



EMPLOYMENT TRIBUNALS

Claimant: Mr D Taheri

Respondent: Prosurance Limited

HELD AT: Manchester

ON: 20 September 2019

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: Not present

Respondent: Miss C Elvin, litigation consultant

JUDGMENT

The claims are struck out pursuant to rule 37(1)(a) of the Employment Tribunals Rule of Procedure 2013 because they are vexatious.

REASONS

This hearing

1. This was a preliminary hearing to consider the respondent's application to strike out the claims of age and disability discrimination on the grounds that they were vexatious or alternatively that they had no reasonable prospect of success and, if the claims were not struck out, for the claimant to be ordered to pay a deposit as a condition of continuing with the proceedings.
2. Although I gave my reasons orally, since the claimant was not present, I have prepared written reasons.
3. This was a public hearing. The claimant did not attend. He had unsuccessfully applied on a number of occasions to be allowed to participate by telephone. I first decided, after inviting comments from the respondent on the issue, whether to go

ahead in the absence of the claimant, without allowing him to participate by telephone. I decided to proceed without allowing the claimant to participate by telephone for the reasons I gave orally and are recorded as follows.

Reasons for continuing with the hearing without allowing the claimant to participate by telephone

4. The claimant's application to have the preliminary hearing conducted by telephone has been refused twice prior to today's hearing. The circumstances have not changed. The respondent continues to oppose the application for the claimant to participate by telephone. The claimant was aware that his application had been refused and has not attended. He telephoned at around 10 a.m. and then wrote again at 10.19 renewing his application and stating that "If the case proceeds without my presence via telephone and is an adverse decision then I will appeal it as it would be a direct violation of my Article 6 Human Rights and discrimination under the Equalities Act 2010".

5. The claimant has known that a preliminary hearing would be held starting at 10 a.m. since the tribunal's letter dated 27 July 2019. The claimant did not make his application for the hearing to be conducted by telephone until 10 September 2019.

6. The claimant supplied a copy of a GP's letter dated 6 September 2019 with his application dated 10 September 2019. The GP's letter refers to a 3 day case. It appears that the GP has made a mistake, misunderstood or been given incorrect information or this letter does not relate to this case, since this hearing is listed for 3 hours, not 3 days. The letter refers to two conditions: severe anxiety and prostate cancer. From the medical records the claimant has supplied, he was diagnosed with prostate cancer in June 2016. There is no mention in the medical records of severe anxiety. If it is correct that the claimant would have considerable difficulty in attending the tribunal because of the effects of prostate cancer, he would presumably have known about this when first notified of this hearing but he did not make his application until about 6 weeks later.

7. The medical evidence has not persuaded my judicial colleagues who made the decisions to refuse to allow the hearing to be conducted by telephone that the claimant is unable to attend this hearing in person.

8. The judge notes that the claimant attended a final hearing in another case at this hearing centre, case no. 2411529/18, on 11 and 12 September 2019 which suggests that the claimant would have been able to attend this hearing in person if he had wished to do so.

9. The claimant's renewed application made this morning simply repeats a request which has previously been refused. There are no new circumstances which make me consider that it would be in the interests of justice to allow the claimant to participate by telephone, despite the earlier refusals. It appears to me possible that the claimant is seeking to obstruct the proper proceeding of this case by failing to attend in person at this hearing, when he had been informed that it would go ahead in person, but, instead, making further applications at the time the hearing was due to begin, without any change in circumstances, for it to be conducted by telephone. In all the circumstances, including the likely difficulty of conducting this type of

hearing with one party participating by telephone and the respondent's objections to the claimant participating by telephone, I decide that the interests of justice are best served by continuing with the hearing in the absence of the claimant, without allowing him to participate by telephone.

The application to strike out the claims

10. The respondent referred me to a bundle of documents which Miss Elvin told me had been sent to the claimant. This contained the pleadings and the application to strike out, judgments in a number of cases brought by the claimant, and some email correspondence between the claimant and the respondent post interview.

11. I raised with Miss Elvin the issue of whether the email dated 25th of April 2015 at 18.03 from the claimant to Christopher Pike of the respondent was admissible since it was headed "without prejudice". She submitted that the document was admissible because the protection of the without prejudice rule is lost where there is "unambiguous impropriety". I have decided that this document is admissible for reasons which I give in my conclusions.

The claim

12. The claim is of age and disability discrimination in relation to the refusal of employment as a life assurance adviser. The full details of claim given on the claim form are as follows:

13. "I attended an interview at Prosurance on 23 April 2019.

14. John Carter who interviewed me explained that they were looking for several trainees to start at the same time asap.

15. I highlighted my Life Assurance Sales and Telesales experience but also informed him that I have prostate cancer.

16. Later that day he informed me by email that I was unsuccessful due to my lack of Life Assurance experience.

17. I also received a response form [sic] one of the directors Mr Chris Pike, he said my rejection was due to the fact I did not have Life Assurance Sales and specifically in a Telesales role.

18. This is untrue and it my assertion [sic] that my rejection is purely done [sic] to my Age and Disability."

19. This is a complaint of direct age and disability discrimination.

20. The respondent denies discrimination. They will say that the decision maker was not the interviewer and was unaware that the claimant had prostate cancer, that the claimant did not have sufficient experience in life assurance sales and telesales to be appointed, and that none of the candidates that applied for the role at the time were deemed suitable due to them not having the right skills for the job so the position went unfilled.

Facts relating to this claim

21. I was shown emails between the claimant and the respondent in the period 23rd to 25 April 2019.

22. By an email dated 23 April 2019 sent at 17:27, John Carter of the respondent wrote to the claimant as follows:

“Thank you for your time this afternoon,

Unfortunately I cannot offer you an opportunity at this time due to lack of life insurance experience.

Ideally we need someone to start with a minimum requirement of training.

I will keep your CV on file and let you know of any forthcoming vacancies.”

23. Four minutes later, the claimant replied by email:

“You are discriminating against me because of my Age and Disability (Prostate Cancer).

I am more than qualified for this position if you don't reverse you [sic] decision you leave me no option open but to contact ACAS.”

24. The email was copied to London ACAS conciliators.

25. Mr Pike of the respondent wrote by email to the claimant on 25 April 2019 at 11:28. He assured the claimant that his current health condition or age were not taken into account when making the decision to not take his application further. He wrote:

“Your experience was not in the sales of Life Insurance, and also not specifically in telephone sales. These factors were taken into account.

We completely refute your accusations and will not be changing our decision.”

26. The claimant wrote back to Mr Pike later that day, this time copying in Birmingham ACAS conciliators. He headed this email “without prejudice” and gave a case number, which is the 1st part of what became the early conciliation number. He wrote:

“You are mistaken in that I do have Life Assurance Sales experience plus a lot of Telesales/Marketing experience.

I have to question why you did not interview me yourself?

The matter is now in the hands of ACAS if you are unwilling to reconsider your decision or pay me £100-00 for expenses then you leave me no option open but to start litigation.”

27. The ACAS early conciliation certificate indicates that the claimant notified ACAS of the potential claim on 24 April 2019 i.e. before the claimant had received the email from Mr Pike dated 25 April in response to his email of 23 April.

28. The ACAS certificate was issued on 9 May 2019 and the claim was presented on that day.

29. I have not been shown the claimant's application form, his CV, the job description and person specification or any interview notes. I assume for the purposes of this application that the claimant did have relevant experience for the job in question.

Information from correspondence

30. In a letter dated 26 June 2019 to the tribunal, referring to the response and the respondent's application to strike out the claim, the claimant wrote:

"I maintain that I have the relevant Life assurance and Telesales experience as I have previously worked as a mortgage consultant for an estate agents."

Other claims brought by the claimant

31. The respondent has informed me of 14 other claims brought by the claimant against other respondents of which they are aware and in which judgments have been given. In particular, I note that in case number 1800403/2017, a complaint of age discrimination in relation to refusal of employment was struck out pursuant to rule 37(1)(a) because it was vexatious. In case number 3304326/2018, costs were awarded against the claimant on the grounds that claims of race and age discrimination had no reasonable prospect of success and the complaint of race discrimination was vexatious. The complaints related to refusal of employment. A number of other complaints were dismissed on withdrawal by the claimant.

Law

32. Rule 37 (1)(a) of the Employment Tribunals Rules of Procedure 2013 provide that the tribunal may strike out all or part of the claim or response on grounds "that it is scandalous or vexatious or has no reasonable prospect of success."

33. The appeal courts have urged caution in reaching a conclusion that a complaint of discrimination is vexatious. The House of Lords in **Anyanwu v South Bank Students Union** [2001] IRLR 305 said that such claims should not be struck out as an abuse of process except in the most obvious and plainest cases.

34. Similarly, it is rarely appropriate to strike out complaints of discrimination on the grounds they have no reasonable prospect of success before all the evidence can be heard. Complaints of discrimination are fact sensitive and inferences may need to be drawn from all the relevant evidence, which will include the evidence given by the respondent. However, as held by the Employment Appeal Tribunal in **Chandhok v Tirkey** [2015] IRLR 195, at paragraph 20, cases which do no more than plead a

difference of treatment and a difference of protected characteristic can be struck out as having no reasonable prospect of success. The EAT referred to the judgment of the Court of Appeal in **Madarassy v Nomura International plc** [2007] IRLR 246 CA, paragraph 56, where Mummery LJ said that, where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which:

'... 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.'

35. As a matter of law, the privilege which attaches to "without prejudice" correspondence is lost where there is evidence of "unambiguous impropriety". This exception only applies in the clearest of cases: **Woodward v Santander** [2010] IRLR 834.

Conclusions

36. The facts asserted by the respondent in its response cannot be tested without hearing evidence and I do not depend on them in reaching my conclusions.

37. I am aware that the claimant has brought a substantial number of other claims without successful outcomes which include, on those brought to my attention, a complaint struck out because it was vexatious and a case where costs were awarded on the basis another complaint was vexatious and complaints had no reasonable prospect of success. The subject matter of the complaints, where it is apparent from the judgments, were complaints of discrimination in relation to the refusal of employment.

38. Although I am aware of these other cases, I do not put significant weight on them in reaching my conclusions, being aware that, even if a claimant brings other complaints which are unmeritorious, and even vexatious, that does not mean that they may not have another complaint which does have merit.

39. The claim as pleaded does not even go as far as asserting a difference in treatment and a difference of protected characteristic. It asserts merely that the claimant had experience in life assurance sales and telesales, that he had informed the interviewer he had prostate cancer, and that he was informed by email that he was rejected because he did not have relevant experience. He does not explain why he informed the interviewer he had prostate cancer; the way he puts it suggests that he volunteered the information rather than this being in response to any question from the interviewer. This would be consistent with what the respondent has said in its response that the claimant, without specifically being asked about the state of his health, informed Mr Carter he had prostate cancer. The claimant asserts that his rejection was because of age and disability. The claimant does not plead any other facts.

40. The claimant alleged unlawful age and disability discrimination within 4 minutes of receiving Mr Carter's email. The claimant had no information about whether anyone had been appointed and, if so, what age they were and whether they had

any disabilities. He had nothing other than, at most, his view of his own suitability for the post, to make him question the respondent's decision not to offer him employment.

41. The extremely quick response from the claimant to allege discrimination and the unusual step of copying in ACAS conciliators at such a very early stage, without seeking to explore with the respondent why they took the view that he had insufficient experience, whether they had appointed anyone else and why, if so, they preferred other candidates over him, makes me question whether the claimant had a genuine view at the time he sent that email, that he had been discriminated against because of age and/or disability. The claimant's subsequent "without prejudice" email casts even greater doubt on the good faith of the claimant in making the allegations.

42. I conclude that the "without prejudice" email is admissible evidence. Although it appears that potentially it would be privileged as correspondence attempting to settle a dispute with the potential for litigation, I consider that this is a case where the "unambiguous impropriety" exception applies. The threat to start litigation if the respondent does not reconsider their decision or pay him £100 for expenses, appears to me to be a clear attempt to use the nuisance value of a potential claim to obtain a financial advantage rather than as an attempt to settle a complaint which the claimant genuinely felt had merit. The fact that the claimant notified ACAS under the early conciliation procedure before waiting for a response from the respondent to his allegation casts further doubt on whether he had a genuine complaint of discrimination or even any real interest in finding out whether there might be any proper grounds for a complaint. Rather, it appears he was seeking a "hook" on which to hang a potential claim and obtain money from the respondent. On the basis of the correspondence with the respondent and the claim form, the claimant had no proper basis for linking his rejection with his age or disability and I conclude that the claimant cannot have had a genuine view when he wrote the email that there was unlawful discrimination because of age or disability. The claimant behaved improperly. I conclude that this is one of the clearest of cases of "unambiguous impropriety" and the claimant cannot, therefore, rely on the privilege of the "without prejudice" rule.

43. I conclude, on the basis of the correspondence with the respondent and the claim form, the claimant had no proper basis for linking his rejection with his age or disability and cannot have had a genuine view when he presented his claim that it had merit. For the reasons given above in deciding that the claimant acted with "unambiguous impropriety", I conclude that this has been an attempt to gain financial advantage rather than a claim brought out of a genuine belief that the claimant had been discriminated against because of age or disability.

44. I conclude that this is an obvious and plain case of abuse of process. The claimant has acted vexatiously in bringing these proceedings and I strike out the complaints of age and disability discrimination on this basis.

45. Had I not struck out the complaints on this ground, I would have struck them out as having no reasonable prospect of success. As noted above, the claim form contains even less than an assertion of a difference in treatment and a difference of protected characteristic. It is a mere assertion that, because the claimant was not

offered the job and considers himself to have relevant experience, the rejection must be because of his age and/or disability. Even if, on consideration of the evidence, the tribunal agrees that the claimant had relevant experience, this would fall far short of proving facts from which the tribunal could conclude that the failure to offer employment was because of the claimant's age and/or disability. In the claimant's letter responding to the response and application to strike out, he provided no other information which would, taken at its highest, suggest that facts might be proved which would assist his case.

Employment Judge Slater

Date: 20 September 2019

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

16 October 2019

FOR THE TRIBUNAL OFFICE

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