaint apart from the fact of simply failing to deal with it.

…

30. … One would hope that, particularly in public bodies, serious care is taken when serious allegations are made and any allegation of discrimination is liable to be serious. But that is very different from saying that an action or inaction by a person who listens to a complaint which has in itself and separately disadvantaged the complainer was done or omitted because of his or her making such a complaint. It was for the Claimant to show the causative link."

16. Another example is Allegation 32. The claimant's case is that she was required to start work at 8.45am, which she found difficult because of the effects of her disability. She accepts that the requirement to start work at that time was imposed across the board, not just to her. The respondent argues that it cannot reasonably be said that this start time was imposed *because of* her disability, and that the case is better put (as it already is) as a reasonable adjustments claim.

The claimant's submissions

17. On behalf of the claimant, Mr Horwood acknowledges the force in the respondent's arguments but responds in the following way. He notes that in **A v Chief Constable of West Midlands Police** Langstaff P acknowledged at [23] that victimisation might be made out *"if the particular nature of the complaint meant that it would not be discussed or dealt with in a way in which other complaints of a different nature would."* Mr Horwood says that this is the situation in relation to these particular Allegations. He says that a thread woven through the allegations was a failure to take the claimant's disability seriously or to accept that she was disabled. He says that this approach was specific to the claimant's particular disability and that her various requests and complaints would have been treated differently if they had been of a different sort. He says that the Allegations in question, put this way, have real as opposed to fanciful prospects of success and should not be rejected on a summary basis.

<u>Analysis and conclusions</u>

Allegations 1.a, 3, 5, 7, 9, 12, 13, 22, 27, 29, 30, 31, 32, 33 and 34

18. If well-founded, Mr Horwood's argument only extends to a certain number of Allegations as they are currently pleaded. The assertion that the respondent's "failure to take the claimant's disability seriously" was the "thing arising" from disability is pleaded only in relation to a sub-set of the allegations to which the respondent's argument applies, namely Allegations 1.b, 2, 4, 6, 8, 10, 17, 18, 20 and 35: Allegations 1.a, 3, 5, 7, 9, 12, 13, 22, 27, 29, 30, 31, 32, 33, and 34 as currently pleaded, rely on different "things arising". It was implicit in Mr Horwood's oral submissions that in order for Allegations 1.a, 3, 5, 7, 9, 12, 13, 22, 27, 29, 30, 31, 32, 33 and 34 to be sustainable, they would require further amendment so as to re-plead the "thing arising" as being (or including) that the respondent "failed to take the claimant's disability seriously."

19. Mr Horwood did not make an express application to amend these Allegations. If he is to be taken to have made such an application implicitly, I reject it. As the history which I have summarised above illustrates, the claimant has more than once sought to re-plead her claim, and the respondent has more than once been required to respond. An amendment would require that to happen once again. The case is at a relatively late stage in the sense that disclosure has taken place and witness statements have been exchanged. Such an amendment would not involve pleading a different kind of legal

claim but it would entail the pleading of new facts, and a new theory of the reason for the alleged unfavourable treatment. It is not fair to the respondent to require it to respond to a constantly shifting case. The prejudice to the claimant if permission to amend is not granted is anyway minor because she has other claims, which she will be able to argue at trial, in relation to the same (or closely connected) matters. The majority of these Allegations are already pleaded, and more cogently, as failures to make reasonable adjustments and/or as acts of direct disability discrimination, and re-pleading them as section 15 complaints adds little other than additional and disproportionate complexity to the claim. The balance of prejudice weighs against allowing such an amendment.

20. Allegations 1.a, 3, 5, 7, 9, 12, 13, 22, 27, 29, 30, 31, 32, 33 and 34 therefore fall to be considered as they stand, and as they stand they have no reasonable prospect of success. The claimant's pleaded case is in my view misconceived for the reasons given by the respondent and referred to above. Accordingly I strike them out. I reach this decision mindful of the authorities which I have referred to above, and in particular the need to exercise caution before striking out discrimination claims.

Allegation 35

21. I turn next to Allegation 35. This allegation should not have been included in the Schedule in the first place, bearing in mind EJ Battisby's order that the claimant had permission to amend her claim to add section 15 claims "as long as no new factual allegations are added." I consider that Allegation 35 is indeed an entirely new factual allegation. Moreover, the alleged "unfavourable treatment" is that *"the Respondent confirmed that they would await the Claimant's MRI scans and then decide whether the matter should go to a full case hearing. If the matter did proceed to a full case hearing, this would give them the opportunity to dismiss the Claimant."* Mr Horwood could identify no unfavourable treatment here, beyond "the possibility of a decision" which was never in fact taken. I see no reasonable prospect of the claimant establishing that this amounted to unfavourable treatment. Allegation 35 has no reasonable prospect of success and I strike it out.

Allegations 1.b, 2, 4, 6, 8, 10, 17, 18 and 20

22. I turn to Allegations 1.b, 2, 4, 6, 8, 10, 17, 18 and 20, which, unlike the other Allegations which I have just considered, do in each case include an assertion that the respondent's "failure to take the claimant's disability seriously" is a "thing arising" from the claimant's disability itself.[3]

23. I am prepared for present purposes to proceed on the assumption that a state of mind on the part of the respondent – a "failure to take the claimant's disability seriously" – is capable of amounting to a "thing arising" from disability. That is necessarily implicit in Mr Horwood's submissions and Ms Garner did not contend otherwise. In **T-Sytems Ltd v Lewis** UKEAT/0042/15 HHJ Richardson held that these statutory words should be given their ordinary meaning, and rejected a submission that the concept of a "thing arising" should be read as being limited to something over which the employer has no control or that it is limited to effects on the disabled person alone, not the employer. In principle, the concept of a "thing arising" seems to me to be capable of including a state of mind on the part of the employer, and in the absence of any submission to the contrary I am prepared to proceed on that basis.

24. The respondent contends that these allegations suffer from much the same problem of circularity as I have already described. However the question of causation at this stage of the analysis (described by Simler P's in points (d)-(f) of her analysis **Pnaiser**) is not identical to the "reason why" question: the "thing arising" question involves an objective not a subjective test and may include more than one causal link. Examination of the mental processes of the relevant individuals involved in relation to Allegations 1.b, 2, 4, 6, 8, 10, 17, 18 and 20 is a fact-sensitive exercise and I am mindful of the need to exercise caution before saying that fact-sensitive discrimination cases have no real prospect of success. I am not persuaded that these matters have no reasonable prospect of success and I do not strike them out.

25. As to Allegation 20, the alleged unfavourable treatment is that Mr Johnson (the claimant's line manager) and others said at a case hearing that they did not believe that the claimant had a disability. In addition to the argument based on causation to which I have referred above, the respondent further argues that the treatment in question was not "unfavourable". The claimant's argument is that this was unfavourable since it conveyed a message that the claimant's disability was not to be

[3] Allegation 35 would also have fallen into this category had I not decided to strike it out on the grounds that the claimant has no reasonable prospect of establishing any unfavourable treatment.

taken seriously, and gave the "green light" to others treating the claimant in a similar way. The claimant's argument on this particular point is fact-sensitive and I am not persuaded that it has no reasonable prospect of success.

Allegations 11, 16 and 28

26. Mr Horwood confirmed that Allegations 11, 16 and 28 all advance the same , namely that (1) the claimant was treated unfavourably by having to work longer hours in order to reduce her debit of hours; (2) her debit hours had built up as a result of her absences, and (3) those absences were consequences of her disability. This is a coherent allegation and I do not regard it as having no reasonable prospect of success.

Employment Judge Coghlin
20 July 2019