



# EMPLOYMENT TRIBUNALS

**Claimant:** Christian Mallon

**Respondent:** Electus Recruitment Solutions Limited

**Heard at:** Bristol Employment Tribunal (via CVP)      **On:** Tuesday, August 3, 2021

**Before:** Employment Judge Mr. M. Salter

**Representation:**

Claimant: In person.

Respondent: Mr. G. Mahmood, counsel.

## RESERVED JUDGMENT

It is the judgment of the tribunal that the Claimant's claim of:

- (a) direct disability discrimination is struck out and has no reasonable prospect of success;
- (b) failure to make reasonable adjustments is:
  - (i) not struck out as having no reasonable prospects of success;
  - (ii) not vexatious as defined; and
  - (iii) not to be made subject of a deposit order.

## REASONS

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

*References in round brackets are to the paragraph of these reasons or to provide definitions.*

### INTRODUCTION

1. These are my reasons for the above judgment. Having heard evidence and submissions on Tuesday, 3<sup>rd</sup> August 2021 I was unable to consider my

decision and give judgment within the remainder of the day, and so I reserved my decision.

2. As stated to the parties at the hearing, 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 4<sup>th</sup> July 2020, is, in short, he was discriminated against on grounds of his disability; that discrimination taking the form of direct discrimination and a failure to make reasonable adjustments. He complains that his application to the Respondent for a role they were conducting a recruitment process for was unsuccessful. The Respondent was a recruitment agency acting on behalf of a separate company looking to fill a vacancy.

### The Respondent's Response

4. In its Form ET3, received by the tribunal 21<sup>st</sup> August 2020, the Respondent denied the claimant had been discriminated against as alleged or at all. Their contention is that the Claimant did not have the essential skills necessary for the role he was applying for and that is why his application did not progress past an initial sift.

Relevant Procedural History

5. The matter was listed for a Preliminary Hearing for Case Management before E.J Rayner on 14<sup>th</sup> April 2021 [33]. The day before the hearing the Respondent applied to strike out the Claimant's claim [29].
  
6. At the Preliminary Hearing E.J. Rayner ordered:
  - (a) the matter be set down for a one-day Preliminary Hearing to determine the Respondent's application;
  - (b) there be sequential exchange of witness statements, with the Respondent disclosing their statements first;
  - (c) the Claimant was permitted to serve a skeleton argument 4 weeks after the Respondent's skeleton argument was served;
  
7. In that hearing E.J. Rayner helpfully summarised the case's facts [40 §57-64] and identifies the issues to be determined at any Final Hearing. So far as is relevant to the task I am asked to undertake, the list of issues states:

Direct disability discrimination (Equality Act 2010 section 13)

2.1 The Claimant describes himself as disabled as having dyspraxia.

2.2 Did the Respondent do the following things:

2.2.1 failed to put the claimant forward for a position he had applied for;

2.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was and therefore relies upon a hypothetical comparator.

2.4 If so, was it because of disability?

3. Reasonable Adjustments (Equality Act 2010 ss. 20 & 21)

3.1 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

3.2 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs:

3.2.1 policy of asking for written job applications;

...

- 3.3 Did the PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the claimant finds it harder to complete a written job application form?
- 3.4 Did the Respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
- 3.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The Claimant suggests:
  - 3.5.1 he should have been given the opportunity to make an oral application for the post;
- 3.6 Was it reasonable for the Respondent to have to take those steps and when?
- 3.7 Did the Respondent fail to take those steps?

#### Subsequent Developments

8. After this hearing the Claimant provided details of 4 other claims he "could find" [43]. He accepts there are more [43]. The Respondent has identified 8 claims [43A]
9. A further case management hearing was held on 5<sup>th</sup> July 2021 before Employment Judge O'Rourke. At this hearing the Claimant stated he could not comply with the Order of Employment Judge Rayner for a written witness statement. E.J. O'Rourke therefore ordered two emails of the claimant stand as his statement and he would answer any questions asked of him in cross-examination [43e §10]

#### TODAY'S HEARING

##### General

10. The matter came before me to consider the strike-out and deposit order application. The hearing had a one-day time estimate. The Claimant represented himself, and the Respondent was represented by Mr Mahmood, of counsel.
11. This was a remote hearing which was not objected to by the parties, being conducted entirely by CVP video platform. A face-to-face hearing was not held because it was not practicable and no-one requested the same it was conducted using the cloud video platform (CVP) under rule 46.

12. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no significant difficulties.
13. The participants were told that it was an offence to record the proceedings.
14. Evidence was heard from the witnesses via video link. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

Particular Points that were Discussed

*Litigant in person*

15. As the Claimant was representing himself I took time to explain to him:
  - (a) the purpose and approach to cross examination;
  - (b) that whilst I would do my best to ensure he was on an equal footing with the Respondent who was represented, and whilst I am able to ask questions of the witnesses in the case, I am not able to conduct cross examination of those witnesses on behalf of him; I also explained that part of cross examination was to “put the case” to the witness, and what this entailed.
  - (c) the requirement to put his case to every witness, or I will consider he accepts the point left unchallenged;
  - (d) that he would get an opportunity at the end of the hearing to make submissions, if he wanted to, to tell me why he should win his claim;
16. Despite this explanation, at various times during the questioning of the witness it appeared me that matters had not been put by the Claimant to the Respondent’s witnesses, so I had to remind him of his obligations in this regard.

**DOCUMENTS AND EVIDENCE**

Witness Evidence

17. I heard evidence from the Claimant. The referred to by Employment Judge O’Rourke were at page 211 and 231 of my bundle. the Claimant had marked up his copy of the Respondent’s witness statements and wished to give evidence using those. The Respondent did not object to that approach
18. I also heard evidence from the following witnesses on behalf of the Respondent:
  - (a) Andrew Little, the Respondent’s Client Relationship Director; and
  - (b) Mark Day, a Director of the Respondent.

19. All witnesses gave evidence by way of written witness statements that were read by the me in advance of them giving oral evidence. All witnesses were cross-examined.
20. There is also a statement from the claimant's partner [209]. The Respondent indicated they did not have any questions for her and so it was unnecessary for her to attend to give evidence. I have taken into account those aspects of her witness statement which concern matters she saw, heard or did personally. I have not attached weight to those parts of her statement in which she simply sets out what was told to her if there was direct evidence to this point.

#### Bundle

21. To assist me in determining the matter I have before me today an agreed bundle consisting of some 231 numbered pages (albeit there were additional pages numbers XXa etc, so there were 236 pages in total) prepared by the Respondent. Pages 1-176 were agreed whilst pages 177-231 were identified the Claimant's documents.
22. My attention was taken to a number of these documents as part of me hearing submissions and, as discussed with the parties at the outset of the hearing and before commencing their submissions, I have not considered any document or part of a document to which my attention was not drawn. I refer to this bundle by reference to the relevant page number.

#### SUBMISSIONS

##### Claimant

23. Despite the opportunity, the Claimant did not provide written submissions. The Claimant made oral submissions which I have considered with care but do not rehearse here in full. His submissions took around 20 minutes and addressed a wide range of matters, many of which were not relevant to the questions I am asked to answer, and so on two occasions I had to request the Claimant focus on the issues I was to determine today. The Claimant's submissions understandably focussed on his explanation as set out in his statements.

Respondent

24. I had a helpful written skeleton argument which Mr. Mahmood supplemented with brief oral submission. Since the skeleton is in writing it is unnecessary to repeat it here. In his submissions Mr Mahmood highlighted the Claimant's evidence today to me and the Claimant's acceptance of large parts of the Respondent's case.

MATERIAL FACTS

General Points

25. Unusually for such an application I heard evidence from both parties. However, when I considered it appeared to me that the core of the evidence was largely uncontroversial and so I do not consider that I need to recite it in detail or make factual determinations on core issues.

The Claimant and his claims

26. Since 2008 the Claimant has commenced over 100 claims in tribunals [136], with 40 since 2017. In cross examination the claimant confirmed that since 2018 there had been about 60 claims issues. He is the subject of 40 published tribunal judgments and since 2018 he has withdrawn at least 39 claims [71-72] including a previous claim against the Respondent.

27. The documents show he has at least 8 live claims before the tribunals at present, however in oral evidence he stated this could be up to 15 or 16 claims, he was not sure.

28. In previous litigation the Claimant accepted that Employment Judges have noted:

- (a) the Claimant early on would threaten litigation if his demands were not met;
- (b) a "strong suspicion" the claimant was using the application process in the hope of making money;
- (c) "the long sequence of claims brought and then withdrawn"
- (d) the claimant has been subject to numerous costs awards arising from his applications.

29. All claims concern failures by him to secure interviews or job roles.

30. He accepted his claims appear to follow the same process. The Claimant submits a generic cv is submitted for a role. He is frequently unsuccessful in

his application, often failing on the core criteria for the role. He then issues claims for compensation and often he withdraws that claim at some point.

This Application Giving Rise to This Claim

31. The following are agreed or unchallenged facts:

- (a) the Claimant applied for a role through the Respondent. He uploaded his CV [160]. This was a standard document that the Claimant has not updated;
- (b) the Claimant has used the Respondent before, completing over 100 job applications with them since 2009. Mr. Little, the Respondent's Client Relationship Director, has experience with the Claimant previously;
- (c) the Claimant has had oral applications before with the Respondent [138-142, 145-148] during which, and without any probing of the job role or essential skills by the Claimant at all, he withdrew his interest in the role and his application. An "oral application" is not an interview, it is a discussion about, amongst other things, the core criteria of the role, it is a preliminary step before any interview;
- (d) on the occasion in question in these proceedings Mr Little determined the Claimant did not meet the essential requirements for the role [158] and so he was not put forward for it. He was written to and notified of this [163]. It was confirmed to him that he did not have the essential skills required;
- (e) of the 130 or more applications the Respondent received for the role in question in these proceedings, they only forwarded three to the company they were recruiting for, and all of these three were unsuccessful;
- (f) within 6 minutes of receiving notification of being unsuccessful, the Claimant had responded asking if the respondent "have a problem with disabled people working"
- (g) the Claimant contacted ACAS and notified the Respondent of this. He referred to legal action [168-171].
- (h) the Respondent offered him an oral application. He declined.
- (i) The Claimant directly approached the company the Respondent was recruiting for and had been permitted an oral application with them. This oral application was not successful, that is the application was not progressed after the initial discussion;
- (j) The Claimant continues to make applications to the Respondent for roles which he does not meet the essential criteria for (Day 8-14)

32. The Claimant's history of job applications shows little consistency in sector, experience, level, salary, benefits or location [Day §4]. The Claimant contends this is because he has a varied portfolio of previous roles, with 19 jobs in the last 7 years of employment.

**THE LAW**

Statute

33. So far as is relevant the Equality Act 2010 states:



#### 4 The protected characteristics

The following characteristics are protected characteristics—

...

disability

#### 13 Direct discrimination.

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

...

#### 20 Duty to make adjustments

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

34. So far as is relevant Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 state

#### 37 Striking Out

- (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
  - (a) that it is scandalous or vexatious or has no reasonable prospect of success;

#### 39 Deposit Orders

- (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

35. The main authorities I considered are as follows: In respect of vexatious claims, in his skeleton argument Mr. Mahmood referred me to the case of Her Majesty's Attorney General v Kuttapan UKEAT/0478/05/RN and set out paragraph 3-6 of that judgment. I do not repeat that extract here.

36. I also bore in mind the Appeal Tribunal's decision in Zeb v Xerox (UK) Ltd UKEAT 0091/15 Mrs Justice Simler held that the power of strike out

has rightly been described as a draconian one, and case law cautions Employment Tribunals against striking out a claim in all but the clearest cases, particularly where that claim involves or might involve allegations of discrimination. Cases in which a strike out can properly succeed before the full facts have been found are rare.”

37. In that decision Simler J. referred to the well-known comments of Lord Steyn and Lord in Anyanwu v South Bank Students' Union [2001] IRLR 305 at paragraphs 24 and 37 respectively.

38. In Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 in the Court of Appeal, Maurice Kay LJ said:

29. It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. ... It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level.

39. In the case of Ahir v British Airways Plc [2017] EWCA Civ 1392 Underhill LJ said:

“As I already said, in a case of this kind, where there is on the face of it a straightforward and well documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced”

40. In the case of Van Rensberg v Royal Borough of Kingston Upon Thames UKEAT/0096/07, Elias J stated that a Tribunal has greater leeway when considering whether or not to order a deposit to make a provisional assessment of the credibility of a party's case

CONCLUSIONS ON THE ISSUES

General

41. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.
42. I will first determine whether the claims should be struck out either on grounds of having no reasonable prospects or because they are vexatious. If I consider that the/a claim is not struck out for whatever reason I will consider whether it/they should be made subject of a deposit order.
43. I should say that cross examination of the Claimant took longer than had been initially timetabled, this is no criticism of Mr Mahmood, rather the Claimant repeatedly failed to answer the questions that was asked of him resulting in the question having to be re-asked often multiple times before a relevant answer was obtained. Even giving all due latitude to the Claimant in this regard I found him to be an unconvincing witness.

Findings on the Issues

*Issue 1: No Reasonable Prospect: Direct Discrimination (Paragraph 2.2-2.4 Employment Judge Rayner's List of Issues)*

*Paragraph 2.2: did the Respondent fail to put the claimant forward for a position he had applied for?*

44. It is agreed the Claimant's application was not forwarded to the recruiting company by the Respondent.

*Paragraph 2.3: Was this Less Favourable Treatment?*

45. On the agreed evidence before me the claimant did not meet the essential criteria for the role he applied for. Indeed, his direct oral application to the company failed for this very reason.
46. There were almost 130 other candidates who did not meet the criteria and were not forwarded to the recruiting company. The Claimant was treated the same as them.
47. I consider, therefore, on the basis of this evidence that the claimant has no reasonable prospect in showing that there was less favourable treatment

between him and the other candidates who did not meet the criteria for the role. These appear to me to be the relevant comparators.

*Paragraph 2.4: was this because the Claimant had Dyspraxia?*

48. There is no evidence of any less favourable treatment. Questions of the motive for that treatment do not, therefore, arise for me to assess.

*Conclusion*

49. Having considered the guidance from the case law above, I consider this is a case where a discrimination claim should be struck out. The Respondent has satisfied me on the agreed evidence that the claimants claim of direct discrimination has no reasonable prospects of success.

*Issue 2: No Reasonable Prospects: Failure to Make Reasonable Adjustments*

50. On the agreed facts:

- (a) the initial sift of applications was done on the papers that the candidates provided. The Respondent denies this is a PCP;
- (b) the Claimant's application was not successful at this stage;
- (c) there is a period of time starting with when the Claimant's application was assessed and rejected on the basis of his paperwork, before he was offered an oral application by the Respondent;

51. With this in mind, it appears to me that at the heart of issue 3.3 (substantial disadvantage), 3.4 (knowledge of that disadvantage) and 3.6 (reasonableness of the step) of Employment Judge Rayner's list of issues are factual questions, requiring a careful factual analysis of the claimant's particular circumstances; whether in the circumstances of this claimant's application for this role he was placed at a substantial disadvantage, as well as an assessment of whether, in all the circumstances, the actions of the Respondent were reasonable.

52. In such circumstances, with such factual matters at the core of the claim, I do not consider that this is the sort of claim that falls within the narrow band of discrimination cases identified by the case law that should be struck out as showing no reasonable prospect of success.

*Issue 3: Vexatious*

53. I must admit to being concerned over the claimant's motives for this large number of claims and do not accept his evidence that the bulk of these claims came about owing to his lack of knowledge of the process or law at

the time as he contended before me. These concerns appear to be shared by other employment judges.

54. The Claimant continues to issue claims and, when pressed on the number of claims he had outstanding at the tribunal, was entirely unconvincing that he did not know.
55. That said, despite my concerns, I do not consider *this particular claim* of a failure to make reasonable adjustments falls within the definition of vexatious as it applies in employment tribunals. I cannot say that, even though it may have a seemingly very modest financial value, it, in the words of Lord Bingham in A-G v Barker [2000] 2 FCR 1, has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the Claimant; and that it involves an abuse of the process of the court meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.
56. I do not consider that the history of this claimant issuing claims and the various comments I have been taken to by other judges as to his motives gives me material to consider that *this particular claim* is vexatious as defined.
57. There are matters of evidence that would need to be considered by a full tribunal hearing, so I do not strike the reasonable adjustments claim out on the basis it is vexatious.

*Issue 4: Deposit Order*

58. I turn, finally, to consider whether the Reasonable adjustments claim, as brought, enjoys something more than “little reasonable prospect of success” as required by r39.
59. I feel it does for the reasons set out in the paragraphs above dealing with the strike out of this claim. I cannot say that there is little reasonable prospect of a tribunal considering that the Respondent’s actions were

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unreasonable, albeit the Claimant may not have cleared this modest threshold by much, and he should not consider that he has any sort of judicial endorsement in this judgment for the strength of his claim, beyond it surpassing the r39 hurdle.

Employment Judge Salter  
Date: 05 August 2021

Judgment & Reasons sent to the parties: 13 August 2021

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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