EMPLOYMENT TRIBUNALS

Claimant: Miss D Hunt

Respondent: Pennine Care Foundation Trust – Dental Services

HELD AT: Manchester **ON:** 19 August 2019

BEFORE: Employment Judge Ainscough (sitting alone)

REPRESENTATION:
Claimant: No attendance
Respondent: Mr P Spencer (Solicitor)

JUDGMENT

The Claimant's claim of disability discrimination is struck out because it has no reasonable prospects of success.

REASONS

1. This claim was brought by the claimant following her dismissal from the respondent's employment for capability on 21st November 2018. The claimant is a single parent with a 2 year old child whom she describes as disabled because of autism. The claimant went off sick on 22nd June 2018 and did not return to work prior to her dismissal. The respondent says the claimant was dismissed because of the extent of her absence in the short period of employment. The claimant complained of unfair dismissal and disability discrimination because of her association with a disabled child and contends she was dismissed because of absences as a result of depression due to caring for a disabled child. The respondent resists the claim and contends it tried to assist the claimant with a return to work by proposing reduced hours for a 3 month period. The respondent dismissed the claimant after the claimant said she did not foresee that she would be fit for work following that 3 month period.

2. The matter was listed for a Preliminary Hearing on 19th August to determine whether:

   (i) the Claimant's child was a disabled person at the material time;

(ii) having regard to the requirement in section 108(1) of the Employment Rights Act 1996, the Tribunal has jurisdiction to consider the claim of unfair dismissal.
(iii) the claims or any of them should be struck out on the grounds that they have no reasonable prospects of success; and
(iv) the claimant should be ordered to pay a deposit if the Tribunal considers that any specific allegation or argument in the claims has little reasonable prospects of success.

3. On 26th June 2019 the complaint of unfair dismissal was struck out by Employment Judge Howard because the Claimant had failed to make representations as to why the claim should not be struck out in accordance with the Order of 5th April 2019.

4. On 18th April 2019 the Respondent conceded that the Claimant's child was a disabled person at the material time.

5. Therefore the only issues before the Tribunal at the Preliminary Hearing were those at 1.3 and 1.4.

Relevant Legal Principles

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

> **"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –**
>
> **(a) that it is scandalous or vexatious or has no reasonable prospect of success…"**

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

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

determination of a full hearing by striking out (*Ezsias* v *North Glamorgan NHS Trust*, supra, Maurice Kay LJ, at para 29)."

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

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

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

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

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

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

11. In **Mechkarov v Citibank NA [2016] ICR 1121** the EAT (Mitting J) summarised the approach in discrimination cases as follows in paragraph 14:

"On the basis of those authorities, the approach that should be taken in a strike out application in a discrimination case is as follows: (1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any

extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts. "

12. In **Ahir v British Airways plc [2017] EWCA Civ 1392,** Underhill LJ put it as follows (paragraph 16):

"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'."

13. The Claimant did not attend the Preliminary Hearing. The administrative staff from the Tribunal attempted to make contact with the Claimant by telephone, but were unable to do so. The Claimant had not provided a written statement of her case and arguments she wished to advance at the Preliminary Hearing in accordance with the Order of 5th April 2019, Annex B paragraph 5.

14. The Respondent had complied with the Order of 5th April 2019, Annex B paragraph 5 and its representative was in attendance. As a result, in accordance with Rule 47 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the Tribunal proceeded with the hearing in the absence of the Claimant.

15. The Tribunal considered the Skeleton Argument and accompanying documents prepared by the Respondent.

16. The claims under Section 15 of Equality Act 2010 – discrimination arising from disability and Section 21 of Equality Act 2010 – failure to comply with duty to make reasonable adjustments have no reasonable prospects of success because the Claimant is not a disabled person. In order to succeed with both claims, the Claimant must have a disability in accordance with the definition at Section 6 of the Equality Act 2010.

17. The claim of direct discrimination, contrary to Section 13 of the Equality Act 2010, has no reasonable prospects of success because the Claimant has no prospect of establishing that she was treated less favourably than a comparator, in accordance with Section 23 of the Equality Act 2010, who had the same level of absence as the Claimant, but who did not have a disabled child. The claimant had not identified an actual comparator and it was the

respondent's contention that it would have dismissed any employee with the same level of absence with the same short period of employment.

18. Should the Respondent seek to apply for a costs order under Rule 77 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, it shall do so in writing to the Tribunal and copy to the Claimant. The Claimant will have 28 days within which to respond in writing to that application to the Tribunal and copy to the Respondent, before the Tribunal will make a determination.

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Employment Judge Ainscough

27th August 2019

JUDGMENT SENT TO THE PARTIES ON
6 September 2019

Miss E Heeks
FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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