Case Number: 3319034/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Heath Mansfield	**v**	Shakespeare Lodge TLA Limited

Heard at: Bury St Edmunds **On**: 4 October 2020

Before: Employment Judge M Warren (sitting alone)

Appearances
For the Claimant: Mr Bussau, Paralegal
For the Respondent: Mr Goldup, Consultant

DECISION ON APPLICATIONS FOR RECONSIDERATION AND FOR LEAVE TO AMEND

1. I vary my Judgment of 14 July 2020 so that it should now read as follows:

   1.1. The Claimant was not a disabled person at the material time.

   1.2. The Claimant's claim of disability discrimination shall proceed only in so far as it relates to his complaint that he was directly discriminated against because of his perceived disability.

2. The Claimant has leave to amend his claim, in so far as that is necessary, so as to include a complaint of direct discrimination because of his perceived disability in the act of dismissal, as more particularly set out below.

REASONS

Background

1. This decision is given to the parties on an application made at the outset of what was to have been a 2 day final hearing. At an Open Preliminary Hearing on 14 July 2020, I made a finding that the Claimant was not a disabled person as defined in the Equality Act 2010 at the material time and accordingly, I struck out the Claimant's claims of disability

discrimination. A written Summary with reasons for that decision was sent to the parties on 28 August 2020.

2. Mr Bussau submitted an application for reconsideration on 30 September 2020. I rejected his application for reconsideration in so far as that related to my finding that the Claimant was not a disabled person as defined. However, in considering that application I noted the Claimant's reference to perceived disability and I saw apparent references to this in his Particulars of Claim. If it is the Claimant's case that he was dismissed because he was perceived as meeting the definition of disability, I ought not to, perhaps, have struck out his claim of disability discrimination. I therefore allowed that aspect of the application to proceed to be heard today so that I might consider it at the outset of the Final Hearing, reserving the same to myself.

The concept of discrimination on grounds of perceived disability

3. To consider these points, one needs to understand the basics of a discrimination claim based upon perceived disability. The possibility of such a claim arises because of the way s.13 of the Equality Act 2010 is worded, (the section that defines direct discrimination). It refers to a person being subject to a detriment *because of* a protected characteristic, so that if a person is perceived as being disabled and they are therefore dismissed, that is *because of* a protected characteristic.

4. In the field of disability discrimination, for such a claim to succeed, the Respondent must believe that all the elements of the statutory definition of disability are present, but the Respondent need not necessarily attach the label 'disabled' to the Claimant. That perception must be the reason for the detriment, in this case the dismissal. It is not enough that the Respondent dismissed the Claimant because of illness or absence. It must be because it believed that he had a long term impairment that was substantially affecting his ability to carry out day to day activities; an impairment that had either lasted 12 months or was likely to last 12 months.

The facts

5. I gave the Respondents the opportunity of providing a written response to the reconsideration application with the benefit of my preliminary thoughts and Mr Goldup helpfully did so, in an email of 8 October 2020. There are two essential points that he makes:

   5.1. The first is that he says direct discrimination because of perceived disability is not pleaded, and

   5.2. His second point is that, in any event, this claim is based upon a bare assertion and therefore has no prospects of success.

6. I begin my analysis by looking at the Claimant's pleaded claim, because it is the pleaded claim which the Employment Tribunal has to decide. At paragraph 85, immediately under the heading 'Disability Discrimination' the Claimant pleads,

> *"Pursuant to Section 15 Equality Act 2010, a person is discriminated against if they are treated unfavourably as a consequence of something arising from a disability."*

7. This is a pleading of unfavourable treatment contrary to s.15, what we sometimes call discrimination arising from disability. It is not a s.13 direct disability claim. All that follows in the pleading is on the basis that this is all to do with a s.15, "discrimination arising" claim.

8. It is though, important that I record paragraphs 92 through to 96:

> *"92. Alternatively (without prejudice to the Claimant's primary position that reason for the Claimant's dismissal was the pension's enrolment requirements) the Claimant takes the secondary position that, a cogent factor in the Respondent's decision to dismissal was the risk of future sickness absences due to his chronic sciatica.*
>
> *93. As detailed above, the Claimant's sickness absence was due to the chronic sciatica on Monday 4 March 2019. The Respondent was informed of the reason for the absence. The Claimant then returned to work, despite on-going pain, on Tuesday 5 March 2019 and was subsequently given the termination notice on that day, which only contained obtuse reasoning for the decision.*
>
> *94. It would be both frivolous and mischievous to suggest that a Respondent did not perceive, or foresee any potential, that future sickness absence may occur as a result of the Claimant's chronic sciatica, after being informed of the reason for the Claimant's sickness absence the day before his dismissal.*
>
> *95. In* Coffey v Norfolk Constabulary, *the EAT held that an employer did not need to believe, or consider, a person to be disabled in order to directly discriminate against them. The EAT clarified the only requirement for direct discrimination was that a person had an impairment (physical or mental) which the employer perceived had the potential to have a long-term adverse effect (such as future sickness absence from work).*
>
> *96. Accordingly, the combined effect of* Coffey, Grosset *and* Valatchi *is that if a contributing factor to the Respondent's decision to dismiss the Claimant was the Claimant's sickness*

absences (or perceived risk of sickness absence) linked to the Claimant's chronic sciatica, then the dismissal would be discriminatory irrespective of whether or not

(a) the Respondent believed or appreciated that the Claimant was disabled;
(b) the Respondent appreciated that the sickness absence, or perceived risk of sickness absence, was linked to the chronic sciatica; and
(c) this was the principal reason for the dismissal."

9. There is one further part of the pleaded claim that I must quote, that is at paragraph 98(b),

> *"The perceived potential of future sickness absence (consequential to his dismissal); was a cogent factor in the Respondent's decision to dismiss the Claimant."*

10. There are a number of points to make about those quoted exerts from the Particulars of Claim:

10.1. One is to reiterate they all follow introductory paragraphs that the pleading is a complaint pursuant to s.15 of unfavourable treatment.

10.2. The second is that there is but the one mention of direct discrimination, at paragraph 95.

10.3. Thirdly, the Respondent makes the correct point that pleading a perceived risk of sickness absence is not the same as pleading perceived disability as defined; i.e. it is not pleading the perceived key components of the definition of disability.

10.4. My fourth point is to note that the Claimant is pleading that because of his impairment, the Respondent dismissed him. I note at 98(b) he says as such. The Respondent points out though that the words, "consequential to his disability" are in parenthesis.

11. At paragraphs 14 to 20 of the Particulars of Claim, the Claimant pleads to a number of absences from work. Then, at paragraph 18 he pleads to another day of absence and on this occasion, his informing the Respondent that the reason for his absence was sciatica. That is in the context of the Claimant's employment being that of a landscape gardener. Next, at paragraph 19, the Claimant says it was the next working day, a Monday, that he was dismissed.

12. Now I turn to the written Summary of a Closed Preliminary Hearing that took place before Employment Judge Loy on 10 October 2019. At paragraph 16, EJ Loy identifies the Claimant's disability claims and he wrote at 16.1,

> *"His dismissal was directly discriminatory in that he was treated less favourably than a hypothetical comparator because of his disability."*

At 16.5 he wrote:

> *"The Claimant also said that he includes a perception of disability claim. The Claimant alleges that perception of future absence is included in the s.15 claim."*

13. For clarity, EJ Loy identifies that there is a direct discrimination claim, he identifies that there is a perception of disability claim, but in the context of s.15 discrimination arising from disability, unfavourable treatment. That is a tad confusing. It is a shame that the point was not clarified at that time.

14. Later, in EJ Loy's Summary, we have a heading 'The Issues' and then under the sub-heading 'Disability' he writes at 23.1.1,

> *"Was the Claimant treated less favourably than the Respondent would have treated a hypothetical comparator because of the Claimant's disability?"*

And at 23.1.2 he wrote,

> *"Was the Claimant dismissed because of absence arising out of his sciatica?"*

15. I note that 23.1.1 is a reference to direct discrimination and there is no reference to perception of disability. 23.1.2 appears to be a s.15, "discrimination arising" claim.

16. It is unfortunate that the way the claims are identified under the heading 'The Issues' is not set out very clearly.

17. I note, under the heading 'Orders', Order number 1 of EJ Loy directs the parties to inform each other and the Tribunal within 14 days, providing full details, if what is set out about the case and the issues is inaccurate or incomplete in any important way. Mr Bussau for the Claimant accepts that, although he did write in to the Tribunal raising matters of concern arising out of the identification of the issues, he did not raise any concerns with regard to the Claimant's disability claim.

18. Next, I turn to the Respondent's amended Grounds of Resistance filed pursuant to leave granted by EJ Loy. In the amended Grounds of Resistance at paragraph 19, the Respondent pleads,

> *"The Respondent denies that in dismissing the Claimant it treated him less favourably than a hypothetical comparator because of his alleged disability, either actual or perceived."*

19. Mr Goldup says that is a belt and braces pleading, "just in case", as it were. It seems to me, that tells me that the Respondent understood from the Closed Preliminary Hearing that the Claimant was indeed claiming direct discrimination by perceived disability.

The Law

20. When considering an application to amend, one must have regard to the guidance of Mummery J, (as he then was) in the case of Selkent Bus v Moore [1996] ICR 836. In exercising discretion, a Tribunal should take into account all the relevant circumstances and should balance the relative injustice and hardship of allowing or refusing the amendment.

21. Non-exhaustive examples of what might be relevant circumstances given by Mummery J included:

    21.1. The nature of the amendment, whether it is a minor error, a new fact, a new allegation or a new claim;

    21.2. The applicability of time limits and if the claim is out of time, whether time should be extended, and

    21.3. The timing and manner of the application and in particular, why an application had not been made sooner.

22. On the question of time limits, section 123(1) of the Equality Act 2010 requires that a claim shall be brought before the end of the period of three months beginning with the date of the act to which the complaint relates or such further period as the Tribunal thinks just and equitable. Conduct extended over a period of time is treated as having been done at the end of that period, (section 123(3).

23. On the just and equitable test, the EAT in the case of Cohan v Derby Law Centre [2004] IRLR 685 said that a Tribunal should have regard to the Limitation Act checklist as modified in the case of British Coal Corporation v Keeble [1997] IRLR 336 which includes that:

    23.1. One should have regard to the relative prejudice to each of the parties;

    23.2. One should also have regard to all of the circumstances of the case which includes:

        23.2.1. The length and reason for delay;

        23.2.2. The extent that cogency of evidence is likely to be affected;

        23.2.3. The cooperation of the Respondent in the provision of information requested, if relevant;

23.2.4. The promptness with which the Claimant had acted once she knew of facts giving rise to the cause of action, and

23.2.5. Steps taken by the Claimant to obtain advice once she knew of the possibility of taking action.

24. Selkent was revisited by Underhill LJ in the Court of Appeal in Abercrombie v Aga Rangemaster Ltd [2014] ICR 209 and the guidance of Mummery J approved. Commenting on the now often referred to distinction between label substitution on pleaded facts as compared to substantial alterations pleading new causes of action, Underhill LJ said that it was clear that Mummery J was not suggesting so formalistic an approach that the fact that an amendment pleading a new cause of action, weighed heavily against allowing an amendment. These are just factors likely to be relevant in striking the balance of injustice and hardship. He said that the focus should be not so much on, "formal classification" but more on the extent to which the amendment is likely to involve different lines of enquiry, *"the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted".* See paragraphs 47 and 48.

25. Underhill LJ also explains in Abercrombie that just because the amendment relates to allegations that are out of time, that does not mean we should automatically disallow it. It is still in our discretion to amend.

26. Whilst tribunals dealing with an amendment application have to consider whether the proposed amendment contains allegations that are out of time, we do not have to actually decide the time point. We can, if appropriate, grant the amendment subject to any limitation points the respondent may wish to raise at the final hearing. An example of when this might be appropriate, is when the subject of the amendment is an allegation that may be part of a continuing act of discrimination, determination of which is fact sensitive and better decided upon after hearing all the evidence at the final hearing, (see Galilee v Commissioner of Police of the Metropolis UKEAT/207/16 and Reuters Limited v Cole UKEAT/0258/17).

27. The apparent merits of the proposed amendment may be relevant to the exercise of discretion, see for example Olayemi v Athena medical Centre UKEAT/0613/10 and Herry v Dudley MBC UKEAT/0170/17.

28. In exercising my discretion, I must have regard to the Overriding Objective and must seek to balance the relative prejudice to the parties. Rule 2 sets out the Overriding Objective as follows:

> *"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

29. I should have regard to the fact that the Claimant has been legally advised; his legal advisors ought to have got it right in the first place. That said, I also have in mind the comments of Underhill J, (once again, as he then was) in Evershed v New Star Asset Management UKEAT/0249/09 when he said that employment tribunals are not in the business of punishing parties or their advisors for errors, pointing out that in most cases where permission to amend is sought, the applying party could have got it right first time around with sufficient care.

30. I set out the law relating to reconsiderations in my written decision of 2 October 2020.

Conclusions

31. This is a major amendment in that it is a new cause of action; a complaint of direct discrimination, which is not expressly set out in the pleaded claim. No new facts appear to be relied upon.

32. The amendment sought is substantially out of time. Therefore, s.123(1) of the Equality Act 2010 is engaged. It is proportionate and appropriate for me to deal with the question of time now. The question is whether it is just and equitable to extend time. I must apply the Limitation Act check list set out in the British Coal Corporation v Keeble.

33. Considering the length and reason for delay, which also covers the point of timing and manner of the application, in accordance with Selkent: the reason for the delay and the length of the delay, which is significant, is an oversight and an error on the part of Mr Bussau as the Claimant's legal representative.

34. The Application is made today at the start of the Final Hearing. Mr Bussau made that Application today when he realised his mistake. In fairness, it

seems that EJ Loy identified a direct discrimination claim and the Respondent understood that the claim included a direct discrimination on the grounds of perceived disability. The point has only been taken, (and this is not a criticism) by the Respondent in its email of 8 October 2020, the point being taken of course in reply to my response to the reconsideration application.

35. In respect of the effect of delay on the cogency of evidence, the Respondent ought to have been focused on showing the reason for dismissal anyway. But, there may be some impact on cogency of evidence in relation to what the Respondent knew or did not know of the Claimant's impairment.

36. There is no suggestion of any lack of co-operation from the Respondent in the provision of relevant information leading to this late application to amend.

37. As for the promptness of the Claimant, acting when he knew of the potential cause of action; in broad terms these proceedings were brought well in time, but as already discussed, this application is very late.

38. The Claimant has sought advice.

39. I then turn to the balance of prejudice question, which very often is the most important aspect in the decision as to how one should exercise one's discretion. I will consider the prejudice to the Respondent first.

40. If I allow the Application, the Respondent will have the expense of preparing for a new hearing, because I would not be able to proceed today; I am a Judge sitting alone and if there is a disability claim, a full tribunal will have to be convened. The Respondent will also have the expense of redrafting its witness statements and also the prejudice of being deprived of the statutory defence that Parliament saw fit to put in place, that of a three month time limit for the bringing of such claims. On the other hand, the Respondent has known since 10 October 2019 that actually, it was certainly the intention that this case included a claim of direct discrimination because of perceived disability. That is why it pleaded to such a claim in its amended Grounds of Resistance. The Respondent appears to have enjoyed something of a windfall, benefitting from my Strike Out of the disability claims without my having realised that there was this potential wrinkle. The Respondent has known the facts relied upon all along.

41. What of prejudice to the Claimant? If I refuse the Application, he will be deprived of the opportunity of arguing that the Respondent dismissed him because it thought that he was a disabled person due to his sciatica. Reading EJ Loy's Hearing Summary and the amended Grounds of Resistance, one could be excused for thinking that the direct discrimination because of the perceived disability claim was in fact in

place. As noted above, employment tribunals are not in the business of punishing advisors for their errors.

42. Lastly, on the merits, Mr Goldup says that this aspect of the proposed case is based upon a mere bare assertion. I think, with respect, that is not so, for the Claimant pleads a sequence of absences and then on the day after he informs the Respondent that his reasons for absence are sciatica, he is dismissed. I think the fact that the context is that of a landscape gardener, work that involves physical effort and for which back problems would likely be a major issue, means that the Claimant would have a reasonable prospect of persuading a Tribunal that it should take the view that it requires some form of explanation from the Respondent.

43. On balance, weighing these matters up, the conclusion which I have reached is that I should allow the application to amend. The amendment should read as follows:

> *The Respondent directly discriminated against the Claimant; treating him less favourably than a hypothetical comparator would have been treated by dismissing him because it perceived that he had sciatica, which was a long term physical impairment which substantially affected his ability to undertake day to day activities and had done so for more than 12 months, or was likely to do so for more than 12 months.*

44. Accordingly, it is necessary in the interests of justice that I vary my Judgment of 14 July 2020 in that the Claimant's claim that he was directly discriminated against because of perceived disability, as I have just outlined, is not struck out and shall be permitted to proceed.

The Claimant's and Respondent's Strike Out Applications against each other

45. The Representatives indicated to me that they each had strike out applications that they wished me to consider before further case managing this case. The Claimant's strike out application is set out in two letters: one dated 30 June 2020 and the second dated 10 July 2020. They are at pages 69 and 104 of the Respondent's Bundle. The Respondent's Strike Out Application is dated 13 July 2020 and is copied at page 21 of the Respondent's Bundle.

46. I read the Applications during the lunch time adjournment and upon resuming, indicated to the representatives that it seemed to me neither application had particularly good prospects of success. Strike out is a draconian step and the bar is rightly set very high. I invited each in turn to present to me their application.

47. Mr Bussau went first. He indicated that he did not wish to apply to strike out the response in its entirety, he simply wished to apply to strike out certain paragraphs of the Amended Grounds of Resistance. As he spoke,

he narrowed that down to an application to strike out paragraph 11. This was on the grounds that it was not an amendment occasioned by EJ Loy identifying the issues on 10 October 2019, but it raised a new defence to the Claimant's claim for payment of pension contributions he says that he should have received. Mr Goldup answered that the Respondent was simply pleading an additional fact which had emerged since the issue of the claim in the original Grounds of Resistance. I declined to strike out the paragraph on that basis; the employment judge who finally hears this case can make of that paragraph what he or she will.

48. Mr Goldup did not, (rightly) pursue the Respondent's strike out application against the Claimant.

Case Management

49. In light of my allowing in the claim of direct discrimination on the grounds of perceived disability, we agreed that I should provide for any further disclosure which may be occasioned by that, followed by finalisation of the Bundle and then the serving of any supplemental witness statements which may be necessary on the point. In discussion, we agreed upon the case management orders in this regard set out below.

Re-Listing for Hearing

50. This case must be heard by a tribunal with members. We agreed that the time estimate remained 2 days. I attempted to speak to the listing department on the telephone so as to re-list the matter immediately but was unable to get through. I therefore made a note of the parties' dates of unavailability and indicated that I would ask the Tribunal to list the matter for the first available date after 30 November 2020, convenient to the parties.

51. Mr Goldup made the point that he had been unable to take instructions on whether any further witness may be required to deal with the amended claim. If he finds that such further witness is required and that the re-listing dates clash with something very important in terms of that witness' availability, he may of course apply for further postponement. However, I do make the point there would have to be a very good reason indeed for such a witness being unavailable and the Tribunal would need to be satisfied that the witness was genuinely necessary.

The Issues

52. I told the representatives that the I would revisit the list of issues. I identify the issues as set out below. If the parties disagree, they can write in setting out their reasons, within 7 days of this document being sent to them.

Disability Discrimination

53. Did the Respondent treat the Claimant less favourably than it would have treated a hypothetical comparator by dismissing him, because it perceived that his physical impairment of sciatica was an impairment which had a substantial impact on his ability to undertake day to day activities and which had lasted more than 12 months or was likely to last more than 12 months?

Unfair Dismissal

54. Was the reason or principal reason that the Respondent dismissed the Claimant, contrary to s.104D(1)(c) of the Employment Rights Act 1996: the obligations of the Respondent under the Pensions Act 2008 Chapter 1 Part 1 to provide prescribed information to the Claimant, to enrol the Claimant in a work place pension scheme and / or to pay employer contributions of 2% in respect of the Claimant?

Breach of Contract / Unlawful Deduction from Wages

55. Did the Respondent in breach of contract and / or in breach of its legal obligations fail to pay pension contributions under the Pensions Act 2008 on behalf of the Claimant?

Failure to provide written Terms and Conditions of Employment

56. If the Claimant succeeds in respect of any of his claims, did the Respondent fail to provide the Claimant with written Terms and Conditions of Employment contrary to s.1 and s.4 of the Employment Rights Act 1996? If so, should the Respondent be Ordered to pay an award for the minimum amount or the higher amount pursuant to s.38 of the Employment Act 2002?

ORDERS

Made under the Employment Tribunals Rules of Procedure 2013

RELISTING FOR HEARING

1. The Final main Hearing for this matter is postponed from today and has been relisted for hearing by CVP on **17 and 18 December 2020**.

THE ISSUES

2. If either party disagrees with the issues as identified above, they should write to the Tribunal, copied to the other side, setting out clearly and succinctly why they say that the identification of the issues is inaccurate and setting out how they say the issues should be identified by no later

than the date **7 days** from the date this Hearing Summary is sent to the parties.

DISCLOSURE

3. By no later than **26 October 2020** the parties shall disclose to each other by copy, any further documents not already disclosed in their possession relevant to the issue of whether or not the Respondent directly discriminated against the Claimant by dismissing him because of his perceived disability.

AMENDMENTS TO BUNDLE

4. Any further documents disclosed shall be incorporated in the Bundle to be prepared by the Respondent, a copy to be provided to the Claimant by no later than **2 November 2020**, a PDF copy to be provided to the Tribunal in accordance with the President's Practice Direction and Guidance for CVP hearings, on the date **7 days before** the Final Hearing.

SUPPLEMENTAL WITNESS STATEMENTS

5. The parties may rely upon supplemental witness statements dealing only with the issue whether or not the Respondent directly discriminated against the Claimant by dismissing him because of his perceived disability provided that such supplemental witness statements are exchanged by no later than **16 November 2020**.

Public access to Employment Tribunal decisions

The parties should note that 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.

President's Guidance

The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: *www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/*

Other Matters

(a) Any person who without reasonable excuse fails to comply with an Order to which Section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(b) Under Rule 6, if this Order 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.

(c) You may apply under Rule 29 for this Order to be varied, suspended or set aside.

_____
Employment Judge M Warren

Date: 3 November 2020

Sent to the parties on: ..21/12/2020

.Jon Marlowe
For the Tribunal Office