EMPLOYMENT TRIBUNALS

Claimant: Ms C Thomas

Respondent: King's College Hospital NHS Foundation Trust

OPEN PRELIMINARY HEARING

Heard at London South: by CVP **On:** 21 March 2022

Before: Employment Judge Truscott QC (sitting alone)

Appearances
For the claimant: in person
For the respondent: Ms van den Berg of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The claim of disability discrimination has no reasonable prospect of success and is struck out under Rule 37(1)(a).

2. The claim of failure to pay arrears of pay has no reasonable prospects of success and is struck out under Rule 37(1)(a).

REASONS

Preliminary

1. By order of EJ Khalil dated 24 August 2021, this Open Preliminary Hearing is to determine the Respondent's application for strike out/deposit order and to deal with case management in the event that the matter is not struck out [53].

2. The Tribunal is asked to determine the following issues:
   a. Should the Claimant's claim for disability discrimination be struck out on the basis that it has no reasonable prospects of success?
   b. Should the Claimant's claim for arrears of pay be struck out on the basis that it has no reasonable prospects of success?
   c. In the alternative, should either of the above claims be subject to a deposit order on the basis that those claims have little reasonable prospects of success?

3. The Claimant spoke to her witness statements and made oral submissions. The Respondent provided written submissions. The Tribunal had available to it an electronic bundle which is referred to where necessary.

BACKGROUND

1. The Claimant is employed by the Respondent as a Band 6 Junior Sister at the Trust's KCH site on the Mary Ray Ward and has been employed in this role since 16th April 2018.

2. The Respondent (the "Trust") is an Acute NHS Foundation Trust which provides a wide spectrum of NHS services to the populations of South East London.

3. The Claimant was involved in an incident on 3 May 2018 when it is alleged by the Claimant that a patient grabbed her hand during a manual handling transfer of a patient. The Claimant continued to work following this incident and remained supernumerary to staffing requirements as she was in a period of induction to the Trust.

4. The Claimant attended her shift on the 4 May 2018, following the alleged injury, however left her shift on 4 May 2018 upon the advice of Michael Bartley, Ward Manager, to attend the Trust's Accident and Emergency Department following the Claimant's complaints of pain. Following the attendance at the Trust's Accident and Emergency Department, the Claimant informed the Trust that she had sustained a wrist fracture but did not provide the Trust with consent to view her medical records in relation to this incident and provided no medical evidence to confirm she sustained a wrist fracture.

5. The Claimant initially remained absent from work due to sickness related to the injury to her wrist from 10 May 2018 until 25 November 2018. A Statement of Fitness to Work dated 11 May 2018 was provided by the Claimant and stated that she was not fit to work due to 'injury left wrist'.

6. The Claimant submitted an Adverse Incident report on 9 May 2018 detailing the incident, stating in the report that her hand was painful following this incident.

7. Yumela Chetty, Matron, submitted RIDDOR documentation on 23 May 2018, following the Adverse Incident report, regarding the incident as described by the Claimant. The RIDDOR document explained that the Claimant was asked by a HCA to assist with the manual transfer of a patient from a chair back to bed. During the manual transfer the patient lost his balance and took hold of the Claimant's hand. The Claimant screamed for the patient to let go of her wrist as it was hurting but the patient was unable to do so as he was falling. The HCA then supported the patient to help him find his balance and the patient then needed minimal support during the transfer. No equipment was used during this manual transfer and the Claimant's wrist swelled up immediately after the incident.

8. The Claimant submitted an Injury Allowance Claim Form in November 2019 and was asked to provide additional detail. The Claimant submitted a further Injury Allowance Claim Form on an unknown date after this.

9. Under section 22 of Agenda for Change, injury allowance is subject to approval from the relevant NHS employer before it is payable to the employee. The decision to make any such payment is subject to the relevant NHS employer believing, on the balance of probabilities, that the applicant had sustained an injury which is wholly or mainly attributable to the employee discharging the duties of their employment, or is connected with or arising from, their employment. Section 22.5 of AfC, provides that:

> "Employees claiming injury allowance are required to provide all relevant information, including medical evidence, that is in their possession or that can reasonably be obtained, to enable the employer to determine the claim," and under section 22.7, "injury, disease or other health condition due to or seriously aggravated by the employee's own negligence or misconduct."

10. The employee has a right to appeal the decision through relevant grievance procedures.

11. Between November 2019 and June 2020, the Claimant remained absent from work and continued to be managed under the Trust's Sickness Absence Policy.

12. Ope Ogunleye (Senior Employee Relations Advisor), a member of the Respondent's Employee Relations Team, emailed the Claimant on an unknown date to confirm details regarding her application for injury allowance, as outlined in The NHS Staff Council's 'Injury Allowance – a guide for employers 2016'. The Claimant was advised that there was no evidence that procedure had been followed to establish her application for injury allowance and explained that Matron Chetty would need to investigate the injury further by seeking statements from witnesses. The Claimant was advised by Ms Ogunleye that if it were found that her injury was due to or aggravated by her own negligence or misconduct that any injury allowance paid to her would be recovered as an overpayment. The Claimant was also advised that if she were found to be entitled to injury allowance that she would then need to provide medical evidence to show that her absence from work was wholly and totally attributable to the original injury and that there were no other health conditions causing her absence. Following the investigation and provision of medical evidence, the Claimant would then be paid the remainder of 12 months' injury allowance, should she be entitled to this.

13. As part of the investigation, Sister Konor Kutubu and Areita Tabanna (Health Care Assistant) provided statements in relation to this incident. Ms Kutubu confirmed in her statement that she worked a shift with the Claimant on 9 May 2018 and that the Claimant told her about her wrist pain and in response Ms Kutubu advised the Claimant that she should attend the Emergency Department. Ms Tabanna explained in her statement that on the day of the alleged injury at work the Claimant called her to assist in the transfer of a patient from a bed to a chair. Ms Tabanna explained that the patient was blind, but was not confused or agitated, and was able to follow instructions. Ms Tabanna advised that the Claimant did not know how to transfer the patient safely, nor did she know whether the patient had a physiotherapy care plan in place. The Claimant informed Ms Tabanna to manually move the patient and gave her instructions on how to do so. The Claimant and Ms Tabanna manoeuvred the patient off the bed and it was when the patient was in the chair that Ms Tabanna heard the Claimant ask the patient not to squeeze her hand. Ms Tabanna stated that the Claimant was okay when she left the bedside and that she did not mention the incident

once throughout their shift. Ms Tabanna explained that the patient also held her hand during the manoeuvre and that she did not see anything of concern during the transfer or she would have stayed with the Claimant.

14. On 16 September 2020, Erika Grobler (Head of Nursing – Acute and Post-Acute Medicine) met with the Claimant regarding her application for injury allowance. Sukai Njie (Ward Manager) and Janear Hinds (Senior Employee Relations Advisor) were present for this meeting. At this meeting, the Claimant's application for injury allowance was considered in line with The NHS Staff Council's 'Injury Allowance – a guide for employers 2016'. Ms Grobler also considered the Fitness to Work Statements provided by the Claimant, the Adverse Incident report and witness statements provided by Ms Kutubu and Ms Tabanna.

15. Ms Grobler informed the Claimant that upon review, she could not determine that the injury sustained to the Claimant had occurred during the course of her working and that therefore her application for injury allowance was not approved. Ms Grobler explained that there were clear differences in the Claimant's version of events in the Adverse Incident report compared to the witness statements gathered as part of the investigation. Furthermore, the Claimant had never produced medical evidence of a wrist fracture and had been absent from work for significant periods of time. Ms Grobler sent the outcome letter via post to the Claimant along with the Trust's Appeals Policy on 16 September 2020.

16. The Claimant submitted an appeal, in writing, to Ms Grobler dated 4 October 2020. The Claimant explained that she had not received the outcome letter until 28 September 2020. The Claimant expressed that the grounds for her appeal were in relation to inaccurate evidence considered at the meeting on 16^{h} September 2020 and procedural errors.

17. The Claimant emailed Lisa de Jonge (Lead Nurse – Acute Speciality Medicine) on 3 March 2021 and 1 April 2021 in regards to her sickness absence and to request that her application for injury allowance be reconsidered in light of new medical evidence from her doctor. The Claimant also indicated that she would like to raise grievances against Ms Chetty and others involved in her case.

18. Ms de Jonge responded to the Claimant via email on 1 April 2021 requesting the Claimant share her availability for an initial discussion about the points raised and to request further detail regarding the nature of her complaint dated 3 March 2021; providing the Trust's Early Resolution Policy also in response.

19. The Claimant did not respond to this request.

The claim

20. The Claimant contacted ACAS on 2 March 2021 and an EC Certificate was issued on 3 March 2021. By presentation of her ET1 on 9 April 2021, the Claimant brought claims for disability discrimination and arrears of pay [4-15].

21. The Claimant ticked the box on her ET1 to say that she is not disabled [12]. The Claimant in her first witness statement alleged that she is not disabled:

> "I denied the fact that I am disabled. I have never tick the Claim Form to conform that I am disable. I did not know why the respondent is bring up the issues of disability." [43]

22. The Claimant then provided a second witness statement. This statement amended her first statement by deleting certain sections and adding in other sections. The Claimant maintained that she is not disabled:

> "I refuse to accept that I am disable I am fit and ready to work. There is never a time did I state I am disable. The respondent had been the one who refused me to returned to work based on the fact that the respondent finds me to be disabled. The respondent had stigmatized me. I urge the ET that my case should proceed further." [55]

The Claimant then added a section to the end of her statement outlining that she is disabled under the Equality Act 2010 [62].

23. The Respondent applied for strike out/deposit order on 10 June 2021 [40-41]. The Claimant provided a witness statement on 29 June 2021 [43-48]. The Respondent responded to this on 13 July 2021 [49]. The Claimant then provided an updated witness statement on 25 August 2021 [55-63], accompanied by a medical expert report [73-90] and medical records [68]. The Respondent responded to this on 15 March 2022 [95].

24. The Claimant takes issue with the Trust in relation to how her alleged injury was caused on 3 May 2018 and the Respondent's subsequent non-payment of injury allowance.

Relevant Legal Framework
STRIKING OUT

25. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hack v. St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:
Rule 37 of the Employment Tribunal Rules 2013 provides materially:-

> "(i) At any stage in 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) Where it is scandalous or vexatious or has no reasonable prospect of success…"
> 55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):
> "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the

> submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"

26. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

27. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. 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, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

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28. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

29. In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including:-

> (i) Ordinarily, the Claimant's case should be taken at its highest.
> (ii) Strike out is available in the clearest cases – where it is plain and obvious.
> (iii) Strike out is available if the Claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

30. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the

exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

31. In **Ahir v. British Airways plc** [2017] EWCA Civ 1392 CA, Lord Justice Underhill reviewed the authorities in discrimination and similar cases and held at paragraph 18, 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."

Time limits and extension
Not reasonably practicable to present claim in time

32. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his claim in time. The burden of proving this rests firmly on the claimant (**Porter v. Bandridge Ltd** [1978] ICR 943 CA). Second, if he succeeds in doing so, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable. The leading authority on the subject is the decision of the Court of Appeal in **Palmer and Saunders v. Southend-on-Sea Borough Council** [1984] ICR 372 CA.

Just and equitable extension

33. The EqA permits the Tribunal to grant an extension of time 'if, in all the circumstances of the case, it considers that it is just and equitable to do so'. They entitle the [employment] tribunal to take into account anything which it judges to be relevant': **Hutchison v. Westward Television Ltd** [1977] ICR 279, EAT. Notwithstanding the breadth of the discretion, it has been held that 'the time limits are exercised strictly in employment cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ).

DEPOSIT ORDERS

34. A deposit order can be made if the specific allegation or argument has <u>little</u> reasonable prospect of success. In **Hemdan v. Ishmail** [2017] IRLR 228, Simler J, pointed out that the purpose of a deposit order 'is 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' (para 10), she stated that the purpose 'is emphatically not to make it difficult to access justice or to effect a strike out through the back door' (para 11).

35. As a deposit order is linked to the merits of specific allegations or arguments, rather than to the merits of the claim or response as a whole, it is possible for a number of such orders to be made against a claimant or respondent in the same case.

DISCUSSION and DECISION

36. In her ET1 and subsequent statements, the Claimant has not set out any basis for asserting she is disabled within the meaning of section 6 of the Equality Act 2010, or particularised any specific allegations of disability discrimination against the Respondent. The Respondent does not admit that the Claimant is disabled. The Claimant has not provided grounds for alleging that she was discriminated against on the grounds of any alleged disability, nor has she stated which head of disability discrimination is alleged.

37. It appears that the Claimant is seeking to bring a claim for personal injury, which the Employment Tribunal has no jurisdiction to hear. She has raised proceedings in the civil courts for personal injury on 3 May 2018.

38. The Claimant has not set out any grounds for asserting that she is owed wages under Sections 13 to 27 of the Employment Rights Act 1996 (ERA 1996). The Claimant has not set out any basis for asserting that the total wages paid to her on any occasion by the Respondent were less than the net amount of the wages "properly payable" on that occasion. The Claimant was denied injury allowance because she did not meet the criteria for payment. Injury allowance does not constitute “wages” within the meaning of section 27 ERA 1996, or that any injury allowance was properly payable to the Claimant in any event.

39. The Claimant’s claim is a claim for breach of contract, as she says that the Respondent has failed to adhere to its contractual obligations set out in the NHS Terms and Conditions of Service Handbook (known as “Agenda for Change” or “AfC”), insofar as she claims she was entitled to receive injury allowance under Section 22 of AfC. Since the Claimant remains employed by the Respondent, the Tribunal does not have jurisdiction to hear any claim for breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 as the claim is not arising or outstanding on termination of the Claimant’s employment, the Claimant’s employment having not ended. This is a matter for the civil courts.

40. The decision not to pay the Claimant injury allowance was made and was communicated to her on 16 September 2020. Any claim in respect of this decision should therefore have been brought by 15 December 2020. The Claimant did not lodge her ET1 until 9 April 2021, nearly four months out of time. The Claimant provided no explanation for the delay. She contacted ACAS on 2 March 2021 and the conciliation period closed on 2 April 2021. The Claimant presented her complaints to the Employment Tribunal on 9 April 2021. Any alleged act or omission occurring on or before 2 December 2020 is out of time and it would have been reasonably practicable to present the claim in time. There was no continuing act nor was the claim was brought within a further reasonable period of time.

41. The Tribunal has taken steps to ensure it understands what the claim is actually for. The Tribunal decided that it did not have jurisdiction to address the Claimant's claims for disability discrimination and arrears of pay.

42. The Tribunal then took on board the authoritative exhortation about not striking out discrimination cases and sought not to be too pedantic about the pleadings when weighing up the appropriate course of action as the claimant was a party litigant. The Tribunal exercised its discretion considering the claims in the round and also individually. The Tribunal considered whether the claims might be cured by extension of time and amendment of pleadings but considered that the claims are incurably deficient.

43. The Tribunal did not consider that a deposit order was appropriate.

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Employment Judge Truscott QC
23 March 2022