EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Bill	**v**	**Norwich University of the Arts**

Heard at: Bury St Edmunds Employment Tribunal

On: 25th September 2019

Before: Employment Judge King

Appearances

For the Claimant: Did not attend
For the Respondent: Mr D Chapman (solicitor)

JUDGMENT

1. The Claimant's claims for disability discrimination are dismissed.

REASONS

Background

1. The claim was listed today back in July 2019 for a preliminary hearing to deal with the respondent's application for a strike out and to determine whether the claimant was disabled within the meaning of s6 Equality Act 2010. These are clearly set out in the case management order of Employment Judge Postle.

2. The Claimant did not attend today's hearing citing childcare reasons due to a change of venue for the hearing. The Claimant having failed to previously attend a preliminary hearing on 3rd July 2019 before Employment Judge Postle and Employment Judge Postle having found at paragraph 21 of his case management summary of that date that the Claimant was aware of that hearing and had chosen not to attend, the did not attend again today.

3. I have considered whether it would be in accordance with the overriding objective for the case to be postponed today and relisted for a third occasion but considering that the respondent has yet again been put to the

expense of attending when the claimant had failed to do so considered this would not be in furtherance of the overriding objective. The claimant has not requested an alternative hearing time and at the time of making this judgment (1.00pm) had not attended the hearing. He has not requested a postponement just notified the Tribunal he is not coming. When the hearing started at 10.50am he had failed to attend.

4. The respondent's solicitor had provided the claimant with its skeleton argument in advance and the claimant has not made additional submissions to the Tribunal in writing other than those referred to below.

5. In addition, Employment Judge Postle made an unless order (at the July 2019 hearing) stated that the claims would be struck out within 7 days (of the order dated 12th August 2019) unless the claimant showed cause why they should not be struck out as having no reasonable prospects of success.

The law

6. The following legal provisions are relevant to the issues before the Employment Tribunal today.

7. Rules 2, 27, 30A, 37 and 38 of Schedule 1 of the Employment Tribunals (Constitution and rules of procedure) Regulations 2013 which state as follows:

Rule 2 - Overriding objective

2. *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Rule 27 - Dismissal of claim (or part)

27.—*(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the Tribunal shall send a notice to the parties—*

(a) setting out the Judge's view and the reasons for it; and

(b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.

(2) If no such representations are received, the claim shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).

(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The respondent may, but need not, attend and participate in the hearing.

(4) If any part of the claim is permitted to proceed the Judge shall make a case management order.

Rule 30A - Postponements

30A.—*(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.*

(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—

(a)all other parties consent to the postponement and—

(i)it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or

(ii)it is otherwise in accordance with the overriding objective;

(b)the application was necessitated by an act or omission of another party or the Tribunal; or

(c)there are exceptional circumstances.

(3) Where a Tribunal has ordered two or more postponements of a hearing in the same proceedings on the application of the same party and that party makes an application for a further postponement, the Tribunal may only order a postponement on that application where—

(a)all other parties consent to the postponement and—

(i)it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or

(ii)it is otherwise in accordance with the overriding objective;

(b)the application was necessitated by an act or omission of another party or the Tribunal; or

(c)there are exceptional circumstances.

(4) For the purposes of this rule—

(a)references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;

(b)"exceptional circumstances" may include ill health relating to an existing long term health condition or disability.".

(4) In rule 76 after paragraph (1)(b) add—

"or

(c)a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.".

Rule 37 - Striking out

***37.**—(1) 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;

(b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c)for non-compliance with any of these Rules or with an order of the Tribunal;

(d)that it has not been actively pursued;

(e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Rule 38 - Unless orders

38.—*(1) An order may specify that if it is not complied with by the date specified the claim or response, or part of it, shall be dismissed without further order. If a claim or response, or part of it, is dismissed on this basis the Tribunal shall give written notice to the parties confirming what has occurred.*

(2) A party whose claim or response has been dismissed, in whole or in part, as a result of such an order may apply to the Tribunal in writing, within 14 days of the date that the notice was sent, to have the order set aside on the basis that it is in the interests of justice to do so. Unless the application includes a request for a hearing, the Tribunal may determine it on the basis of written representations.

(3) Where a response is dismissed under this rule, the effect shall be as if no response had been presented, as set out in rule 21.

Section 6 – Equality Act 2010

6 Disability

(1) A person (P) has a disability if—

(a)P has a physical or mental impairment, and

(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2)A reference to a disabled person is a reference to a person who has a disability.

(3)In relation to the protected characteristic of disability—

(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4)This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

(a)a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b)a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5)A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6)Schedule 1 (disability: supplementary provision) has effect.

The respondent also drew may attention to Mechkarov v Citibank NA [2016] ICR 1121 in its written submissions to which I have had regard.

Findings of fact and conclusions

8. The claimant provided to the respondent's representative and the tribunal a number of documents which have been considered in his absence. The impact statement which included a letter said to be from Arlene Healey – consultant family therapist which is dealt with below and a further 10 paragraph witness statement annexing the ACAS certificate. In addition, I have considered the case management orders of 3rd July 2019, ET1 and ET3 as well as an email from the claimant dated 18th September 2019 referring to his difficulties in obtaining medical evidence and his two emails of 24th September 2019 to the Tribunal. The respondent's representative confirmed that it had had sight of all of these documents.

9. The claimant in his impact statement refers to a number of applications made but does not provide copies. Taking the evidence at its highest on face value he says he indicated in an application in April 2017 that he had emotional difficulties. The claimant has failed to provide copies of the applications. The respondent accepts it has 8 of the 18 applications made by the claimant but, due to the passage of time and in line with its data retention policy, it does not have 10 of them. Of the 8 it has, none refer to any emotional difficulties.

10. The claimant suggests he had two witnesses who can give evidence but has not adduced a statement, letter or outlined the proposed evidence these witnesses can give to assist the tribunal.

11. The claimant alleges he attended an interview in 2017 which the respondent accepts. He does not state that he told that interviewing panel he has emotional difficulties however as second choice for that role and as he has not been appointed since he alleges that this is because of alleged prejudices. He has not confirmed that those in the earlier application processes were on the panels for the later processes. He has not dealt with the matters arising from Employment Judge Postle's findings from the case management summary that the applications were all similar in nature and not tailored to the roles applied for.

12. Employment Judge Postle made findings that the applications made were consistent and not tailored to the role. I have considered that strike out is a draconian measure but despite having two attempts to do so the claimant has no adduced any additional evidence or matters which could be tested by the giving of evidence to support why his case has reasonable prospects of success.

13. He has failed to attend today but did comply with the orders for the impact statement by the 18th September and the medical evidence required (albeit deficient for the reasons set out below) he is not in further breach of orders. It would therefore appear that the claimant has not shown just cause as required by the unless order meaning and his case could therefore be struck out.

14. Further, and in the alternative, the hearing today was to consider the respondent's strike out application which is pursued on two grounds of Rule 37 of the Employment Tribunals (Constitution and rules of procedure) Regulations 2013. Firstly under (a) that it has no reasonable prospects of success and secondly under (b) and (c) that the claim is either not being actively pursed or the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable or vexatious.

15. Taking first the reasonable prospects point under (a) and noting the caution set out in Mechkarov v Citibank NA [2016] ICR 1121 taking the case at its highest the claimant has not established either he is disabled (see below) or that the respondent knew of his disability.

16. The written applications are dealt with above and the claimant has not produced any evidence to show his disability was contained in any application or that the respondent was told orally. The recruitment process is such that application forms are used, the claimant accepts he ticked the "prefer not to say" on the Equality monitoring form and the respondent says this was then separated from the application. Even if the respondent was wrong on this and they were kept together the ticking of the box "prefer not to say" is not evidence of disability. The claimant faces an additional hurdle in that the application processes were scored by two people and that this differed given the variety of applications and secondly that this went before a panel upon which one of the Claimant's witnesses had not sat since 2017.

17. The only reference he say to his disability was a reference to emotional difficulties post the 2017 interview. This is not even if accepted high enough to constitute a disability or knowledge of the same. The claimant has never worked for the respondent and it cannot therefore have gained knowledge from any sick notes, occupational health referrals or similar knowledge that is often acquired in such cases.

18. Even if the claimant was right and there was an issue with the November 2017 application and that those on the panel knew of his emotional difficulties, he does not explain why he took not further action at that point and continued to apply for roles and did not take any action until the last of those in 1 February 2019. Further, taking his case at his highest saying one has emotional difficulties is not indicative of a disability which meets the definition of disability under s6 of the Equality Act. The claimant has done very little since the unless order to establish any primary facts from which an inference can be drawn to shift the burden and nothing in the

documents I have seen suggests that he has such evidence to be tested at a final hearing.

19. For the reasons set out above I find that the claimant's case has no reasonable prospects of success. This would be sufficient alone to grant the respondent's application but I have also set out and tested the alternative positions below.

20. Turning now to the second ground, the claimant is not actively pursing the claims he has having failed to attend the last preliminary hearing and had the importance of so doing impressed on him yet has made no effort to attend this hearing or provide written submissions. Employment Judge Postle found on the last occasion that he did know of the hearing and chose not to attend. The moving of the venue is unfortunate but the claimant has not shown he made any effort to attend. He has not attended late or requested a postponement he simply says he is unable to attend. He has not provided medical evidence to support his case and will scan and email a purported doctors letter later this week. Even if he now has a letter no one has seen the claimant is clearly dismissive of his obligations to the tribunal and to advance his case and will in essence get round to it later this week. Given his history this is not satisfactory and he cannot chose to pursue his case on terms that suit him.

21. Further he says he is in possession of a letter from his doctor but has made no effort to provide a copy of the tribunal or the respondent's representative. The claimant runs a business in Norwich and if I was to accept, he had no such scanning facilities within his business he confirmed at 9.06am yesterday he would have his doctor's letter later that day. By 15.25 that day he says the letter confirms he may have a disability under the Disability Discrimination Act 1995. He further states that he will need to visit a local library and he cannot do that yesterday afternoon but will do it later this week. At the time of writing this judgment neither the respondent's representative nor the tribunal have seen the letter.

22. Given the respondent and its solicitor are both in Norwich and the library is not the only source of scanning facilities in a city that size, the claimant appears to have made no effort to place this evidence before the tribunal for today despite it being critical as to the issue to be determined and for him to satisfy the tribunal he has such a disability.

23. Again, taking it at its highest from his email it says the claimant may have a disability under an act that has been since superseded by the Equality Act 2010 and thus does not assist the tribunal. If this is what the letter says it is a concern that a medical professional should be unaware of the Equality Act 2010 and must drawn into question the other contents of that letter and whether they address the s6 test. Further, given he has quoted from part of the letter it is inconceivable he would not have quoted other parts that he felt benefited his case if indeed there were any.

24. I am content that given the history and the points made below re the inability to establish he is disabled for the purposes of today's hearing that

the manner in which the claimant is conducting the proceedings is unreasonable.

25. As a consequence if I was not minded to strike out the claim for failing to show just cause under the unless order I have grounds to strike out the claim today on either of the grounds advanced by the respondent's representative for the reasons set out above.

26. Further and in the alternative the claimant has failed to establish that he is disabled within the meaning of s6 Equality Act 2010. This was the second purpose of today's hearing.

27. The claimant has produced only one piece of purported medical evidence. This is not an original signed letter on headed paper but text cut and pasted into his impact statement on page 4 from a family therapist as set out above. He has not produced (despite being requested to do so by the respondent's representative) the original signed copy some weeks later. Assuming at its highest this is a genuine document and to be taken at face value, it does not support the claimant's position that he is disabled.

28. It is prepared for family court proceedings by the family therapist providing mediation service and it says a report was prepared for the High Court (which again is notably absent). It says he presents symptoms indicative of trauma and possibly PTSD. It refers to traumatic events in 2012 but gives no detail as to the symptoms or when they started and how long they are likely to last for. At best it is a referral to assess him by a clinical psychologist. No evidence from the clinical psychologist is presented despite the referral.

29. His impact statement only deals with any impact at paragraph 8 which is three short sub paragraphs and again lacks any real detail. The only reference of relevance is that his mind is constantly drawn back to events. It makes no reference to impact on day to day activities. It says he has been diagnosed with post traumatic distress disorder but not by whom or when and again no evidence is provided to the tribunal to support this statement.

30. In another witness statement he says that at paragraph 9 he is in receipt of Employment Support Allowance and receiving counselling. No evidence of either is provided and evidence of Employment Support Allowance is not conclusive in any event. There is no letter or appointment card from his counsellor. He gives no indication of when he started to receive counselling, the form it takes and the frequency. He refers to mental health issues in relation to PTSD but does not state what they are, their impact or that he is on medication for the same. There is nothing in either document that is anywhere close to establishing he is disabled within the meaning of the Act.

31. The doctor's letter he has quoted from in yesterday's email refers to the fact he may be disabled under the Disability Discrimination Act 1995.

Again without further details. I have already dealt with the failure to provide this document for today's hearing above.

32. Taking all this together at his highest he has not established he is disabled within the meaning of s6 Equality Act 2010. He has not established any limb of the test in documents before me. I have considered that had he attended today he could have provided additional evidence for the tribunal orally but that was the purpose of the impact statement and he has failed to do so.

33. His oral evidence may have given the tribunal some material to make such a finding but given the failure to provide any original medical documentation since the July 2019 hearing and some of which he ought to have been able to evidence without the doctors letter from material in his own possession, I cannot say what evidence he could have given and there is no supporting documents before this Tribunal to support any oral evidence he gives.

34. I cannot say that the claimant is disabled. The claimant has brought claims of disability discrimination and unless it can be shown by the claimant he is disabled these claims must fail.

35. It therefore follows that further and in the alternative the claimant has failed to establish he is disabled within the meaning of s6 Equality Act 2010. As the claimant is not disabled his claims for disability discrimination must fail and are dismissed.

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Employment Judge King

Date: …….25.09.19…..

Sent to the parties on: ..31 October 2019

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For the Tribunal Office