THE EMPLOYMENT TRIBUNALS

Claimant: **Mr J Shield**

Respondent: **BPDTS Limited**

Heard at: **North Shields Hearing Centre** **On:** **Tuesday 5 November 2019**

Before: **Employment Judge Arullendran**

Representation:

Claimant: **Mrs C Shield (claimant's mother)**
Respondent: **Mr Brien (Counsel)**

RESERVED JUDGMENT ON PRELIMINARY ISSUE

The Judgment of the Employment Tribunal is as follows:

1. The claims under section 15 and section 20 of the Equality Act 2010, insofar as they relate to the claimant's claim that the respondent failed to provide safe access to a disabled toilet and required the claimant to park in two parking spaces, are struck out under the principle of res judicata.

2. The remainder of the claimant's claims (unfair dismissal, harassment, victimisation and the failure or delay in providing Asperger's awareness training) shall proceed to a full hearing. The Employment Tribunal shall arrange a preliminary hearing as soon as possible to make case management orders in respect of these claims so that they can be bought to a full hearing.

Reasons

1. I was provided with a joint bundle of documents consisting of 477 pages, the majority of which were not referred to by either side. The bundle of documents appears to have more relevance to the full merits hearing rather than this preliminary hearing and I explained to the parties that I would not consider all of the documents in the bundle and that I would only consider those documents

which are relevant to the issues I have to decide in this preliminary hearing. Neither side calling witness evidence and both sides made submissions by reference to the previous Judgment promulgated by Employment Judge Hargrove on 28 March 2018 and the claimant's current claims.

2. The issues to be determined by the Employment Tribunal at this preliminary hearing are as follows:

   2.1 to consider if any allegation of the claimant should be struck out on the basis that it is res judicata
   2.2 to consider if any allegation of the claimant should be struck out on the basis that it is caught by the doctrine in Henderson v Henderson
   2.3 to consider if any claim of the claimant should be struck out on the basis that it has no reasonable prospect of success pursuant to Rule 37(1)(a) of Schedule I to the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules")
   2.4 to consider whether any argument or allegation advanced by the claimant has only little reasonable prospect of success and to consider ordering a deposit of not exceeding £1000 as a condition of continuing to advance such argument or allegation pursuant to Rule 39 of the 2013 Rules.

3. The claimant was asked by the Employment Tribunal whether there were any reasonable adjustments he required the Tribunal to make to assist him with his attendance at this hearing, in addition to the arrangements which had already been made to the hearing room to accommodate the claimant's wheelchair. The claimant asked for breaks to be provided throughout the hearing and it was agreed that the claimant's mother, as the claimant's representative, would request breaks as and when required. I asked the parties at the end of the respondent submissions and claimant submissions whether a break was required, but both parties elected to continue with the hearing which lasted approximately 1 hour and 35 minutes.

4. I explained to the parties at the outset of the hearing the law relating to estoppel. I explained that a party cannot pursue a cause of action which had been dealt with in any proceedings and this is known as cause of action estoppel. I explained that a party cannot reopen an issue that has been decided in earlier proceedings and this is known as issue estoppel. I explained that the rule in Henderson v Henderson provides that if a party fails to raise an issue in the proceedings which he could and should have raised, that party maybe estopped from raising it in future if it would amount to an abuse of legal process and the reason why this rule exists is because there should be finality in litigation.

5. In preparation for this hearing Mrs Shield wrote to Employment Judge Hargrove asking for his recollection of the event at the hearing which took place in February and March 2018 on the basis that the claimant's recollection is that that Tribunal did not make any findings of fact on any issues arising after the presentation of the ET1 in that claim. A copy of Employment Judge Hargrove's reply can be seen at pages 134 and 135 of the bundle. Employment Judge Hargrove states

> "It is his clear recollection, supported by page 6 of his notes, that the full Employment Tribunal refused the claimant's application to reply upon events taking place after the date of the ET1 in that case upon the basis that they had not been raised before the hearing; that if an amendment was allowed, there would be insufficient time to complete the hearing in the time allocated; and that in any event the claimant would be entitled to bring fresh proceedings against BPDTS in respect of those matters, the claimant being still employed. There was, in that respect, a reference to an Access to Work issue, the exact nature of which I do not recollect being identified, but which the Tribunal refused to consider. Accordingly, although I am not aware of the current issues raised by the claimant, the claimant was denied the opportunity to raise issues arising after the date of the ET1 in the earlier case."

6. The claimant's current claims, as set out in his ET1 form, can be seen at pages 71 to 85 of the bundle and a copy of the claimant's further better particulars of claim can be seen at pages 93 to 109 of the bundle. The claimant's ET1 form appears to have been completed by the claimant in person and the further and better particulars have been compiled by the claimant's legal representative, Jason Elliott Associates. To summarise, the claimant has made claims of failure to make reasonable adjustments in failing to provide Asperger's awareness training as recommended by Access to Work, failure to make reasonable adjustments and section 15 discrimination in the use of a toilet, failure to make reasonable adjustments and section 15 discrimination in requiring the claimant to park across two parking bays, harassment, victimisation and unfair dismissal.

7. The respondent's response to the claimant's current claims are set out in the response at page 86 to 92 of the bundle and the second response (in reply to the further and better particulars from the claimant) which can be seen at pages 113 to 120 of the bundle. The respondent argues that the principle of res judicata applies because the claimant had brought the same claims against the respondent under the case number 2500647/2017, for which the Judgment was issued on 28 March 2018. The respondent argues that the previous Tribunal made findings in relation to the section 15 discrimination and failure to make reasonable adjustments claim in respect of the respondent granting two ordinary car parking spaces to the claimant instead of one demarked disability car parking space, harassment on the grounds of the claimant's condition of Asperger's by way of criticism and comments from colleagues regarding his confrontational manner, poor timekeeping, extensive use of his mobile telephone and untidiness of his desk, and victimisation in that he was placed on a performance improvement plan and that he was criticised for his poor timekeeping and the use of his mobile telephone at his desk. The respondent argues that the previous Tribunal made findings that there was no breach of the Equality Act in relation to the claimant's access to disabled toilet facilities, that there was no detriment to the claimant by not painting the car parking bays with a disability sign, that the comments made about the claimants confrontational attitude prior to 24 March 2017 did not amount to discrimination because the respondent had no knowledge of the claimant's condition of Asperger's, that any comments or criticisms made of the claimant did not relate to disability and therefore did not

amount to harassment and that there was no victimisation as the claimant had not identified any acts of detriment.

8. With regard to the claimant's claim that the respondent has failed to provide Asperger's awareness training, as recommended by Access to Work, the respondent submits that this training was provided by the respondent on 21 and 22 June 2018 and that the respondent understands that the alleged failures relate to the delay in providing the training. The referral was made to Access to Work in April 2017 and the respondent's case is that there was a delay in arranging the training because the claimant was absent from work between August and December 2017. However, the respondent concedes that, in light of the letter from Employment Judge Hargrove, it cannot submit that this matter was dealt with by the previous Tribunal. However, the respondent submits that this claim has little reasonable prospect of success as the delay in the provision of the training were caused by the claimant's absence and the delay itself does not render the provision of the training unreasonable.

9. The respondent submits that the claimant's claims relating to failure to provide the claimant with a disabled access toilet which others could not use and the provision of two parking spaces in the parking bay amount to an abuse of process as both the issues were dealt with by the previous Tribunal. The Judgment at pages 49 and 50 of the bundle, at paragraph 12, specifically deals with the claimant's claim that it was a failure to make reasonable adjustments and discrimination contrary to section 15 in allowing other colleagues to use the disabled access toilet. The Judgment at page 41 of the bundle, at paragraph 6.1, deals with the claim for failure to make reasonable adjustments by requiring the claimant to park across two parking spaces. Therefore, the respondent submits that both these issues stand to be struck out on the grounds of res judicata.

10. The respondent submits that the claimant has made generic statements in his further and better particulars about his claims of harassment and victimisation. In particular, the respondent submits that the claimant has failed to particularise whom, when or how the harassment took place and how it related to the claimant's disability. Further, the respondent submits that Employment Judge Hargrove previously rejected the claimant's claim of harassment, which is set out at paragraph 15 of the Judgment and can be seen at page 51 of the bundle. The respondent submits that, as the claimant has not provided any dates or specified any acts in his claim, that there is no reasonable prospect of success, particularly as the claimant has not identified any incidents which postdate the previous Judgment, despite having two attempts to specify the nature of the harassment in his pleadings. Therefore, the respondent submits that this claim should be struck out.

11. The respondent relies on the same arguments in relation to the claims of victimisation as set out for the claims of harassment in paragraph 10, above. In particular, the respondent submits that the claimant, was referring to 2 grievances and contacting the CEO as his protected acts, but he has failed to specify any acts of detriment other than being unfairly disciplined. The respondent submits that the first grievance was in August 2017 which was covered at the previous hearing which took place in February and March 2018

and, therefore, is subject to the principle of res judicata. In addition, the respondent submits that this claim has no reasonable prospect of success as the claimant has failed to specify any detriment.

12. The claimant submits that he took instruction from Employment Judge Hargrove and submitted a new claim in respect of the issues arising out of Access to Work and that Employment Judge Hargrove has confirmed this in his letter, so this claim should proceed.

13. In relation to the claims relating to the provision of a disabled toilet and car parking, the claimants submit that Employment Judge Hargrove had stated that that Tribunal would not decide anything after 29 March 2017 and that his understanding was that he could submit a new claim for any events taking place after that date.

14. The claimant submits that the respondent increased the incidence of harassment and victimisation after receiving the Judgment from Employment Judge Hargrove in that they refused to hold meetings with the claimant by using email and failed to understand what it is meant by Asperger's, which resulted in the claimant taking sick leave from the end of March 2018. The claimant submits that the training was not for the benefit of the claimant but it was for the claimant's managers and colleagues, therefore the claimant did not need to be in attendance at work for the Asperger's awareness training to take place. However, the claimant submits that the respondent was not interested in the training and just wanted to drive the claimant out of work. I asked Mrs Shield why there were no details about the alleged harassment or the detriment in respect of the alleged victimisation claim in the further and better particulars, to which she replied that the barrister who had drafted the further and better particulars had not asked for specific details and that the claimant was in a poor mental state at the time he was providing instructions.

15. I asked the claimant what was meant by wrongful and unfair disciplinary action, to which Mrs Shield said the claimant did not want meetings to be held face-to-face, but the respondent was been difficult and obstructive in doing this by email which resulted in the claimant going off sick with depression. Mrs Shield claims that the respondent was not reading the content of the claimant's emails. Mrs Shield claims that if the respondent had procured the awareness training earlier the claimant would not have been bullied and victimised and he would not have been off sick and, therefore, he would not have been dismissed. With regard to the issue relating to the toilet, the claimant claims that a wooden bench was obstructing the door which the respondent then removed but this resulted in someone else having an accident in or around the first quarter of 2018.

The Law

16. Rule 37 of the 2013 Rules state:
"(1) at any stage of the proceedings, either on his own initiative or on the application of a party, the Tribunal may strike out all part of the claim or any response on any of the following grounds-

(a) that it is scandalous or vexatious or has no reasonable prospect of success; …"

17. Rule 39 of the 2013 Rules state:
"(1) where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response had little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit of not exceeding £1000 as a condition of continuing to advance that allegation or argument.
(2) the Tribunal shall make reasonable enquiries into the pain party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

18. I refer to the case of Anyanwu v South Bank Students Union [2001] 1 WLR 638 in which it was decided that discrimination cases are fact sensitive and should be judged on the merits.

19. I refer to the case of Machkarov v Citibank [2016] ICR 1121 in which it was decided that the claimants' cases should be taken at their highest and where there are core issues of fact which need to be determined, they should not be decided without hearing oral evidence.

Conclusions

20. Since submitting his ET1 form on 2 July 2018, the claimant has been dismissed from his employment with the respondent and the respondent has raised no objections to the claimant amending his claim to include a claim of unfair dismissal. Whilst the respondent has tried to argue today that that claim has little reasonable prospect of success because the reason for the claimant's dismissal was capability and the claimant's own evidence will be that he was absent from work from 4 June 2018 until the date of his dismissal, the claimant also has a claim under section 15 of the Equality Act 2010 arising from the same set of facts as the unfair dismissal claim. In the circumstances, taking the claimants pleadings at their highest and applying the guidance in Anyanwu, I find that this is an arguable claim and it cannot be said that it has no reasonable prospect of success.

21. The claim in relation to the delay in providing Asperger's awareness training, as recommended by Access to Work, contrary to sections 20 of the Equality Act 2010, was not dealt with at the previous Employment Tribunal hearing. It is clear from the letter from Employment Judge Hargrove at page 134 the bundle that findings were not made on this specific issue at the previous hearing and, therefore, I find that it is not caught by the doctrine of res judicata and this claim should proceed to a full merits hearing, particularly as it appears that the claimant is arguing that the failure to provide this training at an earlier date contributed to the events which led to his dismissal. In all the circumstances, this is an issue that a full Tribunal can only make a decision on after hearing all the relevant evidence.

22. I find that the Employment Tribunal considered and made findings in relation to the claimant's claim that the respondent failed to provide him with adequate disabled toilet facilities in the workplace, as set out at paragraph 12 of Employment Judge Hargrove's decision. The claimant has today suggested that the respondent removed a bench from the bathroom which resulted in injury to others, although this is not pleaded in the claimant ET1 or in the further and better particulars produced by his legal representative. Employment Judge Hargrove found that "it is not possible or practicable for an employer to guarantee immediate access on demand to a disabled toilet. We are satisfied that there was adequate provision of disabled toilets at the premises. This is not a breach of section 15 or a failure to make reasonable adjustments." In the circumstances, I find that this issue has already been determined by previous Tribunal and, therefore, is subject to the doctrine of res judicata/issue estoppel and stands to be struck out. Even if I am wrong, allegations raised by the claimant today do not, on the face of it, appear to amount to a detriment to the claimant, but rather a detriment to others and, as such, would stand to be struck out on the grounds of having no reasonable prospect of success.

23. I find that the Employment Tribunal considered and made findings in relation to the claimant's claim that he was subject to a detriment because he was required to park in two parking spaces in the car park, as set out in paragraph 6.1 of Employment Judge Hargrove's Judgment. In particular, Judge Hargrove made findings that he heard evidence that "on one occasion about two days after the move a facilities manager was observed pointing at the car and the way he had parked it. We do not accept that there was a breach of section 15 or section 20 in this respect and we do not accept that this amounted to a detriment." In the circumstances, I find that this issue has already been determined by a previous Tribunal and, therefore, is subject to the doctrine of res judicata/issue estoppel and stands to be struck out.

24. I find that, taking the claimants pleadings at their highest, and applying the guidance in the cases of Anyanwu and Machkarov, it cannot be said that the claimant's claims of harassment and victimisation have no reasonable prospect of success as the claimant refers to an end of year appraisal and communication between him and the respondent, in addition to the respondent's internal processes leading to dismissal. I accept that there is much force in the respondent's argument that the claimant has provided very minimal particulars in respect of the claims of harassment and victimisation, however, without hearing the evidence, it is not possible to say that the claims are bound to fail or have little reasonable prospect of success. A poorly argued claim is not the same as saying that a claim has little or no foundation in law. Whilst Employment Judge Hargrove made reference to the claims of harassment and victimisation in paragraph 15 of his Judgment, the claims appear to relate to the matters set out in paragraph 14 of that Judgment, i.e. poor timekeeping and the state of the claimant's desk, which he found did not relate to the claimant's disability. On the basis that the claimant's current claim of harassment and victimisation appear to relate to his appraisal, communication with the respondent and the application of the capability/dismissal process, I find that the issues relating to harassment and victimisation, as currently pleaded, were not dealt with by the previous Tribunal and, therefore, are not caught by the doctrine of res judicata. In the

circumstances, I find that the claims of harassment and victimisation should be determined by a full Tribunal after hearing all the evidence on the relevant issues.

EMPLOYMENT JUDGE ARULLENDRAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
.....11 November 2019….....