



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: Employment Judge Harrington

BETWEEN:

Miss R Garuba

Claimant

and

Maximus UK Services Ltd

Respondent

ON: 19 March 2021

Appearances:

For the Claimant: Mr O Awodele, Counsel

For the Respondent: Mr N Bidnell-Edwards, Counsel

JUDGMENT

- 1 The Respondent's applications for strike out of the Claimant's claims and / or deposit orders and / or an unless order are not well founded and are dismissed.
- 2 The Claimant's claims of unfair dismissal, disability discrimination and a failure to pay notice pay shall proceed to a final hearing.

REASONS

Factual Background

- 1 By an ET1 received by the Tribunal on 20 December 2019 the Claimant brings claims of unfair dismissal, disability discrimination and a failure to pay notice pay against Maximus UK Services Ltd, her former employer and the Respondent in

this case. The Claimant was employed from 16 April 2019 until 2 September 2019 as a Disability Assessor. The Respondent denies the entirety of the claims. The numbers appearing in square brackets within this Judgment, refer to pages within the agreed bundle provided to the Tribunal at the Preliminary Hearing.

- 2 The relevant background to this hearing may be summarised as follows: On 25 June 2020 the Tribunal held a Case Management Hearing by video. At that hearing, at which the Claimant was represented by Ms Marshall-Bain of Counsel, there was a very prolonged discussion as to the issues in the case. Eventually, the following List of Issues was agreed and appended to the Tribunal's Case Management Order,

Is the Claimant disabled? (s.6 EQA 2010)

1. At the material time: [] [SEP]
- a. Did the Claimant have a physical or mental impairment? [] [SEP]
- b. Did that impairment have an adverse effect on the Claimant's ability to carry out normal day-to-day activities? [] [SEP]
- c. Was that effect substantial? [] [SEP]
- d. Was that effect long-term? [] [SEP]
2. Did the Respondent know, or ought it have known, that the Claimant was a disabled person at the material time? [] [SEP]

Direct discrimination (s.13 EQA 2010) [] [SEP]

3. Did the Respondent treat less favourably than it treated other non-disabled persons? [] [SEP] The less favourable treatment relied on by the Claimant is as follows: [] [SEP]
- (a) Dismissing the Claimant; [] [SEP]
- (b) Failing to provide adequate observation and mentoring of her; [] [SEP]
- (c) Failing to arrange for an occupational health assessment and report. [] [SEP]

The Claimant relies on four actual comparators who started work at the same time as her, and are identified by the Claimant as: Mandy, Alison, Marie and Angelica Gill

4. Was the less favourable treatment because of the Claimant's disability?

Discrimination arising in consequence of disability (s.15 EQA 2010) [] [SEP]

5. Did the Respondent treat the Claimant unfavourably by: ^[REDACTED]_[SEP]
 - (a) Dismissing the Claimant; ^[REDACTED]_[SEP]
 - (b) Failing to provide adequate observation and mentoring of her; ^[REDACTED]_[SEP]
 - (c) Failing to arrange for an occupational health assessment and report. ^[REDACTED]_[SEP]
6. What was the reason for the unfavourable treatment? (this is the “something” referred to in s.15) ^[REDACTED]_[SEP]
 - (a) the Claimant did not achieve or meet required standards; ^[REDACTED]_[SEP]
 - (b) underachievement in relation to the grades she is supposed to achieve.
7. Did the something arise in consequence of the Claimant's disability?
8. Was unfavourable treatment a proportionate means of achieving a legitimate aim? ^[REDACTED]_[SEP]

Reasonable adjustments (s.20 EQA 2010) ^[REDACTED]_[SEP]

9. Did the Respondent apply a PCP that placed the Claimant to a substantial disadvantage compared to a non-disabled person? ^[REDACTED]_[SEP]

To support this claim, the Claimant relies on the following: ^[REDACTED]_[SEP]

PCP: The requirement to write reports, within specified timeframes and in a particular style and format.

Substantial disadvantage: The Claimant found the timescales within which to complete the reports, and the requirement to write according to a particular style, was more difficult for the Claimant because of her disability.

10. Did the Respondent take such steps as was reasonable to avoid such disadvantage? The adjustments that the Claimant says ought to have been made are [to be confirmed] ^[REDACTED]_[SEP]

Jurisdiction (s.123 EQA 2010) ^[REDACTED]_[SEP]

11. Have the discrimination claims been presented to the Tribunal within the applicable time limits provided by the EQA? ^[REDACTED]_[SEP]
12. If not, is it just and equitable to extend time?

3 In addition to these issues, there continued to be some uncertainty regarding the claims of discrimination arising from disability and a failure to make reasonable adjustments. Accordingly, Employment Judge Hyams-Parish ordered the Claimant to provide further information on these points by 16 July 2020.

- 4 An attempt was made to provide further information, in a letter from the Claimant's Solicitor dated 16 July 2020 [58-60]. In a prompt response and in a letter dated 31 July 2020, the Respondent's Solicitor submitted that the Claimant had failed to provide the necessary further information and sought an Unless Order [67].
- 5 The Claimant provided a response to the Respondent's letter [74-78] and included a lengthy written narrative, apparently from the Claimant herself. A subsequent email from the Respondent's Solicitor on 21 September 2020 submitted that, again, the Claimant had failed to provide the necessary further information. The Respondent asked that the Claimant's claim be struck out on the grounds that the manner in which the proceedings had been conducted was unreasonable and / or for non-compliance with the Tribunal's Order for the Claimant to properly particularise her claim [79].
- 6 On 11 November 2020, Ms Macfoy from the Claimant's Solicitors emailed the Tribunal stating that the Respondent's stance was unfair and unreasonable [82].

Preliminary Hearing

- 7 By a letter from the Tribunal dated 14 December 2020, the case was listed for an Open Preliminary Hearing for consideration of the Respondent's application for a strike out / deposit order / unless order [83]. That hearing has taken place today. As previously stated, I have been provided with a hearing bundle, paginated from 1 – 85, and a skeleton argument from Mr Awodele. I have had the benefit of hearing lengthy submissions from both Counsel.
- 8 Mr Bidnell-Edwards set out the Respondent's position that the claims should be struck out or, in the alternative, that deposit orders should be made. Mr Bidnell-Edwards referred to the conduct of the case by the Claimant's Solicitors as being unreasonable, such that the Respondent had been put to additional time and cost in seeking to defend the claims. In particular, at the previous Tribunal Hearing, Ms Marshall-Bain did not appear to have a basic grasp of employment law such that the Tribunal had to spend an extended period of time identifying the claims being brought. Thereafter, the Schedule of Loss produced was considered by the Respondent to be excessive and even fanciful [64-66]. Mr Bidnell-Edwards confirmed that so far as the claims were set out in the List of Issues, it was accepted by the Respondent that those claims had been brought by the Claimant but because of the way in which the Claimant's case had been conducted, with a total disregard and disrespect to the Tribunal, the Respondent considered there were grounds for the claims of discrimination arising from disability and a failure to make reasonable adjustments to be struck out. With regards to the claim of direct disability discrimination, the Respondent's submission was that there was not enough information provided by the Claimant for that claim to succeed. For example, the Claimant had not identified the alleged discriminator and the Claimant's own narrative contradicted her claim. In this way, the claim had no reasonable prospect of success.

- 9 The Respondent also sought a wasted costs order against the Claimant's Solicitors, Eagle Solicitors, pursuant to Rule 80 ETs (Constitution & Rules of Procedure) Regs 2013, Sch 1. With regards to this application, Mr Bidnell-Edwards told me that he was unable to say that the application was specifically identified to Eagle Solicitors prior to today but that a costs schedule had been sent to them yesterday.
- 10 On behalf of the Claimant, Mr Awodele confirmed that the Claimant's claim for discrimination arising from disability was limited to paragraphs 5 (a) and 6 (a) in the List of Issues. The PCPs relied upon with regards to the claim for a failure to make reasonable adjustments are limited to those set out at paragraph 9 of the List of Issues [57] and the PCP accepted by the Respondent in its Draft List of Issues, namely the practice of requiring healthcare professionals to complete the training programme and pass the 4 stage approval process [37]. As those claims have now be clarified, Mr Awodele submitted that there were no grounds for strike out.
- 11 With regards to the claim of direct disability discrimination, Mr Awodele commented that there had been no previous suggestion, either from EJ Hyams-Parish or the Respondent, that this was such a weak claim as to require being struck out at a preliminary stage. A substantive hearing was needed in order for the entirety of the evidence to be heard and tested.
- 12 Mr Awodele did accept that this Preliminary Hearing has been necessitated because of the omission to provide the necessary clarification of the Claimant's claims. However he stated that he was unable to speak to the competence of those instructed on the last occasion or of those instructing him, as he has only been instructed for one week. Mr Awodele noted that the Respondent had not given notice prior to the hearing that an application for a wasted costs order would be made.

Tribunal's Conclusions

- 13 In reaching my Judgment on the Respondent's applications, I have taken into account the entirety of the documentary material to which I have been referred and the oral submissions made by Counsel.
- 14 I have referred to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1 and, in particular, Rules 37 - 39 and 80 - 82. Rule 37 provides that a Tribunal may strike out all or part of a claim on any of the grounds listed in that rule. Those grounds include that it has no reasonable prospect of success, that the manner in which the proceedings have been conducted by or on behalf of the claimant has been unreasonable or vexatious and that there has been non-compliance with an order of the Tribunal. Rule 80 sets out when a wasted costs order may be made. Rule 82 refers to the relevant procedure for such orders and includes the following,

'No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal.'

- 15 As referred to above, this matter previously came before the Tribunal at a hearing on 25 June 2020. At that hearing, Employment Judge Hyams-Parish made various case management orders. Those Orders included the need for the Claimant to provide further particulars in respect of her claims for discrimination arising from disability pursuant to Section 15 of the Equality Act 2010 and for a failure to make reasonable adjustments pursuant to Sections 20 and 21 of the Equality Act 2010. Due to the manner in which the Claimant and her solicitors have sought to comply with those Orders from the Tribunal, I am now asked by the Respondent to strike out those claims and to strike out her claim for direct disability discrimination because it has no reasonable prospect of success.
- 16 There has clearly been delay in the Claimant providing the further information required by the Tribunal's Order in June 2020. It is not until today, in March 2021, that clarity is provided on the Claimant's behalf by Mr Awodele in respect of the claims she brings under sections 15, 20 and 21 of the Equality Act 2010. The Claimant was to be expected to have provided this information far sooner than at this hearing.
- 17 The specific cause of this delay and, more particularly, whether this was due to the Claimant failing to provide necessary information to her Solicitor or whether there is fault on behalf of the Solicitors, is a matter which may need to be considered further by the Tribunal on a future occasion. However, today I must determine whether it is appropriate to strike out the Claimant's claims because of the failure to comply with the Tribunal's Order and the manner in which the proceedings have been conducted.
- 18 I am satisfied that there was a failure to comply with the Tribunal's Order. The information which the Claimant sought to provide in her written communications was not what was required. Further, I am also satisfied that the provision of the information by the Claimant in the letters dated 16 July 2020 and 9 September 2020 amounted to conducting the proceedings in a manner which was unreasonable [73]. Information was passed on from the Claimant without apparent refinement or editing by the Claimant's Solicitor and failed to set out the clear particulars required by the Tribunal, in order to better understand the Claimant's claims.
- 19 However, in exercising my discretion under Rule 37, I do not consider it appropriate to strike out the Claimant's claims. In reaching this decision I have had regard to the overriding objective (Rule 2) and how to deal with this case fairly and justly. As Mr Bidnell-Edwards accepts, the claims are now capable of understanding, following clarification from Mr Awodele. In those circumstances, where the claims have now been clarified (albeit belatedly), I do not consider it would be appropriate to strike out the claims. The final hearing dates were listed at the hearing in June 2020 and can be retained despite the delay caused by the Claimant and, the additional cost to which the

Respondent has undoubtedly been put, can be considered further if the Respondent proceeds with its costs application. I also note that the Claimant's claims, as now clarified, do not go beyond what was anticipated and recorded in the List of Issues and the Respondent's draft List of Issues.

- 20 I am also asked by the Respondent to strike out the Claimant's claim for direct disability discrimination because it has no reasonable prospect of success. I am not satisfied that it has no reasonable prospect of success. The claim is not capable of such scrutiny as this preliminary stage, so as to reach that view. The information currently available is limited to the modest number of pages comprising the Preliminary Hearing bundle. I agree with Mr Awodele's submission that it is appropriate for this claim to proceed to a substantive hearing and for the evidence to be heard by the Tribunal in full and tested appropriately.
- 21 For the avoidance of doubt, I do not consider it appropriate to make a deposit order. I have not heard submissions on behalf of the Respondent as to any specific allegation or argument in a claim, which is said to have little reasonable prospect of success, and I do not accept any broader contention that each of the claims has little reasonable prospect of success. On the information currently available, I am unable to be satisfied that the claims have little reasonable prospects of success.
- 22 In the circumstances, the need for an unless order falls away, as the clarification of the claims has now been provided.
- 23 The Respondent has sought to make a costs application at this hearing. Following a detailed discussion of this, Mr Bidnell-Edwards submitted that he made a wasted costs application against the Claimant's Solicitor or, in the alternative, a costs application against the Claimant herself. As referred to above, the Claimant's Solicitor has not been given notice that a wasted costs application was to be made today. In this way, it did not appear that Rule 82 had been followed and that the Claimant's Solicitor had been given a reasonable opportunity to make representations in response to the application. It also seemed quite possible, if applications for costs were to be made by the Respondent against the Claimant's Solicitor and, in the alternative, the Claimant, that those parties might require separate representation.
- 24 Mr Awodele openly acknowledged that this hearing has been necessary because of the failure to provide the further information of the claims as ordered and there does seem to be an issue as to whether the Claimant's Solicitors have provided appropriate legal assistance to her. There is some reason to believe that Counsel at the June 2020 hearing was not experienced in employment law matters and, on the face of it, in corresponding after that hearing, the solicitors appear to have simply forwarded on narrative provided by the Claimant rather than seeking instructions on the specific legal points identified by the Tribunal and then providing that information.
- 25 Due to the lack of notice provided by the Respondent and applications being made in the alternative, causing understandable concern to Mr Awodele in

responding to those applications appropriately, I was unable to consider the issue of costs further at this hearing.

- 26 If the Respondent continues to seek its costs arising from the delay to comply with the Tribunal Order and the need for this hearing, such costs applications shall be considered further at the full merits hearing. The Respondent must provide appropriate notice if it continues to pursue a wasted costs order against the Claimant's Solicitor and, in the alternative, a costs order against the Claimant. Such advanced notification will then provide opportunity for those parties to consider appropriate representation in responding to the applications.
- 27 In conclusion, the Respondent's applications are not well founded and are dismissed. The Claimant's claims of unfair dismissal, disability discrimination and for a failure to pay notice pay shall proceed to a full merits hearing.

Employment Judge Harrington
14 April 2021