



EMPLOYMENT TRIBUNALS

Claimant: Mark Foster

Respondent: (1) Maritime and Coastguard Agency
(2) Global Resourcing Limited

Heard at: Southampton On: Wednesday, 24th June 2020
Employment Tribunal
(by telephone)

Before: Employment Judge Mr. M. Salter

Representation:
Claimant: Mr. G. Self, Counsel
Respondent: (1) Mr. M. Green, Counsel
(2) Mr. M. Fellowes, Solicitor

JUDGMENT

The applications for Deposit Orders are rejected.

REASONS

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References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

INTRODUCTION

1. These are my reasons for the Judgment above.
2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available

at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant's case as formulated in his ET1

3. The Claimant's complaint, as formulated in his Form ET1, presented to the tribunal on 22nd November 2019, is in short that he was not offered an interview by the First Respondent through the recruitment exercise conducted on its behalf by the Second Respondent and that this was an act of disability discrimination. The Claimant also claims he was then subjected to victimization after raising concerns over his treatment with the Second Respondent.

The Respondents' Responses

4. In the Form ET3s, the Respondents denied the claims.
5. The Respondents applied for deposit Orders in respect of the Claimant's claims of direct discrimination and discrimination arising from disability.

THE PRELIMINARY HEARING

6. The matter came before me on 24th June 2020 to determine the Deposit Order applications and to case manage the claim to Final Hearing. My case management orders are contained in a separate Order.
7. The Claimant was represented by Mr. G. Self of counsel, the First Respondent by Mr M. Green of counsel and the Second Respondent by Mr. M. Fellowes, a solicitor.

DOCUMENTS AND EVIDENCE

Witness Evidence

8. As would be expected in a case concerning a deposit order application of law I heard no witness evidence.

Papers before me

9. To assist me in determining the matter I have before me a small set of papers consisting of the claim form, response forms, the application from the First Respondent, a case management Agenda compiled by the Claimant and First Respondent; an email setting out the Second Respondent's application for a Deposit Order, dated 22nd June 2020, a case management Agenda from the Second Respondent. The Claimant produced a skeleton argument.

SUBMISSIONS

Respondents

10. The Respondents made oral submissions which I have considered with care but do not rehearse here in full. In essence it was submitted that the Claimant would fail to reverse the burden of proof onto them, that the second Respondent had been dragged into this situation in order to bolster the claim against the First Respondent who, on the face of the papers claims had been presented against out of time and that the claims should, therefore be subject of a deposit.

Claimant

11. The Claimant's submissions were in writing, so I do not need to repeat them here. In response to the oral submissions by the Respondents however, Mr Self argues that, putting aside the time point, that was not to be determined today and would require an open Preliminary Hearing to address, what the Respondents were asking me to do was to determine a matter of fact without the benefit of evidence, a bundle and with only a slim selection of documents placed before me. The question of fact at the heart of this matter is whether the Claimant met the criteria or not, and the reasons for the Respondent's assertion he did not are distinctly within the minds of the Respondents from a meeting at which the accounts of the Respondents differ, Mr Self says, in a substantial regard.

MATERIAL FACTS

General Points

12. This being an application for a deposit order and without hearing any evidence I take the Claimant's case at its highest and do not make any findings on disputed

fact, indeed in this matter I may not need to do so as the core facts appear to be undisputed.

13. The Claimant is a disabled person by reason of a lower limb injury.
14. The Claimant applied for a job with the First Respondent. The First Respondent offered a guaranteed interview for any applicant who met the core criteria for the role but who was disabled. The recruitment process was administered by the Second Respondent agency.
15. The Claimant did not get an interview.
16. The Claimant requested disclosure from the Respondents of the reason for his failure to obtain an interview. The Respondents refused that request.
17. The Claimant presented his claims.

THE LAW

The Employment Tribunal (Constitution and Rules of Procedure) regulations 2013

18. So far as is relevant the r39 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (“the 2013 Regulations”) states:

39 Deposit Orders

(1) Where at a preliminary hearing...the Tribunal considers that any specific allegation or argument in a claim or response has little prospect of success, it may make an order requiring a party...to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

19. I consider this to be a two-stage process: firstly, to consider whether the threshold of “little prospect of success” has been met and then, if so, to consider whether I should exercise my discretion contained within r39 to order the Claimant pay a deposit.

Authorities

20. The parties did not take my attention to any authorities.

CONCLUSIONS ON THE ISSUES

General

21. Having regard to the relevant facts, applying the appropriate law, and taking into account the submissions of the parties, I have decided that the threshold for a deposit order has not been met in the circumstances of this case at this time and, if wrong about that, I would not have exercised my discretion to make an Order. My reasons are as follows.

Issue 1: Little Prospect of Success

22. I remind myself of the context of this case and the background to it: the Claimant was an applicant for a job, he had no experience of the First or Second Respondent outside of this application process, he, therefore had nothing to draw from when considering the actions of either respondent.

23. The Claimant alleges he satisfied the core criteria for the role, but no particulars are given of this.

24. The First Respondent denies the Claimant met the criteria. The Respondents have not in their Responses however given any detail as to why they say the Claimant did not meet those criteria or which led them to conclude as they did i.e. what competencies did the Claimant not meet, or what skills do they say the Claimant lacked (see paragraph 5 of the First Respondent's Grounds of Resistance).

25. Further, the Respondents have not voluntarily provided the material requested by the Claimant to assess the strength (or not) of the Respondents' assertions that he did not meet the core criteria.

26. There has been Disclosure ordered by the Tribunal.

27. The burden of proof at the hearing initially rests on the Claimant to show some facts from which a tribunal could conclude, in the absence of any explanation by the Respondent, that discrimination occurred, this must include the claimant establishing that something arose from his disability and that that something was the reason the unfavourable treatment (in this case the refusal of an interview) occurred, or that he was not offered an interview because he was disabled, or that

there is something more than just a mere difference in status and a difference in treatment.

28. In short, and as Mr Self pointed out, the Claimant was, when he presented his claims was “in the dark” as to the Respondents’ motives and reasons for refusing him an interview. This is a situation he still finds himself in, and one which the tribunal is equally is to be found. At this stage in the litigation process there the tribunal is faced with two competing assertions: one that the Claimant met the standards, the other that he did not.
29. The Tribunal can, therefore, see why the Claimant has presented the claims in the form that he has: he does not know why he did not get an interview: was it because of his disability or on grounds of something that arose from his disability? This, however, is not the test I must apply.
30. Looking at the claims and the material placed before me (or more accurately the lack of material) I am left with a choice between two polarised positions. Where the truth of the matter lies is impossible to assess at present and is a determination that will only be arrived at by a tribunal after the consideration of evidence, or at the earliest, once disclosure has taken place and the material the parties rely upon has been provided to the others and an application made for an order then.
31. I hear what the Respondents say as to the initial burden of proof resting on the Claimant and that without being able to show any “thing arising” they consider the claim will fail; however at present, and without disclosure (either voluntary or ordered), I am unable to assess the claimant’s claims as having “little prospect” of success, as r39 must require me to make a determination on the material I have had placed before me, and the burden of establishing this rests on the Respondents.
32. To do otherwise would, it seems to me, open the door for those facing employment tribunal claims such as these to reject the terms of the claims and then seek an order restricting the claimant’s access to justice in effect, on the

ground that they say the claim is weak yet providing no material to support their assertions.

33. In a case where there is limited explanation (if any) as to the Respondent's thought processes in rejecting the claimant for interview; or detail on how they say the Claimant failed to meet the core criteria, in circumstances where the Respondents could have provided such information and were invited to voluntarily to do so; in a case where there is no relevant "history" between the parties to draw inferences from, there are a lot of gaps in the factual and legal matrix which are impossible to fill, or ignore, at this stage when considering a summary assessment of the prospects of success.
34. Whilst I have some sympathy for the Respondents in their position that the Claimant cannot identify the "thing arising" and so, on their analysis of the situation, his claim is doomed to failure. I cannot help but think that an application made on this basis, in a case like this, with bald assertions in the pleadings may have been better made once disclosure had taken place and all material, including that which they consider bolsters their position, had been provided to the Claimant, and them in possession of the disclosure from the Claimant, or alternatively made in a case where the pleadings positively assert the reasons for the assessment of the claimant as not meeting the core criteria.
35. I do not therefore consider that, at present, in this matter in the state that it is, the application passes the threshold of showing little prospect of success. Although I have focused primarily in my reasons on the discrimination arising from disability claim, as this is what the vast majority of the submissions focused on, for similar reasons I reject the application for a deposit order in relation to the Direct Discrimination claim.
36. I therefore reject the applications for deposit orders.

Issue 2: The Discretion

37. If I was wrong on this and the threshold had been met, then exercising my discretion contained within r39, I would not have granted a deposit order on these facts.

38. I had no material before me from the Claimant as to his means and nothing upon which for me consider whether he would be unable to pay a deposit order, if I had ordered one.
39. However, relevant to my assessment is the Overriding Objective and the requirement to do justice to the parties. I consider that the lack of any particularised explanation by the Respondents, as opposed to a generalised assertion of what they say is the explanation for the failure of the claimant to secure an interview, coupled with the failure to provide the material when requested by the Claimant, are all relevant factors in my assessment, and one that would have weighed heavily in the balance when considering my discretion. Whilst it is, of course, open to a potential employer to deny the claim in the broadest terms where the reasons for the decision rest entirely within their minds and papers. A lack of such transparency does not weigh in their favour when considering a discretion that includes consideration of the justice between the party's cases.

Employment Judge Salter

Date: 16 July 2020

Notes

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.