



EMPLOYMENT TRIBUNALS

Claimant: Mr A Tideswell

Respondent: Wilko Retail Limited

Heard: via Cloud Video Platform **On:** 20 November 2020

Before: Employment Judge Ayre (sitting alone)

Appearances

For the claimant: In person

For the respondent: Ms R Kight, Counsel

JUDGMENT

1. The complaints of discrimination are struck out because they have no reasonable prospect of success.

REASONS

The Issues

1. The issues that fell to be determined at today's hearing were those identified by Employment Judge Ahmed in his note of the Preliminary Hearing on 9 June 2020, namely:-
 - (1) Whether the complaint of marriage and civil partnership discrimination should be struck out as having no reasonable prospect of success pursuant to Rule 37 (1)(a) of the Employment Tribunal Rules of Procedure 2013 ("**the Rules**");
 - (2) Whether the complaint of disability discrimination should be struck out as having no reasonable prospect of success pursuant to Rule 37 (1)(a) of the Rules;
 - (3) Alternatively, whether the claimant should be ordered to pay a financial deposit as a condition of continuing with the aforementioned complaints, pursuant to Rule 39 of the Rules, and if so the amount of that deposit.

The Proceedings

2. The hearing today was observed by Ms F Lowe who is an employee of the respondent. At the beginning of the hearing I informed the parties that Ms Lowe is known to me personally, and that I had worked with her in the past when she was in a previous role.
3. Ms Lowe was attending today purely as an observer and Ms Kight indicated that she would not be giving evidence during the course of the hearing. Ms Lowe remained on mute and with her camera switched off throughout the hearing.
4. I asked both parties whether they had any objection to my hearing the case. Both parties told me that they did not.
5. In light of this, and of the fact that Ms Lowe was not to play any part in the proceedings, but was merely an observer, I decided it was appropriate for me to continue to hear the case.
6. I heard evidence from the claimant's brother, Mr Mark Tideswell, and from the claimant. A witness statement had been provided for Mr Mark Tideswell, but not for the claimant. It was, in my view, in line with the overriding objective to allow the claimant to give evidence without submitting a witness statement, and Ms Kight raised no objection to this.
7. There was also a bundle of documents running to 89 pages which was referred to by both parties. The claimant also submitted copies of his bank statements, and Ms Kight a written skeleton argument.
8. At the start of the hearing Ms Kight submitted, on behalf of the respondent, that the claimant's claims were not entirely clear. Following some discussion with the claimant, and having considered the witness statement of Mr Mark Tideswell, I identified that his claims were as follows:-
 - a. Whether the claimant has been subjected to a detriment contrary to section 47C of the Employment Rights Act 1996;
 - b. Whether the claimant has been discriminated against on the grounds of either his alleged disability - migraines with aura; his wife's disability - Meniere's disease, or a combination of the two; and
 - c. Whether the claimant has been discriminated against on the grounds of his marital status.
9. The acts of alleged discrimination are:-
 - a. The decision of Ms J Wagstaff on 21 October 2019 to give the claimant a level 1 warning
 - b. The decision of Ms M Hudakova on 5 November 2019 to uphold that warning; and
 - c. The decision of Ms J Wagstaff on 17 November 2019 to give the claimant a level 2 warning.

Findings of fact

10. The claimant was employed by the respondent from 3 October 2013 to 4 December 2019 when his employment terminated by reason of his resignation.
11. In 2019 the claimant had a number of absences from work. He was absent on 28 April 2019, 20 May, 22 July, 7 August, 25 August and 16 October. Four of those absences (including one which lasted two days) were time off for dependants to enable the claimant to care for his wife. Two of the absences were due to the claimant's own illness and were recorded as 'neurological conditions.
12. The respondent's Attendance policy contains a number of different stages. Stage 1 applies after the first period of absence in a rolling 12 month period and involves a return to work interview. Stage 2 applies after the second period of absence and can involve a 'Letter of Concern' being issued. Stage 3 applies to the third absence and may involve a Formal Absence Meeting which can result in a First Absence Level sanction. Stage 4 (4 periods of absence) can result in a Second Absence Level sanction, Stage 5 (5 periods of absence) can result in a Final Absence Level sanction and Stage 6 can result in dismissal.
13. After 6 periods of absence, the claimant was invited to a meeting with Ms Wagstaff. The meeting took place on 21 October 2019 and the claimant was accompanied by a representative from the GMB trade union. Despite the fact that the claimant had 6 absences, his absence was treated at stage 3 of the respondent's policy (normally applied for 3 absences) and he received a First Absence Level warning, to remain on his file for 3 months.
14. The claimant appealed against the warning, and was invited to an appeal hearing on 5 November. The decision of the appeal hearer was to uphold the warning.
15. In November 2019 the claimant had a further period of absence covering 2 shifts. The reason for that absence was that the claimant took time off to care for his wife, and in particular to take her to hospital.
16. Following this further period of absence the claimant was invited to another formal absence meeting, this time under stage 4 of the procedure. The outcome of that meeting was that the claimant was given a Second Absence Level sanction, to stay on his file for 6 months.
17. The claimant appealed against the decision to give him a Second Absence Level sanction, and the appeal was heard on 3 December 2019 by Mr Halpin. Mr Halpin decided to uphold the claimant's appeal because of the mitigation provided by the claimant during the appeal hearing, and to revoke the Second Absence Level sanction.
18. On 13 December 2019 the claimant sent a letter of resignation to the respondent, informing the respondent that he had decided to retire with effect from 4 December 2019.

19. The claimant told me during his evidence that he was not the only one who had been given warnings for absence, and that others had also been given warnings.
20. The claimant accepted, in cross examination, that the reason he was given warnings was his absence, and in particular the number of times he was absent.
21. He also acknowledged that he would have received the warnings if he had to take time off to care for a non-married partner who was unwell, and that not all married people have a poorly spouse.
22. The claimant recognised, in his evidence, that he would have received the warnings if he had to take time off to care for someone who was not legally disabled, and that he would also have received the warnings if he himself had not been disabled.
23. The claimant accepted that the warnings were given in accordance with the respondent's policy, but argued that they were unfair, including for the reasons found by the appeal hearer who overturned the Second Absence Level warning.
24. Since leaving the respondent's employment the claimant has not worked. His income is as follows:-
 - a. State pension £378 a week;
 - b. Private pension £597 a month;
 - c. Industrial injury benefit - £278 every 28 days.
25. The claimant lives with his wife. She does not work and receives Employment Support Allowance and, since last month, a Personal Independence Payment of £333 a month. The claimant and his wife live in a council house on which they pay rent of £400 a month. The claimant has no savings or other assets except a car. The claimant's outgoings, including rent, are approximately £1,117 a month.

The Law

Strike-out / deposit order

26. Rule 37(1)(a) of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("**the Rules**") provides that :-

"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."*

27. Rule 39 of the Rules states that :-

“(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.

(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.”

28. In *Anyanwu and anor v South Bank Student Union and anor* 2001 ICR 391 HL the House of Lords highlighted the importance of not striking out discrimination claims except in the ‘most obvious’ of cases, as most discrimination claims are fact-sensitive and require a full consideration of the facts before a clear finding can be made. In *Kwele-Siakam v Co-Operative Group Ltd* EAT 0039/17 the EAT held that tribunals should avoid striking out discrimination claims where the fact of the case, including the reasons for the acts complained of, are in dispute. Where, however, the facts have been established at a preliminary hearing, strike-out may be a tenable option.
29. Tribunals should be particularly slow to strike out claims where the claimant is a litigant in person. In *Mbuisa v Cygnet Healthcare Ltd* EAT 0119/18 the EAT urged tribunals to exercise particular caution if a case is badly pleaded, for example by a litigant in person.
30. The threshold of whether a claim has no reasonable prospects of success is not passed simply due to the likelihood or possibility of a claim failing. In *Balls v Downham Market High School and College* [2011] IRLR 217, Lady Smith held that the test is not whether the claim is likely to fail, nor is it a question of asking whether it is possible that the claim will fail. The test is a high one and the tribunal can only strike out if it considers that the claim has no reasonable prospects of success.
31. The threshold for making a deposit order is lower, namely whether the claim (or a particular aspect of the claim) has ‘little reasonable prospects of success’.

Direct discrimination

32. The definition of direct discrimination is set out in Section 13(1) of the Equality Act 2010 (“**the EqA**”):

‘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.’

33. A complaint of direct discrimination can, therefore, only succeed where the Tribunal finds that the protected characteristic was the reason for the claimant’s less favourable treatment. It does not need to be the person’s own protected characteristic but can be a protected characteristic of someone with whom they are closely associated.

Indirect discrimination

34. Section.19 EqA provides that :

“(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 subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with 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 persons 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.”

Submissions

35. In relation to the claims of direct discrimination, Ms Kight submitted that the reason the claimant was sanctioned was because of the number of absences he had, rather than the reasons for those sanctions. The claimant was, she argued, clear in his evidence that he would still have received the sanctions whether or not he had been married, and whether or not he and/or his wife were disabled. On the claimant's own evidence, therefore, he was not treated less favourably than a comparator who was not disabled, whose wife was not disabled, or who was not married.
36. In relation to the indirect discrimination complaints, Ms Kight submitted that the claimant could only rely upon his own protected characteristics, and not the protected characteristics of his wife, or indeed anyone else.
37. She pointed out that the claimant had accepted in evidence that not all married people have poorly wives, and that there was no evidence, or even an assertion by the claimant that a greater proportion of married people would suffer the disadvantage that he had, namely the absence warnings. In Ms Kight's submission, the disadvantage that the claimant suffered stems from his wife's illness rather than the marriage itself, and the comparator group would be people who are not married.
38. The claimant cannot, in Ms Kight's view, get over the requirement of showing group disadvantage in relation to the complaint of indirect discrimination on the grounds of marital status, and this complaint therefore has no reasonable prospect of success.
39. Ms Kight also submitted that, in relation to the complaint of indirect discrimination based on the claimant's own alleged disability, the comparator

group would be non-disabled people who were put to a disadvantage. The claimant accepted that the reason he suffered the disadvantage was not because of his own medical condition. Only 2 of the absences for which the claimant received a sanction were related to his own medical condition. The claimant would not have received a sanction for 2 absences. The claim of indirect discrimination based on the claimant's own disability was therefore flawed, as the claimant is unable to show disadvantage.

40. For the above reasons, Ms Kight argued that both the direct and indirect discrimination claims have no reasonable prospect of success. In the alternative she argues that they have little reasonable prospect of success.
41. The claimant submitted that he was wrongly sanctioned by the respondent and discriminated against. He referred me in particular to the letter revoking the second warning, and said that, if the respondent had properly taken account of his wife's illness, we wouldn't be here today. If Mr Halpin could take account of the illness, why could Ms Wagstaff not do the same.

Conclusions

42. In reaching my decision, I have taken account of the fact that the complaints in question are ones of discrimination, and that the claimant is a litigant in person. I accept that in such a case the power to strike-out the complaints should be exercised with particular caution.
43. I have taken the claimant's case 'at its highest' and considered prospects of success based on the claimant's evidence. This is not a case in which there are disputed issues of fact which will need to be resolved – the facts are, to a large degree, uncontested.
44. Although this is a case in which the claimant is representing himself, it is not a case that is, in my view, badly pleaded, nor one in which the claimant has struggled to articulate his claim or the legal arguments upon which it is based. He is assisted in presenting his claim by his brother who is a trade union official.

Marital discrimination

45. In order to succeed in a complaint of direct discrimination on the grounds of marital status, the claimant would have to establish that he was less favourably treated than others because he was married.
46. There is, quite simply, no evidence of that. The claimant accepted in his evidence at the preliminary hearing that he would have been disciplined if he weren't married and was caring for an unmarried partner, and that others had also received warnings for absence.
47. Putting the claimant's case at its best therefore, I fail to see how it can succeed. The complaint of direct discrimination on the ground of marital status has, therefore, no reasonable prospect of success.

48. Turning now to the complaint of indirect discrimination on the ground of marital status, the PCP (provision, criterion or practice) relied upon by the claimant is the respondent applying its attendance policy.
49. There is no evidence before me, nor even an assertion by the claimant, that married people were more likely to need time off to care for an unwell spouse than unmarried people would need time off to care for an unwell partner.
50. There is, therefore, taking the claimant's case at its best, no group disadvantage, and for that reason the complaint of indirect discrimination has, in my view, no reasonable prospect of success.

Disability discrimination

51. The claimant told me that others who were not disabled had received warnings for absence. There is therefore no evidence that the claimant was treated less favourable than non-disabled employees of the respondent, even if the claimant is able to establish that he meets the legal test of disability.
52. The claim of direct disability discrimination has, therefore no reasonable prospect of success.
53. In relation to the complaint of indirect disability discrimination, the claimant can only rely upon his own alleged disability and not that of his wife. Again there is no prima facie evidence of group disadvantage not any assertion by the claimant that the PCP caused group disadvantage. In those circumstances, the complaint of indirect disability discrimination also has no reasonable prospect of success.
54. For the above reasons I am of the view that the complaints of discrimination have no reasonable prospect of success and should be struck out.

CASE MANAGEMENT SUMMARY

Final hearing

- (1) All issues in this case, including remedy, will be determined at a final hearing before an Employment Judge sitting with Members at the Employment Tribunals, **The Tribunal Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG**, on **Tuesday 20 July 2021 and Wednesday 21 July 2021** starting at 10 am or as soon as possible afterwards. The parties must attend by 9.30 am on that day. The time estimate for the hearing is 2 days, based on the claimant's intention to give evidence and call 1 further witness and the respondent's to call 2 witnesses.
- (2) The claimant and the respondent **must** inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

The Issues

- (3) The issues between the parties which potentially fall to be determined by the Tribunal are as follows

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Notice of Judicial Mediation

- 1.1 All parties are interested in judicial mediation. If they change their minds, they must inform each other and the tribunal of this as soon as possible.
- 1.2 There will be a Judicial Mediation conducted via private telephone preliminary hearing commencing at **9:45 am on Tuesday 20th October July 2020**. It has been given a time allocation of 1 day.
- 1.3 To take part the parties should dial 0333 300 1440 on time, and when prompted enter access code 512292#.
- 1.4 Please note that if dialling into the telephone hearing from a mobile phone, higher rates apply and the parties may wish to check the call rate with their service provider first.

2. Complaints and issues

- 2.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

3. Statement of remedy / schedule of loss

- 3.1 The claimant must provide to the respondent by **22 January 2021** a document – a “Schedule of Loss” – setting out what remedy is being sought and how much in compensation the tribunal will be asked to award the claimant at the final hearing and how the amounts have been calculated.

4. Documents

- 4.1 On or before **17 November 2020** the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so.

5. Final hearing bundle

5.1 By **12 January 2021**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files (“bundle”), and provide the claimant with a ‘hard’ and an electronic copy of the bundle by the same date. The bundle should only include documents relevant to any disputed issue in the case and should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;
- documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

6. Witness statements

6.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **16 March 2021**. No additional witness evidence will be allowed at the final hearing without the Tribunal’s permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle; contain only evidence relevant to issues in the case. The claimant’s witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated.

7. Final hearing preparation

7.1 **On the working day immediately before the first day of the final hearing** (but not before that day), *by 12 noon*, the following parties must lodge the following with the Tribunal:

- 7.1.1 four copies of the bundle, by the respondent;
- 7.1.2 four hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if

appropriate, in accordance with rule 44), by whichever party is relying on the witness statement in question;

8. Other matters

- 8.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
- 8.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 8.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- 8.4 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.
- 8.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 8.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

Employment Judge Ayre

8 January 2021

