



EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

Claimant

Respondent

Mrs Catherine Joyce

v

Selectaglaze Ltd

Heard at: Watford (by CVP)

On: 16 March 2022

Before: Employment Judge Andrew Clarke QC (sitting alone)

Appearances

For the Claimant: In person (assisted by her husband)

For the Respondent: Mr Thomas Wood, Counsel

JUDGMENT

1. The claims for direct and indirect age discrimination and for indirect disability discrimination are dismissed on withdrawal.
2. The application to strike out the claim for direct disability discrimination and/or the claim under s.15 of the Equality Act 2010 for disability related discrimination is dismissed and no deposit orders are made in respect of either such claim.

REASONS

1. This is a hearing to consider whether the claims for age and disability discrimination should be struck out as having no reasonable prospect of success, alternatively that as the claims have little reasonable prospect of success a Deposit Order should be made (see Rules 37(1) and 39(1) of the 2013 Rules of Procedure).

2. The hearing was ordered by Employment Judge Tobin at a preliminary hearing on 10 January 2022. The case management summary explains his reasoning and his concerns that the discrimination claims might be unsustainable. It also provides an account of the nature of the claims which I need not repeat in any detail.
3. The claims were made following the claimant's dismissal, ostensibly for redundancy, on 10 September 2020. She made claims for unfair dismissal, disability discrimination and age discrimination. The discrimination claims relate to the dismissal and aspects of the selection process which led to it. The claim form sets out a detailed account of the events leading to the claimant's selection for redundancy. It points to what the claimant says are important inconsistencies in the various explanations she was given of why and how she was selected in the redundancy process as it progressed. It also suggests that she was significantly disadvantaged by her disabilities in the application of the selection criteria (if they were ever properly applied at all). She relies as disabilities on tendonitis and obsessive-compulsive personality disorder (OCPD). She claims that each is a disability for the purposes of the Equality Act and that the claimant was aware of these disabilities. At the hearing before me it was accepted that both are disabilities for the purposes of the 2010 Act and that she suffered from them, but there is an issue as to whether the respondent was aware of her OCPD.
4. Whilst declining to order the provision of further particulars of the discrimination aspects of her claim, EJ Tobin did order that the claimant provide "clarification" of her discrimination claims by way of a witness statement or written submissions, that the respondent should respond to this and that the claimant might reply to that response. That led to a helpful exchange of materials which appear in the joint bundle for this hearing.
5. Striking out a claim requires an Employment Tribunal to form a view on the merits of a case. Only if the Employment Tribunal is satisfied that the claim must fail, or that there is only a fanciful prospect of the claim succeeding, can that claim be struck out. The authorities show that particular care must be taken when (as here) the Tribunal is dealing with a discrimination claim. Such cases are often highly fact sensitive and, as a consequence, determining that such a claim has no reasonable prospect of success before the findings of fact are made is very often impossible.
6. The test under Rule 39 is obviously one which sets the bar somewhat lower. The claim needs to have "little" rather than "no" prospect of success for a Deposit Order to be made. Distinguishing the two tests in practice is not always straightforward and it is not enough that the Employment Tribunal has concerns about the likelihood of the claimant's case succeeding in order to make a Deposit Order. However, the Deposit Order provision does allow a Tribunal that considers that the "no reasonable prospect" test is almost made out to make a reasoned order which reflects that view and explains why the claimant's case was almost struck out, but just survived.

7. Although there are very significant disputes of fact in this case, it was not suggested by either side that this was one of those rare cases where I could decide any of those disputes at this stage. Nor was it suggested that I could conclude that the claimant's version of events was so unlikely to be correct that this would suggest that her claims (or any of them) had little prospect of success. Hence, I have proceeded on the basis that the claimant could succeed in establishing the matters of fact upon which she relies.
8. There is no challenge to the claimant's unfair dismissal claims proceeding to trial. Those claims rely upon the same criticisms of the respondent's approach as do the discrimination claims. As well as complaining that the criteria chosen to score her performance are, as regards "teamwork" and "efficiency", inherently discriminatory given her disabilities she complains that those doing the scoring lacked the knowledge to do it properly and that the confused and inconsistent accounts given to her suggest that the approach the respondent claims to have adopted was a smokescreen for a decision to dismiss her due to her disabilities.
9. In considering these applications I have also kept in mind the provisions of s.136 of the Equality Act 2010 dealing with the burden of proof.
10. Although counsel previously instructed (by different solicitors) on behalf of the respondent supported the approach adopted by EJ Tobin, there was, strictly speaking, no application on behalf of the respondent to strike out parts of the claim. The initiative was taken by the employment judge himself, as the rules provide for.
11. In discussion with the parties at the start of the hearing I indicated the provisional views I had reached having read the papers. These were that I could see arguable claims of direct disability discrimination and of disability related discrimination, but struggled to see the basis for the age discrimination claims and the indirect disability discrimination claim. I also questioned whether, as a matter of practicality, if the claimant lost the direct discrimination claims the other claims were at all likely to succeed. As discussions progressed it became clear to me that the claimant also had a claim for a failure to make reasonable adjustments. The respondent did not object to an amendment to include such a claim and in the record of the Preliminary Hearing and Case Management Orders which appear in a separate document, I have given permission for such a claim to be added. It appeared to me (and to the respondent) that this consisted simply of a relabelling of aspects of the allegations already advanced.
12. The claimant (and her husband) told me that the focus of their case was the direct disability discrimination claim (together with the s.15 claim) and that they did not wish to pursue any age discrimination claim, or the claim for indirect discrimination. By getting the claimant to explain the basis of her claim and questioning her about it, I satisfied myself that she did indeed wish to confine her claims in this way and that, in so doing, she was not omitting a viable claim for age discrimination or indirect disability

discrimination. As already noted, those debates led to the inclusion of a claim for failure to make reasonable adjustments.

13. In those circumstances the claims for age discrimination and for indirect disability discrimination will be dismissed on withdrawal.
14. Mr Woods indicated on behalf of the respondent that it accepted that the claimant had viable claims for direct disability discrimination, under s.15 of the 2010 Act and for a failure to make reasonable adjustments. In the light of his stance and my own views, those claims will not be struck out and will not be the subject of any Deposit Order.
15. Mr Woods also accepted that both of the claimant's alleged disabilities were made out, but he did not concede that the respondent had relevant knowledge as regards her OCPD.
16. In the circumstances, I proceeded to deal with the case management of the remaining claims making relevant Orders which are set out in a separate document.

Employment Judge Andrew Clarke QC

30 March 2022

Date signed

Sent to the parties on

04 April 2022

For the Tribunal

Office: