EMPLOYMENT TRIBUNALS

Claimant: **Mr Sandeep Singh**

Respondent: **Asda Stores Limited**

Heard at: **London South** **On:** **8 December 2021**

Before: **Employment Judge Cheetham QC**

Representation

Claimant: Ms Gillian Crew (counsel)
Respondent: Mr Francis Mortin (counsel)

JUDGMENT

1. The application to strike out the claim of harassment, in the alternative seek a deposit order, is dismissed.

2. The claim will now be listed for a telephone case management discussion.

REASONS

1. This Preliminary Hearing was listed to hear the Respondent's application to strike out the claims of harassment, alternatively seek a deposit order.

Procedural background

2. The Claimant has been employed as a lorry driver by the Respondent since 17.10.05. His first claim (Claim no. 2304839/2019) was brought on 2.11.19 and complained of disability discrimination, relying on an ankle injury and resulting stress. The response raised jurisdictional issues and also did not accept that the Claimant was disabled.

3. At a Preliminary Hearing on 6.10.20 (EJ Wright), the Tribunal found that the Claimant was not disabled for the purposes of the Equality Act 2010. An application for reconsideration of that decision was subsequently dismissed.

4. By the time of that hearing, the Claimant had issued this second claim (Claim no. 2301622/2020), which was brought on 21.4.20. However, the Preliminary Hearing only addressed the question of disability by reference to the allegations in the first claim. The second claim complained of harassment related to disability and unpaid wages and the Respondent applied to strike out that second claim in its response.

5. At a Case Management Hearing on 24.2.21(EJ Ferguson), the Claimant explained that he was not contending that he was disabled for the purposes of this second claim, arguing that disability discrimination could include less favourable treatment because of a perceived disability.

6. The Judge listed a Preliminary Hearing to hear the strike out application and that application was heard at this hearing.

The law

7. Under Rule 37(1) of the Employment Tribunal Rules:

> *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;*
>
> *(c)for non-compliance with any of these Rules or with an order of the Tribunal;*
>
> *(d)that it has not been actively pursued;*
>
> *(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).*
>
> *(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

8. Under Rule 39:

> *(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.*

9. The claim of harassment is made pursuant to the Equality Act 2010 s. 26 and the allegation is of harassment related to the protected characteristic of disability. The Claimant does not contend that he was disabled at the time, but that the Respondent perceived him to be disabled.

10. In ***Chief Constable of Norfolk Constabulary v Coffey*** [2019] IRLR 805, the Court of Appeal stated that, "*in a claim of perceived disability discrimination the putative discriminator must believe that all the elements in the statutory definition of disability are present, though it is not necessary that he or she should attach the label 'disability' to them*" (Underhill LJ, §35).

11. Under the Equality Act 2010 s.6(1):

> *A person (P) has a disability if—*
> *(a)P has a physical or mental impairment, and*
> *(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

12. The Tribunal was provided with an authorities bundle which included: ***Anyanwu v South Bank Students Union*** [2001] ICR 391, ***Ezsias v North Glamorgan NHS Trust*** [2007] ICR 1126, ***Moxam v Visible Changes Ltd*** UKEAT/0267/11, ***Sharma v New College Nottingham*** UKEAT/0287/11 and ***Fortt v CC of South Wales Police*** ET case no.1601986/14.

13. In their written submissions, counsel also referred to a number of additional authorities, although it is not necessary to set them all out. However, Mr Mortin relied in particular on ***Coffey*** and also on dicta of Langstaff P in ***Aderemi v London and South Eastern Railway Ltd*** [2013] 591 at §14:

> *It is clear first from the definition in section 6(1)(b) of the Equality Act 2010 , that what a Tribunal has to consider is on adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.*

Factual background

14. In brief summary, the Claimant suffered an accident on 8 April 2019 and was then signed off work until January 2020. In the intervening period, he was subjected to disciplinary proceedings on the basis that the accident had occurred because he had failed to follow health and safety procedures.

15. Initially there was reference to his ankle injury and, on 11 June 2019, the Respondent became aware that his mental health was deteriorating. From August 2019, the Claimant was signed off because of both stress/anxiety and

the ankle injury. The Tribunal was taken to the various Occupational Health reports and fit notes.

16. The Claimant's complaint revolves around the information provided to the DVLA and was summarised at a previous hearing as follows: "*he was due to return to work in January 2020 and the respondent prevented him from doing so on the basis that an occupational health report of 7 October 2019 recorded that the claimant had suicidal thoughts, and the claimant was therefore not allowed to drive until he had reported this to the DVLA. The claimant says (and said at the time) that the occupational health practitioner had misreported what he said, and he has never had suicidal thoughts*".

Submissions

17. Both counsel provided full written and oral submissions, which are only briefly summarised here.

18. Mr Mortin carefully deconstructed the documentary evidence and based his submissions around ***Coffey*** and the need for all of the elements of the statutory definition to be present. He submitted, by reference to the documents, that there could have been no perception of a progressive condition. Equally, while there may have been a perception of a substantial adverse effect in October, that was not present from the following January, which therefore did not tie in with dates of the alleged harassment. As to the unwanted conduct (regarding the DVLA), Mr Mortin submitted that it could not possibly be seen as relating to the disability.

19. Ms Crew painted with a broader brush, emphasising the case was tied to its facts and those facts needed to be tested through cross examination, particularly in the case of the manager, Mr Jassel, who was the alleged discriminator. She noted that it had taken Mr Mortin an hour and a half to go through those facts, which might suggest they were not undisputed. She said that it was arguable that the Claimant's condition was thought to be long-term and substantial, but – in terms – that it was not something the Tribunal could adjudicate upon without hearing the evidence. It was, she said, a battle between principle and pragmatism.

20. Those brief paragraphs do not do justice to either counsel's submissions, which were clear, well-argued and very helpful.

Discussion and conclusions

21. This was a difficult decision to reach, but after careful consideration, the Tribunal sided with Ms Crew for these reasons.

22. ***Coffey*** is helpful authority, but it is not a case dealing with striking out, rather with what needs to be established for a claim based upon perceived disability to succeed. It may well be at the final hearing that it is not established that the putative discriminator believed all of the statutory elements of disability were present. However, at this stage, the Tribunal must ask itself whether that claim has no (or little) reasonable prospect of success.

23. In terms of the substantial adverse effect, it is accepted by the Respondent that the Claimant's mental impairment had a substantial and adverse effect from September until 31 December 2019. The evidence suggests that the Claimant said at the start of January 2020 that he had been cleared to drive by the DVLC and the Respondent says that it therefore no longer considered that the mental impairment continued to have that effect. However, as Ms Crew submitted, it may not have been so clear cut in the mind of the manager, Mr Jassel, whose evidence on all of this would be highly relevant, given that he is the person alleged to have harassed the Claimant.

24. In respect of whether or not the Claimant was perceived to have an impairment that was long-term, it was submitted that, once it had received the OH report of 20 January 2020, there was no possibility that the Respondent (which in terms means Mr Jassel) could have perceived the Claimant to be suffering from an impairment that was long-term or likely to recur. That report refers to the Claimant describing himself to the OH assessor as "*mentally fit and well now*", although it otherwise makes very little mention of the mental impairment. Those words can certainly be read as suggesting that he had fully recovered and that there would be no recurrence, which may well be what Mr Jassel thought. However, in the Tribunal's view, there is force in the argument that his evidence should be tested on this issue, because that report also needs to be placed in context.

25. Mr Mortin's argument over the alleged unwanted conduct was that being asked to call the DVLA and not being allowed to return to driving could not have been related to any perceived disability, as it was simply a health and safety consideration. Again, that might prove to be correct, but the same counter-argument prevails, as Mr Jassel's evidence on this needs to be tested.

26. Therefore, on balance, Ms Crew's pragmatic arguments succeed on this application, although Mr Mortin's arguments of principle and analysis of the documents carry considerable weight and suggest that this is not an especially strong claim. However, after careful consideration of everything that was said and also further reading of the documents, it cannot be said that this claim has little reasonable prospect of success. This is a claim where the evidence (and particularly that of the Claimant and Mr Jassel) needs to be heard.

27. In those circumstances, the application is dismissed.

28. The Tribunal apologises to the parties for the delay in sending this judgment and reasons, which was due in part to illness. As agreed at the hearing, the case will now be listed for a telephone case management hearing and a separate Order will be sent with those details.

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Employment Judge Cheetham QC

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Date 20 January 2022