EMPLOYMENT TRIBUNALS

Claimant: **Mr A Shafqat**

Respondents: **(1) BGC Technology International Ltd**
(2) HW Technology Solutions Ltd

PRELIMINARY HEARING (OPEN)

Heard at: **London South by CVP**
On: **26 November 2021**

Before: **Employment Judge Braganza**

Appearances

For the Claimant:	In person
For the First Respondent:	Mr Purnell, Counsel
For the Second Respondent:	Mr Augustine, recruitment agent at Second Respondent

JUDGMENT

It is the judgment of the Tribunal that:-

(1) The First Respondent's application to strike out the Claimant's claim against it is dismissed. The Tribunal is not satisfied that the claim against the First Respondent has no reasonable prospect of success.

(2) The claim of direct discrimination against the First Respondent has little reasonable prospect of success. The claim is that the Claimant was subjected to direct discrimination because of his disability by the First Respondent failing to arrange a technical test at home and conduct an interview with him at a café or its office in Canary Wharf with step free access. The Claimant is ORDERED to

pay a deposit of £750 no later than 21 days from the date this Order is sent as a condition of being permitted to continue to advance this claim. The Tribunal has had regard to the information available as to the Claimant's ability to comply with the Order in determining the amount of the deposit.

REASONS

1. This was a remote hearing by CVP which was not objected to by the parties. A face to face hearing was not held because it was not currently practicable. The relevant matters could be determined in a remote hearing.

2. The purpose of the hearing was to deal with the First Respondent's application to strike out the Claimant's claim against it, alternatively, for a deposit order against the Claimant. I gave my decision and reasons at the end of the hearing. The Respondent requested written reasons which are set out below.

Documents in respect of the strike out application

3. I was provided with a bundle of 128 pages, a skeleton argument and the cases of *Ahir v British Airways* [2017] EWCA 1392, *Ezias v North Glamorgan* [2007] ICR 1126 and *Van Rensburg v The Royal Borough of Kingston-Upon-Thames & Others* UKEAT/0096/07 by the First Respondent. The Claimant provided a bundle of 27 pages and also a skeleton argument. There was nothing from the Second Respondent. I confirmed that everyone had all the above documents.

The Claim

4. In summary, by a claim form presented on 25 September 2019 the Claimant brought a claim against the First Respondent for disability discrimination. The Claimant, who is disabled with mobility difficulties, claimed that when he attended the First Respondent's premises in Woking for an interview on 29 July 2019, there was no step free access. Two of the First Respondent's employees explained to the Claimant that this was an old building without step free access, for which they apologised. They said they would be able to accommodate the Claimant at another office at Canary Wharf, a café or other location with accessibility. The Claimant recorded this conversation.

5. The Claimant claimed that the next day in a telephone call with a recruitment consultant of the Second Respondent, he was asked about his disability and whether it was long-term or temporary. He said it was long-term and claims that he was told by the Second Respondent that the First Respondent would not be able to consider him for the role at the Woking office and if there were a role available at any other location, he may contact him. The Claimant claims he asked this to be confirmed in an email and received no further response.

6. The First Respondent disputed the claim. It asserted that it offered to rearrange the interview to a location with step-free access. It emailed the Second Respondent, who said that the Woking office would not work for the Claimant,

which the First Respondent took to mean that the Claimant was no longer interested in the role.

7. On 15 August 2019 the First Respondent received a letter from the Claimant that he had been discriminated against and was seeking compensation of £100,000. The First Respondent replied agreeing to interview the Claimant at its offices in Canary Wharf and assured the Claimant he suffered no disadvantage with respect to his application. On 27 August 2019 the Claimant replied that he had secured another job. The Second Respondent also disputes the claim.

Clarification of the issues

8. At the outset of the hearing the Claimant confirmed that he no longer brought a claim of direct discrimination or a breach of the duty to make reasonable adjustment against the Respondents in respect of the interview on 29 July 2019. He accepted that his disability was not known to the Respondents at that time. The Respondents did not object to the Claimant amending his claims in this way.

9. The Claimant confirmed that the remaining claims were as set out in his skeleton argument of 25 November 2021. These were:

    9.1 That he had been subjected to direct discrimination because of his disability by the Second Respondent in the telephone call on 30 July 2019 when he was asked about his disability and informed that the First Respondent would not consider him for the role.

    9.2 That he had been subjected to direct discrimination because of his disability by the First Respondent by it failing to arrange a technical test at home and failing to conduct an interview with him at a café or its office in Canary Wharf with step free accessibility.

Procedural history

10. On 19 March 2020 the First Respondent applied for a deposit order against the Claimant. On 23 March 2020 at a telephone case management discussion Employment Judge Truscott QC directed that there should be a further open Preliminary Hearing to consider matters, including the application to strike out.

11. On 17 June 2020 the First Respondent made an application for an unless order based on the Claimant's failure to provide details of his claim and medical records. On 27 and 28 June 2020 the Claimant replied. On 15 July 2020 the application for the unless order was therefore refused.

12. On 24 August 2020 at a Preliminary Hearing before Employment Judge Khalil, the First Respondent accepted that the Claimant was a qualifying disabled person within the meaning of the Equality Act 2010. The Tribunal identified the need to add a third party, now the Second Respondent, because of the conversation between the Second Respondent recruitment agency and the Claimant and/or between the agency and the First Respondent. The Tribunal therefore considered it could not determine the application to strike out or the deposit order. An open

preliminary hearing was listed to take place on the 13 November 2020. That hearing was cancelled and a further hearing listed, which was postponed 11 November 2021. Due to insufficient time remaining after the issues had been clarified at the hearing on 11 November 2021, the hearing was adjourned for the First Respondent's applications to be decided at a further Preliminary Hearing on 26 November 2021.

The First Respondent's application

13. On behalf of the First Respondent, Mr Purnell relied on his skeleton argument and specifically paragraphs 13-16 in the case of *Ahir* which warn against employment tribunals being deterred from striking out claims, including discrimination claims, which involve a dispute of fact if there are no reasonable prospects of success. He also referred to paragraph 19 of *Ahir* which set out when there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on the claimant to say what reason he has to suppose that things are not what they seem, albeit that they are not yet in a position to prove it.

14. He relied on the case of *Van Rensburg* (paragraph 25) where the court was acting on the assumption that the power to order a deposit could in principle be exercised where the tribunal had doubts about the inherent likelihood of the claim succeeding. He referred to *Ezias* demonstrating that disputes over matters of fact, including a provisional assessment of credibility, can in an exceptional case be taken into consideration even when a strike out is considered.

15. There were three key emails at page 28 of the bundle that the First Respondent relied on:

    15.1 The first was on 29 July 2019 from the First Respondent to the Second Respondent explaining that the building did not have step free access and that if the Claimant wanted to rearrange, the interview and technical test could be held in one of the London offices which had a lift.

    15.2 The second, about half an hour later on the same day, was from Mr Augustine of the Second Respondent to the First Respondent saying that he was "not sure the Woking office would work for him" (the Claimant).

    15.3 The Third email on 15 August 2019 was an internal email of the First Respondent referring to the Claimant's letter alleging discrimination, that it appeared that Mr Augustine did not "handle the situation well" and that the First Respondent offered to rearrange the interview and it appeared the Claimant tried to take this up but that Mr Augustine did not pass it on. The First Respondent suggested arranging the interview previously offered.

16. The First Respondent argued that the emails demonstrated that it was trying to rearrange the interview. There was no evidence of the First Respondent instructing the Second Respondent that it would not consider the Claimant for the role. Mr Purnell also relied on the Claimant covertly recording his first interaction with the First Respondent on 29 July 2019 and demanding £100,000 in

compensation. The dispute was between the Claimant and the Second Respondent. He invited the Tribunal to strike out the claim against the First Respondent and, alternatively, to make a deposit order in the maximum amount.

The Claimant's reply

17. The Claimant resisted the applications. He said that the conversation about his disability had taken place with Mr Braxton of the Second Respondent on 30 July 2019 and that he would not lie about it. Mr Braxton specifically asked him whether his disability was long or short term and told him he would not work in the Woking office. The Claimant had repeatedly followed this up on LinkedIn and referred to the emails in the bundle. As to the recording, he had been subject to disability discrimination on many past occasions and so he had made a recording. He referred to a link of a case reported in the news of a discrimination case. He explained that he had the phone in his hand for the recording and wanted to check as many companies say something discriminatory. He rejected the point that this was premeditation on his part in bringing his claim.

18. The Claimant referred to the email at page 27 of his bundle when he asked Mr Braxton to confirm by email what he said on the phone to the Claimant and at page 26 where Mr Braxton says he is waiting to hear back from the First Respondent with regards to the confirmation.

19. In answer to the question from the Tribunal as to what he relied on to claim that he had been discriminated against he explained that the First Respondent did not follow up any further interview with him after his conversation with the Second Respondent and also on the interpretation by Mr Jones of the First Respondent that the Claimant had had a change of heart. This was a reference to Mr Augustine sending an email to Mr Jones at 10:29am on 30 July 2019 (page 28 of the Respondent's bundle) that he was not sure the Woking office would work for the Claimant and Mr Jones interpreting this as meaning the Claimant had had a change of heart in wanting the job.

20. The Claimant then also gave evidence as to his means. He explained he was employed as a senior software engineer and gave details of his income, outgoings and savings.

21. In reply, the Second Respondent highlighted that at its highest the Claimant relied on speculation and his application not being followed up. This was a matter for the Second Respondent as the recruitment agents.

The law

22. Rule 37(1)(a) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provides that a claim may be struck out if it has no reasonable prospect of success.

23. The central question is whether the claims have a realistic as opposed to a fanciful prospect of success *Eszias v North Glamorgan NHS Trust [2007]*. Even discrimination claims can and should be struck out where the allegations are

implausible and there are no facts indicative of unlawful discrimination. A case that otherwise has no reasonable prospect of success cannot be saved from being struck out on the basis that "something may turn up" *Patel v Lloyds Pharmacy Ltd* [2013] UKEAT/0418/12.

24. In *Anyanwu v South Bank Student Union* [2001] UKHL 14, [2001] ICR cited in *Ahir* Lord Steyn at paragraph 24 set out

> '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.'

25. Rule 39 deals with 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.
> (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
> (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
> (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
> (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.
> (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

26. In considering whether to make a deposit order, the Tribunal is entitled to have regard to the likelihood of a party being able to establish facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. In *Van Rensburg v The Royal Borough of Kingston Upon Thames* [2007] UKEAT/0096/07, Elias P held:

> "…the test of little prospect of success…is plainly not as rigorous as the test that the claim has no reasonable prospect of success… It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response"*;*

27. In *Hemdan v Ishmail* [2017] IRLR 228, Mrs Justice Simler, as she then was, described the purpose of a deposit order as being:

> *"…*to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails*."*

Conclusions

28. I am only concerned with the Claimant's allegation against the First Respondent. That is that the First Respondent directly discriminated against the Claimant because of his disability. It treated the Claimant less favourably because of his disability in failing to arrange a technical test for him at home and in failing to arrange an interview at a step free location.

29. I have considered carefully the guidance in *Anyanwu* and *Ahir* and the guidance in the other cases set out above. There is no dispute on the facts as to what happened at the interview on 29 July 2019.

30. The remaining claim is concerned with what happened afterwards. I have considered whether there are no reasonable prospects of success and cannot say that there are no reasonable prospects. I have had regard to the emails taken to me by the First Respondent and by the Claimant. Whilst I have serious reservations as to the prospects of success on the allegation against the First Respondent, I remind myself that discrimination cases are fact sensitive and that in this case there will be oral evidence addressing the emails that followed after the interview on 29 July 2019, surrounding the telephone call between the Claimant and the Second Respondent and as between the First and Second Respondent that the Claimant at this stage will not be able to question.

31. I have also had regard to the timing and the words of the email from Mr Augustine on 29 July 2019 to the First Respondent and the conversation that the Claimant says he had with Mr Braxton on 30 July 2019. The threshold to strike out a claim is a high one and in my view without hearing oral evidence of the surrounding events on and after 30 July 2019 that threshold is not met.

32. I have decided, however, that this is a claim where a deposit order should be made. That is in light of the emails as referred to me by the First Respondent and because I conclude that there is little reasonable prospect of success.

33. I have taken into account the details provided to me by the Claimant, his income and outgoings and savings and assessed that in all the circumstances, the sum of £750 would be appropriate for the deposit order. The Claimant must pay £750 to proceed with the claim from the date this Order is sent. I ordered at the hearing that this was to be paid within 14 days. As the time for the payment runs from the date the Order is sent, together with the guidance and instructions, I have varied the time for payment of the deposit to 21 days from when this Order is sent.

Employment Judge Braganza
Date: 7 December 2021

NOTE ACCOMPANYING DEPOSIT ORDER
Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a "deposit order") requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.

2. If that party persists in advancing that/those allegation(s) or argument(s), a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the allegation(s) or argument(s) to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.

5. If the deposit is not paid within that time, the allegation(s) or argument(s) to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation(s) or argument(s) against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.

8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.

9. Payment must be made to the address on the tear-off slip below.

10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.

12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 916 5015. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

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DEPOSIT ORDER

To: **HMCTS Finance Centre**
The Law Library
Law Courts
Small Street
Bristol
BS1 1DA

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order