



EMPLOYMENT TRIBUNALS

Claimant: The Estate of Keith Anderson (deceased)

Respondents: 1. Wirral University Teaching Hospital NHS Foundation Trust
2. NHS Business Services Authority

Heard at: Liverpool (by CVP)

On: 29 November 2021

Before: Employment Judge Robinson

REPRESENTATION:

Claimant: Mr Budworth, Counsel

1st Respondent: Mr Smith, Solicitor

2nd Respondent: Mr Crammond, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. That the application by both respondents to have the case struck out as having no reasonable prospect of success fails and is dismissed.
2. That the application by both respondents to have a deposit order made because the claim has little reasonable prospect of success fails and is dismissed.
3. The claimant may therefore pursue claims on behalf of Mr Anderson's estate relating to claims under the Equality Act 2010 for breach of Section 15 of that Act, discrimination arising from disability and for breach of the duty to make reasonable adjustments (Sections 20 and 21 of the Act).
4. The claimant has standing to bring her claims on behalf of Mr Anderson's estate with regard to the claims set out in paragraph 3 above.
5. Orders for the future good conduct of these proceedings to the final hearing in October 2022 have been made and are set out in a separate document.

REASONS

1. The hearing today was arranged to deal with the issue as to whether the claim or any part of it should be struck out on the ground that it had no reasonable prospect of success or that a deposit or deposits should be paid on the ground that the claim and allegations had little reasonable prospects of success, to determine whether the claimant has legal standing to bring any part of the claim, to determine, on the assumption that there was discrimination arising from disability, whether such discrimination contravened the non-discrimination rule in Section 61 of the Equality Act 2010, to determine the same question, on the assumption that the alleged discriminatory failing to make adjustments occurred, and did such discrimination contravene the non-discrimination rule in Section 61 of the Equality Act 2010 and to make further case management orders if required.

The basic facts

2. I set out below facts which are not disputed as far as this Tribunal is aware as between all three parties.

3. The claim is brought by Mr Anderson's (the deceased) widow and executor namely Miss Saminaden (The executor).

4. The deceased had 34 years' service with the first respondent and was diagnosed with terminal cancer in October 2018 and died on 4 March 2019.

5. The parties agree that is the relevant time the claimant was disabled although the issue of knowledge of disability is something which may have to be dealt with at the final hearing with regard to the second respondent, which had no employment relationship with the claimant.

6. The claimant was told in January 2019 that he would be given ill health retirement and consequently he and his legal advisers feel that the effective date of termination is the 25 January 2019.

7. The executor has already given evidence at a previous hearing that the deceased received a letter confirming his last day of employment as 25 January 2019 but that he received a letter from the second respondents, sent on 18 February 2019, which informed him that his retirement date had been pushed back to 24 March 2019 because he had untaken annual leave which both respondents now say had to be added to his days of service. The second respondent are of the view that the effective date of termination is 24 March 2019. The first respondent now accept that as the effective date of termination, but the claimant's widow does not.

8. Consequently, when the second respondent added untaken holiday as a carry over the deceased was deemed to still be in work at the point that he died on 4 March 2019 and therefore was only entitled to death in service benefit.

9. That decision left the executor and the estate with an alleged £125,000 shortfall.

10. It is that issue which persuaded the executor, after taking legal advice, to issue these proceedings.

11. At no time was the deceased an employee of the second respondent which is a body set up to administer the NHS pension scheme in England and Wales.

12. The pension regulations under which the second respondent work are the 1995 regulations referred to in the pleadings (the regulations). the specific regulation which is in issue here is Regulation C2 (5).

13. The claimant was paid monies with regard to unpaid leave that had accrued. The second respondent will say that the deceased's pensionable employment was extended by the number of days he was paid in lieu of accrued, but untaken, leave. The second respondents suggest that that is an incontrovertible fact and cannot be in dispute. Because of that extension the claimant died during his pensionable employment for the purposes of the regulations.

Potential disputes and triable issues

14. Whether the executor has standing to issue these proceedings and proceed with them?

15. What were the roles and powers of the first and second respondent at any given point and was the first respondent, as it pleads, lawfully able to bring the deceased's employment to an end but not able to grant the deceased IHR payments? Alternatively, was the second respondent, as it pleads, not able to end the deceased's employment but was able to determine the date on which pensionable service ended in accordance with the 1995 pension scheme rules?

16. Whether IHR payments would be made and if so from what date?

17. Was the second respondent forced to impose the carry over days to length of service and have no discretion to disapply that rule?

18. What cause of action was vested in the deceased at the time of his death?

19. I am not deciding whether the statutory authority defence of the second respondent is made out. Whether that defence is made out will be determined at the final hearing because these claims have not been struck out.

20. Can the deceased's widow proceed against both respondents for claims of breach of the duty to make reasonable adjustments and a section 15 of the Equality Act 2010 (the Act) claim?

21. Can there be a provision criteria or practice which is a one-off event. For example, the decision by either respondent or both to carry over untaken holiday thus extending the deceased's employment and taking him out of the IHR scheme. (The carryover issue).

22. Did the carryover issue put the claimant at a substantial disadvantage when a comparison is made with a non-disabled person who for whatever reason might

receive IHR but is not deemed to be disabled. Mr Budworth gave the example of a drug user or alcoholic who would not be deemed to be disabled but might have available to him or her an IHR retirement pension.

23. With regard to a Section 20 and 21 claims under the Act, is it right that the deceased should be treated more favourably by having the respondents take additional steps to which a non-disabled worker is not entitled?

24. With regard to the Section 15 of the Act claim did the carryover issue represent unfavourable treatment which occurred because of something arising in consequence of the claimant's disability?

25. With regard to the standing issue does the deceased's executor have standing to pursue this litigation to the final hearing?

26. In that regard does Section 1 of the Law Reform (Miscellaneous Provisions) Act 1934 allow a claim in the Employment Tribunal relating to discrimination and which constitutes a cause of action and consequently allows the executor to pursue a claim. On the facts can the executor stand in the shoes of the deceased in this litigation and therefore was the cause of action vested in the deceased when he died?

27. Can that last question be dealt with without hearing evidence at a final hearing and do both respondents or one respondent have to deal with that issue when neither respondent was seised of the decision to carry over holidays at the point when the IHR form was completed and sent to the second respondent by the first respondent on 16 January 2019?

28. Whether either the first or second respondent had a discretion to override the regulations relating to the first respondent's pension scheme?

29. What were the roles and powers of the first and second respondent at any given point and was the first respondent, as it pleads, lawfully able to bring the deceased's employment to an end but not able to grant the deceased IHR payments. Alternatively, was the second respondent, as it pleads, not able to end the deceased's employment but was able to determine the date on which pensionable service ended in accordance with the 1995 pension scheme rules?

30. Whether IHR payments would be made and if so from what date?

31. Was the second respondent forced to consider the carry over days due to length of service and have no ability to disapply that rule?

32. What cause of action was vested in the deceased at the time of his death?

33. I am not deciding here whether the statutory authority defence of the second respondent is made out. Whether that defence is made out will be determined at the final hearing because these claims have not been struck out.

The principles I have applied

34. Rule 37 of the 2013 rules provides that at any stage 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 the grounds that it is scandalous vexatious or has no reasonable prospect of success and with regard to Rule 39, where at a preliminary hearing 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 to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.

35. The orthodox position is set out in the case of Anyanwu versus South Bank Student Union 2001 ICR391 Per Lord Steyn. 'The 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'.' Lord Hope went on to say that he would be reluctant to strike out (such) claims (because) discrimination issues of the kind which have been raised in this case should, as a general rule, be decided only after the hearing of evidence. He went on to say that the risk of injustice is minimised if the answers to these questions are waited until all the facts are out. 'The Tribunal can then base its decision on its findings of fact rather than on an assumption as to what the claimant may be able to establish if given an opportunity to lead evidence.'

36. That has been the position for some time although I accept that there has been a slight shift in emphasis recently when in 2015 the then president of the EAT in Chandhok v Tirkey 2015ICR 527 stated that 'the decided cases stop short of a blanket ban on strike out applications succeeding in claims for discrimination.' He went on to say that there may be still occasions when a claim can properly be struck out.

37. Consequently, Tribunals can, even where there is a dispute of fact, if there is no reasonable prospect of the facts necessary to liability being established still strike out.

38. In the February 2021 decision of the EAT in London Fire Commissioners and others v Sargeant, it was held that where the rules in a pension scheme had a discriminatory impact, authorities could not use the fact that those rules were set out in a statutory instrument as a defence. Section 61 of the Act prohibits discriminatory treatment and takes priority over a scheme's rules that required an authority to act in a seemingly discriminatory way. In short, pension Trustees must not contravene the Equality Act 2010.

Decision

39. With regard to the essence of this case factual issues will have to be considered and that can only be done once disclosure has taken place and the parties have considered the evidence contained in the witness statements and that evidence tested in cross examination. In particular, the claimant's legal representatives are keen to know what interaction there was between the first and second respondents when dealing with the issue as to whether to apply the rigorous rule set out in regulation C2(5) and what potential latitude there was to either respondent to disapply the strictures of that rule.

40. The non-discrimination rule in section 61 of the Act will have to be considered in the light of the evidence and, in particular, whether simply following the rules of a pension scheme is or is not a defence to any discrimination claim.

41. Those are matters which cannot be dismissed by me at this stage in the proceedings. There is much to play for here. There are triable issues which can only be resolved at a final hearing and there are causes of action which can be proceeded with by Mr Anderson's widow on behalf of his estate. In short, I cannot say whether any of these claims have no or little reasonable prospect of success, nor can I say that the claimant's widow cannot bring these proceedings. The deceased was denied ILR when he received the letter from the second respondent telling him he was not entitled to it because his retirement had been pushed back. Consequently, the issues as to whether there had been any breach, as a disabled person, of the Equality Act 2010 can only be decided at the final hearing, when there has been full disclosure and a test of the witnesses' evidence in cross examination.

42. With regard to standing, I am satisfied that, as was set out in the Court of Appeal's judgment in *Harris v Lewisham and Guys Mental Health NHS Trust* 2000 IRLR 320, that the claimant's widow has standing and that the claims that Mr Anderson had at his death devolve upon his widow. I am persuaded that before his death Mr Anderson had the right to issue proceedings himself. His causes of actions, as statutory torts, must survive him. Whether his estate will be successful against either or both respondents or they fail is a matter only a Tribunal at a full hearing can decide and it would be premature and inappropriate for me, in these circumstances, to strike out any or all the claims or order deposits to be paid.

43. I have sent out, in a separate document, orders for the future good conduct of these proceedings as requested by the parties.

Employment Judge Robinson
10 January 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
11 January 2022

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