EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Mr T Agbaje** | v | **Dukes Alridge Academy** |

# OPEN PRELIMINARY HEARING

**Heard at:** **Watford** **On:** **23 July 2020**

**Before:** **Employment Judge Alliott**

**Appearances:**
**For the Claimant:** **Ms Linda Burke (Representative)** **For the Respondents:** **Mr M Magee (Counsel)**

# JUDGMENT

1. The claimant's claims of disability and age discrimination have no reasonable prospects of success and are struck out.

2. The claimant's claims for race and religion and belief discrimination and for an arrears of pay and other payments are dismissed upon withdrawal. For the avoidance of doubt, the claimant's claim for notice pay has already been dismissed upon withdrawal.

3. The respondent's application for a strike out order or a deposit order in relation to the unfair dismissal claim is dismissed.

# REASONS

**Introduction**

1. The claimant was employed by the respondent. The claimant says he was employed on 1 October 2003 whereas the respondent says that he was employed from 4 February 2008. Be that as it may, the claimant's employment terminated on 24 July 2018 and he was paid in lieu of notice.

**This Open Preliminary Hearing**

2. On 11 February 2020 Employment Judge Bedeau directed that there should be a preliminary hearing to determine the following issue:

> "To consider the respondent representative's strike out and deposit order application set out in paragraph 4 of their response to further and better particulars dated 3 December 2019."

3. Prior to this hearing it was indicated to the tribunal that the claimant was too ill to attend in person. A direction was made on 22 July that if the claimant could not attend then he could join remotely via CVP. The claimant has not been in attendance today but Ms Burke indicated that she was content to proceed in his absence.

**The law**

4. Strike out and deposit orders are dealt with in Rules 37 and 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. A strike out order can be made if I conclude that a claim has no reasonable prospects of success and a deposit order can be made if I conclude that a claim has little reasonable prospects of success.

5. The Employment Appeal Tribunal has made it abundantly clear on numerous occasions that when dealing with discrimination claims, which are invariably fact sensitive, it will be rare that it is appropriate to strike out a claim. As per paragraph 11.123 from the Employment Tribunal Practice and Procedure IDS Employment Law Handbook:-

> "Special considerations arise if a tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success".

6. In Anyanwu and another v Southbank Students Union and another [2001] ICR 391, HL, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination. I stress that I have taken that principle fully into account in my determination.,

7. When assessing the prospects of success of the claimant's claims I should take the claimant's claims at their highest. At this stage the evidence has not been tested.

**The facts**

8. The claimant was employed as an Assistant Site Manager. I understand that he had responsibility for, inter alia, the swimming pool. His employment ceased on 24 July 2018 following the submission of a resignation letter signed by the claimant on 19 July and dated 20 July. There is a further signature on that document dated 20 July which may be that of Mr Paul Renny, a Trade Union Representative.

9. By a claim form presented on 27 November 2018, the claimant presented claims for unfair dismissal and age and disability discrimination. (I disregard those claims that have been withdrawn).

10. The particulars of his claim were in short order and are as follows:-

> "I was injured on the respondent's premises. I fell by the swimming pool and sustained substantial injuries to which medical evidence will be provided. The respondent sent their representative to my home when I was ill recovering and could barely walk. I was compelled to sign a document against my will. I was treated very badly. I was constructively dismissed."

11. In due course the claimant provided further and better particulars of his claim along with a witness statement.

12. It would appear that in January 2018 Occupational Health investigations were made into the claimant's capacity to carry, for example, a number of chairs.

13. In or about April and May 2018 the claimant was subject to disciplinary proceedings. These culminated on 25 May 2018 when he was issued with a final written warning.

14. On 9 July 2018 the claimant had an accident at work at the swimming pool. He fell over and was unfortunately injured in that he hurt his hip and his head. He was admitted to hospital. Thereafter the claimant was absent from work.

15. On 11 July 2018 the respondent's Attendance Officer was making enquiries as to information concerning the claimant's accident and his hip. Later that day she was informed as follows:-

> "Taj advised me he slipped and fell when he was cleaning the poolside as the tiles were wet. He fell on his hip and hit his head on the floor. He was taken to hospital by ambulance and was assessed to have bruising to his hip and monitored for any signs of a head injury."

16. On 17 July 2018 the claimant was written to as follows:-

> "…An investigatory meeting has been arranged to take place with you on Monday 23 July 2018 at 10am.
>
> You have been invited for this meeting because you have not provided the Academy with a reason for your absence therefore the presumption is that you are fit for work.
>
> The purpose of this meeting is for me to investigate the following allegations of misconduct which is serious and could amount to gross misconduct:
>
> - A serious breach of health and safety rules.
> - Falsification of data."

17. Mr Magee was not in a position to tell me what the two alleged items of gross misconduct were. There is a statement from a Mr Davis in the bundle but this significantly post dates the letter dated 17 July 2018. That document refers to poor cleaning of the poolside. An indication of what the issues may involve comes from the claimant's witness statement wherein he refers to:-

> "Prior to the accident I was informed by the respondent that I had only carried out a water test of the pool twice and not three times as instructed. I explained that the electric automatic device was not working, malfunctioning and I did it manually."

18. I note that the allegation of misconduct predates the accident.

19. Be that as it may, the claimant states that there were several telephone calls between himself and the respondent. He alleges that his manager told him that if he did not come back to work the respondent would carry out the investigation without him. The claimant wanted to be present at the investigation. Although in his further and better particulars the claimant refers to allegations of poor performance being in relation to his ability to carry chairs, he does assert that any allegations of poor performance are unfair and unfounded.

20. On 19 July the claimant was visited by a union representative who also worked for the respondent as a Teaching Assistant. The claimant asserts that he was informed that the investigation would be conducted without him and he was shown a text message from a manager stating the same. The claimant also asserts that the trade union representative told him that:-

> "They are finding ways of getting rid of you"

21. The claimant asserts as follows:

> "I felt pressurised to resign. I was unwell and I was presented with a resignation letter prepared by the union representative which I was advised to sign. I was really trying to recover from my injuries and at the same time I felt under a lot of pressure to resign from the job I loved after a period of 15 years. I signed the letter."

22. Mr Magee invites me to approach this case on the basis that the intervention of the trade union representative with advice to the claimant was nothing to do with the respondent and interrupts any causal link between any complaint of the conduct of the respondent that could amount to a breach of the fundamental term of the contract of employment and the decision of the claimant to resign his employment.

23. It seems to me that the claimant could characterise his complaint of unfair dismissal on two grounds. Firstly, that he could assert that his resignation was forced and that as such, it was actually a dismissal by the respondent. Secondly, he could present this as being a constructive dismissal claim if he did resign on the basis that the conduct of the respondent was in some way a breach of a fundamental term of the claimant's contract of employment. In particular, the instigation of an investigatory process against him whilst off sick and the decision to hold the investigation in his absence. Further, factual investigation of the

intervention of the trade union representative may provide further grounds for making these assertions.

24. All the issues surrounding the termination of the claimant's contract of employment are, in my judgment, fact sensitive and as such I cannot conclude that the claimant has no reasonable prospects of succeeding in his claims.

25. I have gone on to consider whether or not I can conclude that he stands little reasonable prospect of success. In my judgement, given the fact sensitive nature of the case, I cannot so conclude. Accordingly, I dismiss the application for a strike out and/or deposit order in relation to the unfair dismissal claim.

26. I now turn to consider the disability and age discrimination claims.

27. The disability alleged relates to the injuries sustained by the claimant in the accident on 9 July 2018. The claimant signed the resignation letter on 19 July, some 10 days later.

28. It would appear that the information available to the respondent concerning the claimant's condition was as set out in the email exchange I have recited above. A bundle has already been prepared for the full merits hearing of this action and the only medical evidence within the bundle is the entry in the GP records for 11 July 2018. This recites:-

> "Hip pain right, had an accident on 9 July 2018 at work. He slipped on the swimming pool and hit head and hit ground with the right hip. He was in the hospital, he vomited two times yesterday. They did a head scan ECG and a scan of the hip and X-ray. They gave IM/IV pain killers and then discharged him. Was told to use paracetamol but not helping with the pain.
>
> Problem hip pain right – likely bursitis."

29. There is also a record of an X-ray that took place on 4 August 2018 (post the cessation of the claimant's employment) which revealed no bone injury.

30. The claim for disability discrimination is presented pursuant to s.15 of the Equality Act 2010. That clause does not apply if the respondent shows that the respondent did not know and could not reasonably have been expected to know that the claimant had a disability.

31. I am conscious that there has been no witness statement from the claimant dealing with the effects of his alleged disability. Witness statements are only due in early August. Nevertheless, in my judgment, on the evidence in the trial bundle the prospects of the claimant establishing that he has a disability within the meaning of the Equality Act 2010 are remote. What I am quite clear about is that, in my judgment, there is no reasonable prospect of the claimant establishing that the respondent knew or could reasonably have been expected to know that the claimant had any disability at the relevant times.

32. Further, in examining the claimant's disability discrimination claim, I am told that the something arising in consequence of the disability was the claimant's inability to return to work. In order for the claim to be made good, the claimant is going to have to establish that the unfavourable treatment, namely his dismissal, was because of the thing arising in consequence of his disability. In my judgment, the facts taken at their highest from the claimant's perspective do not provide an evidential basis upon which such a link can be made. In whatever way the claimant was being treated by the respondent, in my judgment, it was not on the basis that he was absent from work. As far as the claimant is concerned, all the pleaded case in relation to the pressure brought to bear to resign relates to the investigation then pending.

33. Accordingly, and applying the very high standard required for a strike out order in a discrimination claim, I consider this to be so clear that a strike out order is appropriate.

34. I now turn to consider the age discrimination claims. At the relevant time the claimant was aged 64 years old. The age discrimination claim is not touched upon in the claimant's witness statement. In the further and better particulars, the reference to age discrimination appears to be in relation to the fact that the respondent employed a temporary replacement worker a great deal younger than the claimant. Whether or not that is correct, I do not know but taking it at its highest I do not consider that the age of an employee engaged to cover an employee's absence through sickness can begin to constitute an act of age discrimination. In order to make good a claim for age discrimination the claimant will have to establish less favourable treatment, provide a comparator and establish that the difference in treatment was due to his age. This is put in the further and better particulars as follows:-

> "The claimant will argue he was treated less favourably and not permitted to continue in his employment or permitted to recover due to his age."

35. There is no indication of who the comparator is. A comparator would have to be a younger individual on sick leave who was not allowed to return to work or to recover. In my judgment, the claimant stands no reasonable prospect of successfully establishing that the treatment was on the grounds of his age.

36. Accordingly, I conclude that the age discrimination claim, again applying the relevant high test, stands no reasonable prospect of success and I will strike it out.

# ORDERS

**Made pursuant to the Employment Tribunal Rules 2013**

1. **The claim for accrued holiday entitlement not paid on termination of employment**

1.1 The respondent is to send to the claimant by **4pm, 20 August 2020,** full particulars of such payment as was made to the claimant for his holiday accrued but untaken at the time of termination.

1.2 The claimant is to send to the respondent and the tribunal by **4pm, 7 September 2020**, a document indicating whether the claimant still maintains the claim for holiday pay and, if so, on what basis?

2. **Other matters**

2.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

2.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.

2.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.

2.4 **Public access to employment tribunal decisions**
All 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.

2.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

2.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

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**Employment Judge Alliott**

17/08/2020

Sent to the parties on:

For the Tribunal: 17/09/2020

Jon Marlowe