EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112336/19 (P)

Held on 29 September 2020

Employment Judge N M Hosie

Miss L Walker	**Claimant** **Represented by** **Mr D Walker,** **Father**
The Scottish Ambulance Service Board	**Respondent** **Represented by** **Mr G Fletcher,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

1. the indirect discrimination complaint is time-barred and is dismissed for want of jurisdiction;
2. the indirect discrimination complaint is struck out as having "no reasonable prospect of success"; and
3. the constructive unfair dismissal complaint has "little reasonable prospect of success" and the claimant is required to pay a deposit as a condition of continuing to advance that complaint, in a sum to be determined.

REASONS

E.T. Z4 (WR)

1. The claim in this case comprises complaints of indirect discrimination, the protected characteristic being the claimant's disability, and constructive unfair dismissal. The claim is denied in its entirety by the respondent.

"Prospects"

2. The respondent's solicitor applied for the claim to be struck out as having "no reasonable prospect of success", in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure"); or alternatively, that the claimant should be required to pay a deposit as a condition of continuing to advance the claim, on the basis that the complaints have "little reasonable prospect of success", in terms of Rule 39.

3. As, on the face of it, the respondent's solicitor appeared to have at least a stateable argument, I decided, having regard to the "overriding objective" in the Rules of Procedure and the interests of justice, that the application by the respondent's solicitor should be considered at this stage. It was agreed that the issue of the "prospects" of the claim succeeding would be considered and determined on the basis of written submissions.

Written submissions

4. The respondent's solicitor made submissions by e-mail on 27 July 2020 at 17:42; the claimant's representative made submissions by e-mail on 21 August 2020 at 14:03 and on 6 September 2020 at 15:11; the respondent's solicitor made further written submissions by e-mail on 6 September 2020 at 18:14; the claimant's representative made further submissions by e-mail on 17 September 2020 at 19:15.

5. In addition to these submissions, helpfully, the parties submitted a Joint Inventory of Documentary Productions ("P").

6. For the purpose of this exercise only, I took the claimant's factual averments in the claim form (P1) and the "Better and Further Particulars" (P2) at their highest value. In other words, I accepted that the claimant would be able to prove all the facts she has averred. I also remained mindful that the claimant is represented by her father and, so far as I am aware, has no experience of Employment Tribunal proceedings.

Indirect discrimination complaint

7. S.19 of the Equality Act 2010 is in the following terms:-

"***19 Indirect Discrimination***

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of sub-section (1), a provision, criterion or practice is discriminatory in relation to a relevant characteristic of B's if –
(a) A applies, or would apply, if the person to whom B does not share the characteristic,
(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with person with whom B does not share it,
(c) It puts, or would put, B at that disadvantage, and
(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

8. The "provision, criterion or practice" ("PCP") relied upon by the claimant is to be found at para. 161 of the claim form (P1, page 37): -

"*161. Examples of treatment I have provided amount to a provision, criterion or practice (PCP) which indirectly discriminated against me and persons with my disability and put me and persons with my disability at a substantial disadvantage because of the very nature of my disabilities, being ignored, not being kept up-to-date etc. will cause me to overthink things, think about the worst case scenario. There are simple steps which could have been taken to avoid this. In addition, management decisions not to deal with a reduction in staff caused an increase in my workload and stress levels. Ignoring my calls for help worsened the situation. The respondent will not be able to show that any of the PCPs were a proportionate means of achieving a legitimate aim. The particular disadvantage I was placed at was that the respondent's actions caused heightened distress and upset when compared to employees*

who do not share my disability. The detriment I suffered as a consequence was an exacerbation of my symptoms to such an extreme that I was off sick and finally to the point where I felt I had no option but to resign. I was scared of how bad my health would deteriorate if I remained in employment."

Disability status/respondent's knowledge

9. The respondent's solicitor intimated that he did not accept the claimant was disabled in terms of s.6 of the 2010 Act; he also maintained that the respondent did not have knowledge of the claimant's disability.

10. Section 6 of the 2010 Act is in the following terms: -

"***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….."

11. The focus of the definition, therefore, is on a person's ability to carry out "day-to-day activities". Without hearing evidence from the claimant in this regard I am unable to determine whether she was disabled in terms of the Act.

12. However, under para. 2(1) of Schedule 1 to the 2010 Act, the effect of an impairment is "long-term" if it:

- Has lasted for at least 12 months,
- Is likely to last for at least 12 months, or
- It is likely to last for the rest of the life of the person affected.

13. The respondent's solicitor drew to my attention in his submissions that the period from the first date of the claimant's absence (25 September 2018 until her resignation) was less than 12 months. Further, although the claimant was

referred to Occupational Health on a number of occasions, the respondent was never advised that the claimant was a disabled person.

14. On the other hand, the claimant's representative submitted that the totality of the claimant's absences, for a variety of different medical conditions, meant that the claimant's impairment was "long-term".

15. In my view, there is some force in the submissions by the respondent's solicitor that the claimant was not disabled as defined by the 2010 Act. However, as I recorded above, it is not possible to make a determination in this regard without hearing evidence from the claimant.

16. There also appears to be some force in the submission by the respondent's solicitor that, in all the circumstances, and absent a report from Occupational Health to the effect that the claimant was disabled, the respondent had no "knowledge actual or constructive" that the claimant was disabled.

17. Suffice to say that when considering the prospects of the discrimination complaint succeeding, I had regard to the fact that disability status and the respondent's knowledge were live issues in the case.

Time-bar

18. The respondent's solicitor also raised a time-bar point in his submissions. The claimant had full details of the allegations she faced when she received the investigation report on 21 June 2019 (P11 and P12 pages 88 -161).

19. Discrimination complaints require to be lodged within a period of three months from the date of the last act complained of although "the clock will be stopped" for a period of one month to allow ACAS early conciliation.

20. If the clock starts to run on 21 June 2019 the claimant should have lodged her claim on or before 20 October 2019. It was not lodged until 6 November 2019 and would appear to be out of time.

21. The respondent's position is that *"it took time to assess the content of the many documents to establish the detail of the allegations and consider a response".* However, as the respondent's solicitor submitted, "*any issue involving the PCP of not providing information the claimant required was remedied at that point.*" (on 21 June 2019 when the claimant was provided with the full investigation report).

22. In all the circumstances, I am satisfied that the three-month time limit started to run on 21 June 2019. I am satisfied that the submission by the respondent's solicitor that the discrimination complaint is out of time is well-founded.

23. The Tribunal does of course have a discretion to extend the time limit in relation to discrimination complaints if it considers it "just and equitable" to do so. In his submissions, the respondent's solicitor set out the relevant case law, in some detail. I was also mindful that the exercise of this discretion is the *"exception rather than the rule"* (***Robertson v. Bexley Community Centre*** [2003] IRLR 434).

24. It was also a factor that after that on 21 June 2019, when the claimant was provided with the full investigation report, she had the benefit of representation by a specialist employment solicitor.

25. As the respondent's solicitor set out in his submissions, the EAT suggested in ***British Coal Corporation v. Keeble & Others*** [1987] IRLR 336 that Employment Tribunals would be assisted by considering the factors listed in s.33 of the Limitation Act 1980. That section deals with the exercise of discretion in Civil Courts in personal injury cases and requires the Court to consider certain factors.

26. I am satisfied that the submissions by the respondent's solicitor in this regard are well-founded. I am satisfied that the balance of prejudice/hardship favours the respondent. As I recorded above, it was significant that at the time the claim form was submitted the claimant had the benefit of independent legal advice. Nor was there any suggestion of there being any impediment to the claim being submitted in time. .

27. I arrived at the view, therefore, that this was not a case where I should exercise my discretion. In my view, it would not be "just and equitable" to do so.

28. Accordingly, the discrimination complaint is out of time and the Tribunal does not have jurisdiction to consider it.

"Prospects"

29. In any event, I was not persuaded that the discrimination complaint has a "reasonable prospect of success". Apart from the fundamental issue of whether or not the claimant was disabled, which will require to be addressed, and the issue in relation to whether or not the respondent had knowledge of the claimant's disability, the complaint advanced in this case is one of indirect discrimination defined in s.19 of the 2010 Act. While the claimant is critical of the way in which she was treated by the respondent, in my view that is mainly relevant to her complaint of constructive unfair dismissal.

30. The onus is on the claimant to satisfy the first three conditions in s.19(2). Even taking the claimant's pleadings at their highest, I am not persuaded that the claimant would be able to discharge that onus. While the EHRC Employment Code confirms that the PCP is capable of covering a wide range of conduct, I am not persuaded that the test set out in s.19 would be met.

31. Even if I had decided that the Tribunal had jurisdiction, therefore, I would still have struck out the discrimination complaint on the basis that it has "no reasonable prospect of success".

32. In arriving at this decision, I was mindful of the guidance in such cases as ***Ezsias v. North Glamorgan NHS Trust*** [2007] ICR 1126 and ***Balls v. Downham Market High School & College*** [2011] IRLR 217 that a cautious approach is required in striking out discrimination claims, particularly where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to these facts to be considered.

33. I also remained mindful, as I recorded above, that the claimant's representative had no experience of Employment Tribunal proceedings. However, at one time, the claimant did have the benefit of legal advice.

34. As the respondent's solicitor drew to my attention, in ***Ahir***, the Court of Appeal asserted that the Tribunal should not be deterred from striking out claims, even those that involve disputes of fact, if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are fully aware of the dangers of reaching such a conclusion in circumstances where the full evidence has not been explored. The Court in ***Ahir*** concluded that the Employment Judge had rightly described the allegations as "*fanciful*" and struck out the claims as having no reasonable prospect of success.

35. I was also mindful of the guidance in ***Ezsias*** that when determining whether a claim has a reasonable prospect of success the issue is whether it has a "realistic" prospect of success.

Constructive unfair dismissal complaint

36. I take no issue with the relevant law, as set out, in some considerable detail, by the respondent's solicitor in his submissions. The leading case is ***Western Excavating ECC Ltd v Sharp*** [1978] IRLR 27

Affirmation

37. An employee must make up his mind to leave soon after the conduct of which he complains. If he continues to work for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose the right to treat himself as discharged. I am satisfied that there is some force, at least, in the submissions by the respondent's solicitor that any alleged breach of contract by the respondent was affirmed by the claimant.

Final straw

38. I also have concerns as to the claimant's ability to establish that the letter of 18 July 2019 from the respondent to her was the "final straw" (P.15).

39. The claimant's representative submitted that it was clear from the terms of that letter that the issue of the claimant's continued employment had been predetermined. I am not persuaded, on a normal reading of those terms, that that was so.

40. Further, and in any event, as the respondent's solicitor submitted, that letter has to be considered "in context". The claimant had already intimated that she was not prepared to attend an investigation meeting. She had already advised the respondent she would not attend the disciplinary hearing "for health reasons" (P.14). Also, by that time the claimant had undergone a period of training in order to secure alternative employment and was of a mind to bring her employment to an end. As it transpired, she intimated her resignation on 18 July (P16) and commenced alternative employment on 29 July.

41. The respondent's solicitor submitted that the claimant had not resigned in response to any material breach of contract on the part of the respondent, As

she is required to do (***Western Excavating***), but rather because she had secured alternative employment.

42. In these particular circumstances, I considered the prospects of the constructive unfair dismissal complaint succeeding. In doing so, I remained mindful that the onus is on the claimant to prove a fundamental breach of contract on the part of the respondent.

43. I found the guidance in the cases where there was a submission of "no case to answer" to be of assistance. If such a submission is accepted, the party making it will not be required to present his or her evidence and the claim or defence, as the case may be, will fail. In ***Clark v Watford Borough Council*** EAT 43/99 the Appeal Tribunal summarised the general principles thus:

- there is no inflexible rule of law and practice that a tribunal must always hear both sides, although that should normally be done
- the power to stop a case at "half time" must be exercised with caution
- it may be a complete waste of time to call upon the other party to give evidence in a hopeless case
- even where the onus of proof lies on the claimant, as in discrimination cases, it will only be in exceptional or frivolous cases that it would be right to take such a course of action
- where there is no burden of proof, as under s.98(4) of the Employment Rights act 1996 (reasonableness of dismissal), it will be difficult to envisage arguable cases where it is appropriate to terminate proceedings at the end of the first party's case.

44. These principles were approved explicitly by the Court of Appeal in ***Logan v Commissioners of Custom and Excise*** 2004 ICR 1. In that case the Court also said that the fourth point above, in relation to discrimination cases, applies equally to cases of constructive unfair dismissal.

45. However, these cases were decided before Tribunals had specific power to strike out a case on the ground that it has *"no reasonable prospect of success"*, or order the payment of a deposit as a condition of being permitted to proceed with a claim, on the ground that it has *"little reasonable prospect of success"*, which allows Tribunals to identify weak claims at an earlier stage.

46. Having regard to this guidance and taking the claimant's averments at their highest, I was not persuaded that the complaint of constructive unfair dismissal has *"no reasonable prospect of success".* However, for the reasons I have given, and as I was satisfied that there was force in the submissions by the respondent's solicitor, I am of the view that this complaint has *"little reasonable prospect of success"* and that in terms of Rule 39 the claimant should be ordered to pay a deposit as a condition of continuing with the complaint. The claimant will also run the risk should she decide to proceed with the complaint of a finding of costs against her if her claim is unsuccessful.

Amount of deposit

47. To enable me to assess an appropriate deposit, I require to make reasonable enquiries into the claimant's ability to pay the deposit in terms of Rule39(2). **I direct the claimant's representative, therefore, to provide the Tribunal,**

within the next 7 days, with details of the claimant's financial circumstances: her net weekly earnings and commitments and her capital.

Employment Judge	**Nick Hosie**
Date of Judgement	**5 October 2020**
Date sent to parties	**5 October 2020**