



EMPLOYMENT TRIBUNALS

Claimant
Miss M Galway

Respondent
v Chief Constable of Leicestershire Police

RECORD OF AN ATTENDED PRELIMINARY HEARING

Heard at: Leicester

On: Thursday 27 February 2020

Before: Employment Judge Victoria Butler (sitting alone)

Appearances

For the Claimant: Mr N Bidnell-Edwards, Counsel

For the Respondent: Mr D Hobbs, Counsel

JUDGMENT

1. The application for permission to amend the claim form to bring complaints of direct disability discrimination and discrimination arising from disability is granted in part. The following amendments are allowed:

Direct discrimination

- Failure of the Respondent's staff to know how to deal with the Claimant when she fell unconscious
- Failure of Ms Simpson to arrange a meeting to discuss the incident
- Failure of the Respondent to inform the Health & Safety manager of the Claimant's disability
- Ms Simpson sending an e-mail to team members alerting them to the Claimant's disability without her consent
- Ms Simpson stating that she did not know what a risk assessment or Personal Evacuation Plan ("PEEP") was
- The Respondent's failure to appoint a Fire Marshal to support the PEEP
- Mr Cooper (Health & Safety Officer) commenting that whilst police officers have access to first aid kits, he was concerned about what had/had not been communicated to them in respect of giving first aid to colleagues
- The Respondent's employee 'Kevin' not knowing what to do when she fell unconscious

Discrimination arising from disability

- The unusual nature of the disability meant that the Respondent did not understand the need to make adjustments

The following amendments are refused:

Direct discrimination

- Failure of Mr Stott to demonstrate regard or empathy for the Claimant's medical condition during a meeting
- Mr Donovan failing to tell her what the Professional Standards Department officer wanted to speak to her about before taking her into the meeting
- Leaving the Claimant in the room by herself after informing her that she was to be subject to a misconduct investigation
- The Claimant's resignation by reason of acts A-J breaching the implied contractual term of trust and confidence.

Discrimination arising from disability

- Sending a confidential document to her mother due to a lack of concentration caused by the Respondent's failure to implement a PEEP, appoint a fire marshal, and train staff on her disability (in case she lost consciousness).

2. The complaint has little reasonable prospects of success and a Deposit Order is made in the terms given in the attached Order.

REASONS

Introduction

1. This hearing followed a preliminary hearing for case management conducted by Employment Judge Ahmed ("EJ Ahmed") on 26 September 2019. EJ Ahmed, having considered the papers and information before him, listed this case for a further preliminary hearing to consider whether the claim should be struck out as having no reasonable prospect of success under Rule 37 Employment Tribunals (Constitution and Rules of Procedure) Regulations ("the Regulations") or, otherwise, whether a deposit should be paid under Rule 39 of the Regulations as a condition of allowing the Claimant to proceed with the matter.
2. EJ Ahmed ordered the Claimant to supply further and better particulars of her claim as it was not well particularised, which she did on 6 December 2019. He acknowledged that "*it may well be that once the information has been supplied and the issues and complaints clarified, the Respondent accepts that a preliminary hearing is not necessary.....*". On receipt of the further particulars, the Respondent still felt that the preliminary hearing was necessary, so I treated the deliberation of a strike out or deposit order as its application.
3. The Respondent concedes that the Claimant was a disabled person at the relevant time because of Vasovagal Syncope, one of the symptoms being a tendency to faint.

The hearing

4. Both parties were represented by Counsel at the hearing today and there was an agreed bundle of documents. I did not hear any oral evidence from the Claimant, other than about her ability to pay a deposit. She told me that she

was currently earning £1,712 per month and her outgoings amounted to circa £1,500 per month.

The law

Striking out a claim or part of it – Rule 37 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

5. Rule 37 provides:

“At any stage of the proceedings, either on its own initiative or on the application of a party, the 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;*
- (b) For non-compliance with any of these Rules or with an order of the Tribunal;*
- (c) That it has not been actively pursued;*
- (d) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)”*

6. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is “no reasonable prospect” of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are remote or that the claim or part of it is likely, or even highly likely to fail - it must be bound to fail. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):

“The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words “no” because it shows the test is not whether the Claimant’s claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects...”

7. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal will rarely, if ever, be appropriate to be struck out as having no reasonable prospect of success before the evidence has been deliberated.

8. When consideration is being given to striking out discrimination claims particular care must be exercised and it will rarely, if ever, be appropriate to do so in cases where the evidence is in dispute. The Claimant’s case should be taken at its highest, unless it can legitimately be said as enjoying no reasonable prospect of succeeding at a substantive hearing.

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

9. Rule 39 provides:

“(1) Where at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.”

(3) The Tribunal reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented as set out in Rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides a specific allegation or argument against the paying party for substantially the same reasons given in the deposit order: - (a) The paying party shall be treated as having acted unreasonably pursuing that specific allegation or argument for the purpose of Rule 76 unless the contrary is shown and; (b) The deposit shall be paid to the other party or if there is more than one to each other party (or the parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.”

10. Accordingly, a Judge or Tribunal may make a Deposit Order where allegations or arguments have little reasonable prospect of succeeding. It remains at the discretion of the Tribunal to determine if such an Order should be made, even where there is little reasonable prospect of success.

11. The Judge or Tribunal should identify the allegations or arguments that have little prospect of success and to discourage their pursuit by ordering a sum to be paid, consequently placing the party at risk of costs if the claim is pursued and subsequently fails.

12. I am not restricted to considering purely legal issues and am entitled to have regard to the likelihood of the Claimant being able to establish the facts necessary to the case and can reach a provisional view as to the credibility of the assertions being advanced.

Submissions

13. Mr Hobbs provided written submissions setting out why the Claimant’s claims are ‘doomed to failure’. Taking the reasonable adjustments claim first, the

Claimant advanced four PCPs: (1) a policy of not appointing fire marshals; (2) a policy of not putting Personal Evacuation Plans (“PEEP”) in place for its employees, including a named fire marshal and/or not informing its employees of any PEEP put in place including the identity of the fire marshal; (3) a policy of not undertaking risk assessments for staff facing a disciplinary process/leaving staff alone after informing them that they are subject to a disciplinary process; and, (4) a policy of not providing disability relevant training to its staff.

14. Mr Hobbs submitted that the Respondent had appointed a fire marshal, put in place a PEEP, agreed that PEEP with the Claimant, informed her of the fire marshal’s identity (Mr Todd), undertook a risk assessment and informed the wider team about her disability and how to respond if she fainted. He took me to supporting documents in the bundle.
15. In respect of the claim of direct discrimination, the Claimant relies on a hypothetical comparator who has a short-term medical condition producing the same symptoms. Mr Hobbs submitted that the claim must fail because the Claimant would be unable to establish that someone who had an impairment producing the same symptoms, albeit caused by a short-term impairment, would have treated more favourably.
16. Turning to the discrimination arising from disability claim, the Respondent understood the Claimant’s disability, but regardless, the pleaded case of ‘*the unusual nature of the disability meant that the Respondent did not understand the need to make adjustments*’ relates to the disability itself, and not something arising in consequence of it.
17. Mr Bidnell-Edwards submitted that the appointed fire marshal, Mr Todd, was not in fact the fire marshal and the Claimant was not subsequently advised who it was; that there was not actually a fire marshal appointed at all; the PEEP was not effective; the wider team were not aware of how to deal with the Claimant’s disability, or what do if she fainted during an evacuation; and, that the Respondent failed to make a reasonable adjustment by not giving her notice of the meeting in which she was advised there was going to be a misconduct investigation.
18. The evidence of direct discrimination needs testing. In respect of discrimination arising from disability, he said that because the Respondent was not familiar with the Claimant’s impairment and it failed to deal with it in the same way as it would other disabilities. He resisted the application that the claim should be struck out or, alternatively, that a deposit should be ordered.

Conclusions

19. I have grave concerns about the merits of this case but, taking it at its highest, I cannot say with absolute confidence that it has *no* reasonable prospect of success. I am mindful that there are some points which might require the evidence testing. Therefore, a strike out is not appropriate, and the application is refused.
20. However, I am satisfied that overall, there are little reasonable prospects of success. The documentary evidence clearly supports the Respondent’s assertion that there was a PEEP in place, which was devised in conjunction with the Claimant and agreed by her (p.143- 146). A buddy system was introduced to provide additional support in the event of an evacuation (p.125) and a risk assessment was completed in conjunction with her too (p.147-151).

21. The Claimant was aware that the Fire Marshall was Mr Todd which is evidenced in an e-mail dated 17 October 2018 saying: “*As you know Graham Todd is the Fire Marshall are you happy to approach him and explain the Buddy System?*” (p.139). At no point thereafter did the Claimant suggest to the Respondent that Mr Todd was not in fact the fire marshal, that is until today. The Claimant was instrumental in setting up her PEEP, chose her buddies and explained the role to them (p.125). On the face of it, the assertion that there was no fire marshal is simply not credible. The Claimant was confident in raising her concerns with the Respondent throughout her employment, but did not complain that she was misinformed at any time. Her pleaded case is that the Respondent did not inform colleagues who the fire marshal was, and there is a vast difference between that allegation, versus today’s allegation that there was not a fire marshal at all.
22. Turning to the direct discrimination claim, I agree with Mr Hobbs’s submission regarding the Claimant’s comparator that she will have difficulty establishing that someone who has suffered the same symptoms as her, but consequent of a short-term impairment, would have been treated more favourably.
23. I have allowed the amendment to include the discrimination arising from disability claim as set out above but, again, I agree with Mr Hobbs’ submission that the ‘something arising’ pleaded (i.e. ‘the unusual nature of the disability’), concerns the disability itself and not *something arising* from it.
24. The Respondent provided full disclosure prior to this hearing and the documentary evidence seemingly supports the Respondent’s arguments that it made the adjustments about which the Claimant now complains. The same allegations span across all three heads of claim, so my concerns in respect of their success apply across the board.
25. In view of these concerns, I was satisfied that a deposit order was merited. Prior to my deliberations, Mr Hobbs confirmed the Respondent’s view that a deposit of £300 would be an appropriate sum. I was mindful of the balancing act between the Claimant’s ability to pay that the fact that I consider the claims to have little reasonable prospect of success and I was satisfied that an order of £300 was an appropriate and proportionate amount as a condition precedent of her continuing with the claim.
26. I warned the Claimant about the consequence of pursuing her claim and being unsuccessful, in that she was exposed to an award of costs on application by the Respondent.

Employment Judge Victoria Butler

Date: 17 March 2020

Sent to the parties on:

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For the Tribunal:

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Notes

Reasons for the judgment on the application to amend 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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