EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101986/2020 & 4101988/2020 (A)

Preliminary Hearing held by telephone on 29 March 2021

Employment Judge A Kemp

Mr S Burnett	**Claimant** **In Person**
Malcolm Allan Limited	**First Respondent** **Represented by:** **Mr R White** **Solicitor**
DC Recruitment Limited **t/a Connect Appointments**	**Second Respondent** **Represented by:** **Mr J Lee** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The second respondent's applications for strike out and a deposit order are refused.

REASONS

Introduction

1. This was a Preliminary Hearing to consider two applications made by the second respondent by email dated 26 November 2020 for strike out, which failing a deposit order. It was conducted by telephone. The claimant appears for himself, and Mr Lee appeared for the second respondent. Mr White appears for the first respondent, but had no direct interest in the applications made.

2. There were two claims taken by the claimant, against the first and second respondents respectively, under the reference numbers set out above. On 12 August 2020 the two claims were ordered by the Tribunal to be heard together.

3. A Preliminary Hearing took place on 27 October 2020 following which orders were issued. The first respondent is Malcolm Allan Ltd, and it is a client of the second respondent DC Recruitment Ltd trading as Connect Appointments, although the body of the Note following that Preliminary Hearing referred to those parties in the opposite order. The claimant provided Further and Better Particulars of his claim by email on 3 November 2020, and he sent a further email doing so on 4 March 2021.

Background

4. No evidence was heard, but the following are the basic facts as understood from the Claim Form, Response Forms, and subsequent correspondence.

5. The claimant was an agency worker registered with the second respondent. He was supplied to the first respondent. The claimant was absent from work on various occasions. A decision was made by the first respondent to end his work assignment due to poor attendance.

6. The claimant says that he has a disability in terms of section 6 of the Equality Act 2010, which is a mental illness namely depression and anxiety. The second respondent denies that, but the first respondent accepts it.

7. The claim against the second respondent is that it was in breach of its duty under sections 20 and 21 of the Equality Act 2010, in particular that the second respondent did not reply to all contact from the claimant, and did not liaise with the first respondent in relation to adjustments that the claimant was seeking from them. The first respondent accepts that it applied certain provisions, criteria or practices (PCPs) to the claimant. The second respondent denies the claims made against it entirely.

8. The claimant is unemployed and in receipt of Universal Credit. His income is about £600 per month, from which he pays rent of £300 per month,

council tax of £25 per month, and payments for gas, electricity and access to the internet, which leaves him with about £80 per month for food and other necessities.

Submission for second respondent

9. In brief summary the submission from Mr Lee for the second respondent was that the Claim against his clients was "quite confused". He referred to the Claim Form in which there is acceptance of contact from the second respondent, and contrasted that with an email from the claimant dated 4 March 2021 when he said that there had been no reply. The claimant had been absent from work from 9 October 2019 to 10 December 2019 for a variety of different reasons. There had been a Preliminary Hearing at which the claimant had been ordered to provide Further and Better Particulars for the claim against the second respondent, and he had sent them by email on 3 November 2020. He had set out a number of matters that had happened including an accident in 2011 and the claimant's partner being admitted to hospital. The claimant said in that message that there was no way that he could return to work.

10. Mr Lee argued that there was a contradiction between the claims of no contact, and the Claim Form, and that there was no reasonable prospect of the claim succeeding as any increased contact from the second respondent would not have made any difference. In reference to the overriding objective he noted that the Final Hearing would require to determine the issue of whether or not the claimant was disabled if that hearing included the second respondent, but not if the present application was granted, saving about two days of time, and therefore cost.

11. His alternative argument was that there were little reasonable prospects of success and that there should be a deposit order. At its highest the claim was one of the second respondent having someone on site, which was not, for the second respondent, commercially realistic. The claimant remained on the books of the second respondent, and would be allocated work when he was fit to do so.

12. In reply to comments from the claimant, referred to below, Mr Lee stated that a deposit order could be granted even if someone was on benefits.

Claimant's submission

13. The claimant explained that he was somewhat confused by the process, and that he had tried without success to secure legal representation. His basic argument was that he had tried to seek help from the first respondent, and then when it was not forthcoming from the second respondent. Had the second respondent responded properly to his attempts at contact and engaged with him, and then with first respondent, he may have been able to return to work with adjustments made by the first respondent to allow him to do so. The second respondent had told him that it would visit the premises, and he waited for that but they did not come. On his last day at work he was told that he had to think of the work, rather than his mental health. He thought that both respondents had a responsibility. He set out his financial position, recorded above.

First respondent

14. The first respondent quite properly did not have a submission to make.

Law

15. A Tribunal is required to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

> "2 **Overriding objective**
>
> 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."

(i) Strike out

16. Rule 37 provides as follows:

"**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

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious……

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

17. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In ***Hassan*** Lady Wise stated that the second stage is important as it is 'a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit' (paragraph 19).

18. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In ***Anyanwu v South Bank Students' Union [2001] IRLR 305***, a race discrimination case heard in the House of Lords, Lord Steyn stated at paragraph 24:

> "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

19. Lord Hope of Craighead stated at paragraph 37:

> " … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

20. Those comments have been held to apply equally to other similar claims, such as to public interest disclosure claims in ***Ezsias v North Glamorgan NHS Trust [2007] IRLR 603***. The Court of Appeal there considered that such cases ought not, other than in exceptional circumstances, to be struck out on the ground that they have no reasonable prospect of success without hearing evidence and considering them on their merits. The following remarks were made at paragraph 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.”

21. In ***Tayside Public Transport Co Ltd (trading as Travel Dundee) v Reilly [2012] IRLR 755***, the following summary was given at paragraph 30:

> "Counsel are agreed that the power conferred by rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian ***(Balls v Downham Market High School and College [2011] IRLR 217***, para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts (***ED & F Man Liquid Products Ltd v Patel [2003] CP Rep 51*****,** Potter LJ, at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (***ED & F Man … ; Ezsias …).*** But in the normal case where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out (***Ezsias*** … Maurice Kay LJ, at para 29)."

22. In ***Ukegheson v Haringey London Borough Council [2015] ICR 1285***, it was clarified that there are no formal categories where striking out is not permitted at all. It is therefore competent to strike out a case such as the present, although in that case the Tribunal's striking out of discrimination claims was reversed on appeal.

23. That it is competent to strike out a discrimination claim was made clear also in ***Ahir v British Airways plc [2017] EWCA Civ 1392***, in which Lord Justice Elias stated that

> "Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been

heard and explored, perhaps particularly in a discrimination context."

24. In ***Mechkarov v Citi Bank NA [2016] ICR 1121*** the EAT summarised the law as follows:

> "(a) only in the clearest case should a discrimination claim be struck out;
> (b) where there were core issues of fact that turned on oral evidence, they should not be decided without hearing oral evidence;
> (c) the claimant's case must ordinarily be taken at its highest;
> (d) if the claimant's case was 'conclusively disproved by' or was 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it could be struck out;
> (e) a tribunal should not conduct an impromptu mini-trial of oral evidence to resolve core disputed facts."

(ii) Deposit

25. Rule 39 provides as follows:

> "39 **Deposit orders**
> 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 prospects 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….."

26. The EAT has considered the issue of deposit orders in ***Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14,*** and ***Tree v South East Coastal Services Ambulance NHS Trust UKEAT/0043/17***. In the latter case the EAT summarised the law as follows:

> "[19] This potential outcome led Simler J, in ***Hemdan v Ishmail [2017] ICR 486 EAT***, to characterise a Deposit Order as being 'rather like a sword of Damocles hanging over the paying party'

(para 10). She then went on to observe that 'Such orders have the potential to restrict rights of access to a fair trial' (para 16). See, to similar effect, ***Sharma v New College Nottingham UKEAT/0287/11*** para 21, where The Honourable Mr Justice Wilkie referred to a Deposit Order being 'potentially fatal' and thus comparable to a Strike-out Order.

[20] Where there is, thus, a risk that the making of a Deposit Order will result in the striking out of a claim, I can see that similar considerations will arise in the ET's exercise of its judicial discretion as for the making of a Strike-out Order under r 37(1), specifically, as to whether such an Order should be made given the factual disputes arising on the claim. The particular risks that can arise in this regard have been the subject of considerable appellate guidance in respect of discrimination claims, albeit in strike-out cases but potentially of relevance in respect of Deposit Orders for the reasons I have already referenced; see the well-known injunctions against the making out of Strike-out Orders in discrimination cases, as laid down, for example, in ***Anyanwu v South Bank Students' Union [2001] IRLR 305 HL*** per Lord Steyn at para 24 and per Lord Hope at para 37.

[21] In making these points, however, I bear in mind - as will an ET exercising its discretion in this regard - that the potential risk of a Deposit Order resulting in the summary disposal of a claim should be mitigated by the express requirement - see r 39(2) - that the ET 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'. An ET will, thus, need to show that it has taken into account the party's ability to pay and a Deposit Order should not be used as a backdoor means of striking out a claim, so as to prevent the party in question seeking justice at all; see ***Hemdan*** at para 11.

[22] Although an ET will thus wish to proceed with caution before making a Deposit Order, it can be a legitimate course where it enables the ET to discourage the pursuit of claims identified as having little reasonable prospect of success at an early stage, thus

> avoiding unnecessary wasted time and resource on the part of the parties and, of course, by the ET itself.
>
> [23] Moreover, the broader scope for a Deposit Order - as compared to the striking out of a claim - gives the ET a wide discretion not restricted to considering purely legal questions: it is entitled to have regard to the likelihood of the party establishing the facts essential to their claim, not just the legal argument that would need to underpin it; see ***Wright*** at para 34."

Discussion

(i) Strike out

27. The test for strike out is a high one. It is competent to do so, but that is permissible in only the clearest cases where the claim is of discrimination, as the present one is. Whilst the second respondent does not accept that the claimant is a disabled person the first respondent does, and from what is said on the claimant's behalf it appears that he has reasonable prospects of establishing that he is a disabled person under the terms of section 6 and Schedule 1 of the Act. It will of course be a matter for evidence.

28. There were two essential grounds for strike out argued by the second respondent. The first was on the basis of what were said to be contradictions between his Claim Form, which accepts that there was contact from the second respondent, and the later emails providing further particulars which alleged that there was none. At one level that is true, but reading the documentation fully, and giving allowance for the fact that the claimant is not legally qualified and may be a disabled person, that inconsistency is arguably at least of limited effect. Firstly in the Claim Form the claimant does refer to some messages being unanswered. Secondly, when he refers to answers from the second respondent, the point he may have been seeking to make in his messages was not, it appears from his pleadings, actually answered. That is shown most acutely from the final communication, when if his detail is accurate he was in effect advised to return to work, and to disregard his disability (if he has that). There is a question therefore as to exactly what was said by the parties, and in what

circumstances. The extent to which there is inconsistency may be weighed in the balance when assessing credibility and reliability, but it is not apparent from the documentation that the claimant cannot succeed in his argument.

29. Against that background it did not appear to me that this aspect of the submission by the respondent met the test to which I have referred. It is part of a core body of disputed fact, which can only properly be determined after hearing the evidence. The terms of the pleadings, and of the documentation on which the respondent relied, do not in my judgment meet the test as explained in ***Mechkarov*** of where the claim was "conclusively disproved by" or was "totally and inexplicably inconsistent" with undisputed contemporaneous documents.

30. I also took into account in my assessment of the matters above that the claim was one of discrimination in which there is a strong public interest in being determined following evidence.

31. The second essential argument for the second respondent was that the claimant had no realistic prospect of success in his claim under sections 20 and 21 of the 2010 Act. It was suggested that given the background circumstances that the claimant referred to in his Further and Better Particulars nothing that the second respondent could have done would have made any difference. The claimant argued in reply that if the second respondent had intervened with the first respondent he may have been able to return to work. As I read his Claim Form and Further and Better Particulars, he argues that he should have been removed from a wrapping machine and given other duties, moved to a different shift rota arrangement, and allowed to start later in the day. These are matters he alleges he asked the first respondent about, and when they did not agree to that he asked the second respondent to intervene, either by coming to the premises on a visit they had told him would take place but did not, on his argument, and by text messages and phone calls which did not bear fruit. He argues that if they had done so, and then spoken with the first respondent, the changes he was seeking which he argues are reasonable steps would then have allowed him to return, his absences would have

been less extensive, and he would have remained working at the first respondent.

32. It is certainly true that the case against the second respondent is not set out as clearly as it might be, and the PCP applied by the second respondent does not appear to be specified, but the claimant is a party litigant, and he alleges that he is a disabled person. It may be necessary to provide him with a measure of assistance in formulating the claim – as discussed in ***Cole v Elders Voice UKEAT0231/19***. It may be, by way of illustration, that a PCP of requiring the claimant to attend for work at the first respondent was applied to him by the second respondent, and that that caused him as a disabled person (if that is established) a substantial disadvantage, and that a reasonable step to avoid that disadvantage was for the second respondent to engage in discussions with the first respondent as to adjustments he says were required by the first respondent so as to allow him to return to work. It is possible that the claimant can argue that had those discussions taken place they would have succeeded. The founding elements of such an argument do appear, I consider, from the Claim Form and Further and Better Particulars.

33. In each of the aspects referred to in the second respondent's submission there is, I consider, a core body of disputed facts. The disputed facts may include what inferences to draw from primary facts established. The height of the hurdle that the respondent must overcome was made clear in the case of ***Ukegheson***, in which the EAT made the following comments on the claims there made of race and sex discrimination which the Tribunal had struck out:

> "This seems to me to be something of a long shot. But I cannot say that it is completely out of the question and therefore I cannot say that, on the basis on which the judge approached it, or in any event, the decision is plainly and unarguably right. It might be, but it may not be. It needs the evidence to be heard to evaluate the facts."

34. So far as any issue of specification of the claim is concerned, particularly the PCP relied on and what effect the adjustments sought would have had, and although no direct argument on that was made, I do not consider in

any event that it is proportionate to strike out the claim. I concluded that the second respondent can seek an order for that if thought to be necessary.

35. I considered also in the context of proportionality the argument that there would be a saving of time and therefore cost if the claim against the second respondent were to be struck out. That is a part of the overriding objective, and is the kind of consideration that can also arise at the second stage of the determination. In this case however I do not consider that it is appropriate to consider such a saving in time in the manner proposed by the second respondent. The second respondent is perfectly entitled to dispute the fact of the claimant being a disabled person under the 2010 Act. But that is its choice, and it is not I consider in the interests of justice for that argument, which may or may not be upheld after the evidence is heard, to be used against the claimant in consideration of a strike out of his claim against the second respondent. That is I consider a conclusion fortified by firstly the acceptance by the first respondent that the claimant is a disabled person, and secondly by the reasonable prospect that the claimant appears, from the information presently available, to have in that regard. It is an issue that requires evidence as the second respondent does not accept it. No submission was made that the claimant has no reasonable prospects of success in establishing that he is a disabled person.

36. In summary, I did not consider that the respondent had met the high threshold, set out in the authorities, to strike out the claim and that application must be refused.

(ii) Deposit order

37. I then considered whether there ought to be a deposit ordered. The test for that is a lower one than for strike out, requiring “little” rather than “no” reasonable prospects of success, and the considerations for it are therefore not the same, all as set out in the authority quoted above. I have concluded that in all the circumstances it would not be appropriate to order the claimant to make payment of a deposit. That is firstly because I cannot conclude from the matters placed before me that the claimant has little

reasonable prospects of success. The decision must be made following evidence on disputed matters of fact. This is far from saying that the claimant does have reasonable prospects of success, but I consider that the second respondent has not shown that the statutory test in this regard is met.

38. In any event, even if there were little reasonable prospects of success I require to take account of the potential effect of a deposit order given the financial circumstances of the claimant. Whilst it is correct, as Mr Lee submitted, that simply because a claimant is on Universal Credit does not mean that a deposit order cannot be granted, as the EAT has set out granting a deposit order may in some circumstances have a similar effect to a strike out. The claimant has about £80 per month for necessities. If I were to make an order for a deposit the claimant may well simply not have the funds to make payment, and his claim against the second respondent would then not be heard.

39. I have concluded that this is not a case in which I can determine that there are little reasonable prospects of success under the terms of the Rule, and that in any event it is not in accordance with the overriding objective to grant a deposit order. I must therefore refuse the application under Rule 39.

Conclusion

40. I have refused the applications for strike out and a deposit order.

41. I have referred in this Judgment to a number of authorities. No authorities were placed before me in submission. In the event that the second respondent considers that it has suffered prejudice by my doing so, and wishes to make submissions in relation to those authorities, it may do so by an application for reconsideration under Rules 70 – 72, although it is not encouraged to do so by referring to that matter.

Further Procedure

42. The parties were agreed that it would be appropriate to fix a Preliminary Hearing for case management, to be held by telephone, after this

Judgment is issued. Although a four day Final Hearing was ordered at the last Preliminary Hearing, it has not yet been fixed I understand. Arrangements for that Final Hearing, including dates for it, can be discussed at that Preliminary Hearing. Notice of the same shall be given to the parties separately and in due course.

Employment Judge: **A Kemp**
Date of Judgment: **31 March 2021**
Entered in register: **11 May 2021**
and copied to parties