



EMPLOYMENT TRIBUNALS

Claimant: Dr Angela Musso

Respondent: Cutler's Hill Surgery

Heard at: Watford **On:** 13 September 2022

Before: Employment Judge Liz Ord

Representation:

Claimant: In Person
Respondent: Allan Roberts (Counsel)

RESERVED JUDGMENT

1. The claimant's claims of direct discrimination, harassment and victimisation under sections 13, 26 and 27 of the Equality Act 2010, are struck out on the ground that they have no reasonable prospect of success.
2. The respondent's application for a deposit order relating to the claimant's disability discrimination claim and reasonable adjustment claim under sections 15 and 21 of the Equality Act 2010, is refused.

REASONS

The Application

1. Pursuant to Employment Judge Palmer's Order of 28 February 2022, this Preliminary Hearing was listed for a full day to determine:
 - 1.1. the status of the Claimant and whether applying s.83 of the Equality Act 2010, the Claimant is entitled to pursue claims she seeks to pursue under ss. 13, 15, 26, 27 and 21;
 - 1.2. whether the Claimant's claims under ss. 13, 26 and 27 should be struck out for having no reasonable prospect of success under Rule 37 of the

Employment Tribunal Rules of Procedure 2013 or, in the alternative, a deposit order should be made in respect of those claims under Rule 39; and,

- 1.3. whether a deposit order should be made under Rule 39 Employment Tribunal Rules of Procedure 2013 in respect of the Claimant's claims under ss. 15 and 21, Equality Act 2010.
2. In addition to the above, the Respondent applied for the Claimant's case to be struck out on the basis that the Claimant had behaved in a way that was unreasonable, scandalous and/or vexatious.
3. Due to confusion over listing and judge availability, the tribunal office had initially cancelled the hearing, only to re-instate it in the list later that morning. Because of the late start, the need to deal with preliminary issues, and the taking of a lunch break, it was not until 13.40 in the afternoon that the substantial hearing commenced.
4. For this reason, it was agreed that the hearing would be confined to the strike out/deposit order applications. Thereafter, it took until 15.35 to hear submissions on the issues set out at 1.2 and 1.3 above, and the respondent's counsel needed to leave by 15.50. Consequently, it was agreed that the hearing would not deal with the additional ground for the strike out application set out at 6 above. The respondent will write in to the tribunal, should it wish to proceed with this application.
5. Consequently, this judgment is limited to determining the issues at paragraphs 1.2 and 1.3 above.

Evidence

6. The tribunal had before it the respondent's bundle of 196 pages; the claimant's bundle of 137 pages entitled "exhibits"; the respondent's application to strike out; the respondent's abridged skeleton argument; the claimant's Statement of Fact.
7. Oral submissions were heard from the respondent's representative and from the claimant.

Law

Employment Tribunal Rules

8. Schedule 1 of The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provides the relevant rules (the ET Rules).
9. **Rule 37** of the ET rules sets out the provisions for **strike out**, the most pertinent of which are:
 - (1) 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 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)

10. **Rule 39** of the ET rules sets out the provisions for **Deposit Orders**, the most relevant of which are:

- (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.

11. The Tribunal is also required to have regard to the **overriding objective**, which is set out in **Rule 2**. The most relevant parts provide that:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable:

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by these Rules.

Discrimination Legislation

12. The relevant legislation is contained in the **Equality Act 2010**

13. Section 13 - Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

14. Section 15 – Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if –
 - (a) A treats B unfavourably because of something arising in consequence of B’s disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

15. Sections 20 and 21 – Duty to make reasonable adjustments

Together these sections put certain persons under a duty to make reasonable adjustments in certain circumstances. One instance is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who

are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

16. Section 26 – Harassment

- (1) A person (A) harasses another (B) if –
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) The conduct has the purpose or effect of –
 - i. Violating B’s dignity, or
 - ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-
- (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

17. Section 27 – Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because –
- (a) B does a protected act, or
 - (b) A believes that B has done, or may do, a protected act
- (2) Each of the following is a protected act –
- (a) Bringing proceedings under this Act;
 - (b) Giving evidence or information in connection with proceedings under this Act;
 - (c) Doing any other thing for the purposes of or in connection with this Act;
 - (d) Making an allegation (whether or not express) that A or another person has contravened this Act.

Case Law -Discrimination

18. The difference between direct disability discrimination and s 15 disability discrimination is set out in **Bennett v Mitac [2021] IRLR 25** where it states at paragraph 40:

“Because in the case of disability discrimination the circumstances include a person’s abilities, when assessing a claim of direct disability discrimination it is necessary to compare the treatment of the complainant with an actual or hypothetical person with comparable abilities. Thus, if the consequence of a disability is a reduction in a person’s ability to do a job and that reduction in ability is the reason for adverse treatment it will not be possible to make out a claim of direct discrimination because the comparator would have the same level of ability as the disabled person. That is why s 15 Equality Act 2010 is necessary, which provides for discrimination because of something arising in consequence of disability. However, if stereotypical assumptions are made about the ability and/or likely future ability of a disabled person this can amount to direct disability discrimination: Chief Constable of Norfolk Constabulary v Coffey [2019] EWCA Civ 1061, [2019] IRLR 805, [2020] ICR 145.”

Case Law – Strike out

19. In ***HM Prison Service v Dolby [2003] IRLR, 694*** and ***Hassan v Tesco Stores Ltd UKEAT/0098/16*** the EAT held that the striking out process requires a two-stage test. 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. In ***Hassan*** Lady Wise stated that the second stage is important as it is “a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit.”
20. In ***A V B and anor 2011 ICR, D9*** the Court of Appeal considered whether there was a “more than fanciful” prospect of proving the case.
21. The House of Lords in ***Anyanwu and anor v South Bank Student Union and anor 2001 ICR, 391*** said that discrimination claims should not be struck out except in the most obvious cases as they are generally fact sensitive and require a full examination to make a proper determination. However, it recognised that rule 37 applies just as equally to discrimination claims as to any other (Lord Hope at para 39).
22. ***Jaffrey v Department of the Environment, Transport and the Regions [2002] IRLR 688***, at para 41 provides that where there is a tenable view that a discrimination claim has no reasonable prospects of success, the Tribunal has the requisite discretion to strike it out.
23. In ***Ezsias v North Glamorgan NHS Trust [2007] ICR, 1126*** the Court of Appeal stressed that it would only be in an exceptional case that an application would be struck out as having no reasonable prospect of success when the central facts were in dispute. However, this could include an allegation which is totally and inexplicably inconsistent with undisputed documents.
24. In ***Mbuisa v Cygnet Healthcare Ltd EAT/0119/18*** the EAT notes that strike-out is a draconian step that should be taken only in exceptional cases. Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person.
25. In ***Cox v Adecco and ors 2021 ICR 1,307*** the EAT spoke about cases where the claimant was a litigant in person and there were facts in dispute. It stated that “ The claimant’s case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claims and issues are. There has to be a reasonable attempt at identifying the claim and the issues before considering strike out or making a deposit order.”
26. In ***Ahir v British Airways plc 2017 EWCA, Civ. 1392***, the Court of Appeal asserted that the tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored. It went on to say that the test in s37(1)(a) of “no *reasonable* prospect of success” was lower than the test in previous versions of the strike out rule, which referred to “no prospect of success”.

27. In ***Kaur v Leeds Teaching Hospitals NHS Trust 2019 TCR 1***, Lord Justice Underhill in the Court of Appeal observed (in concluding that an Employment Judge had correctly struck out a constructive dismissal claim) that “Whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed. There were in this case no relevant issues of primary fact.”
28. In ***RMC v Chief Constable of Hampshire EAT 0184/16***, where strike out was considered at a preliminary hearing and the facts were not in dispute, Judge Eady QC said that the tribunal had been as well placed to determine the merits of the case as it was ever going to be. In the light of the way the case had been argued, the tribunal’s conclusions concerning the lack of any reasonable prospect of success was one to which it was entitled to come.

Caselaw – Deposit Orders

29. In ***Hemdan v Ishmael and anor UKEAT/0021/16/DM***, Mrs Justice Simler, President of the EAT at paragraph 10 observed 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”.
30. In ***Van Rensburg v Royal Borough of Kingston-upon-Thames & Others UKEAT/0096/07*** the Employment Appeal Tribunal (Elias P as he then was) concluded that a Deposit Order can take into account the prospects of success on factual matters as well as purely legal matters (paragraph 23) and emphasized that the test of “little prospect of success” is not as rigorous as the test for striking out a claim under what is now rule 37(1). He said:

“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.”

31. ***Mr J Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14/JOJ*** provides that a tribunal has a broad discretion and is entitled to have regard to the likelihood of a party being able to establish the facts essential to their case.
32. ***Mr L Garcia v The Leadership Factor Ltd [2022] EAT 19*** provides that, when assessing whether a claim or allegation has little reasonable prospect of success, a tribunal is entitled to assess the likelihood of factual issues being established at the full hearing provided that a proper basis for doing so is identified.

Amount of Deposit

33. With respect to the amount of money to be deposited, a tribunal will consider each allegation and whether to make a deposit order against it. Consequently, there may be several deposits ordered and the tribunal will determine what is proportionate.

34. In *Hemdan v Ishmael and anor* UKEAT/0021/16/DM, the EAT made the following point at paragraph 17:

“An order to pay a deposit must accordingly be one that is capable of being complied with. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise. The proportionality exercise must be carried out in relation to a single deposit order or, where such is imposed, a series of deposit orders. If a deposit order is set at a level at which the paying party cannot afford to pay it, the order will operate to impair access to justice. The position, accordingly, is very different to the position that applies where a case has been heard and determined on its merits or struck out because it has no reasonable prospects of success, when the parties have had access to a fair trial and the tribunal is engaged in determining whether costs should be ordered.”

35. The claimant should consider the risk of a costs order against her/him if the claims proceed to a final hearing. Where a deposit order is made and a tribunal decides the issue against the claimant, s/he will be treated as having acted unreasonably (unless the contrary is shown), for the purposes of a costs order under rule 76 of the Employment Tribunal Rules, and the deposit will be paid to the opposing party.

Background

36. The respondent is an NHS surgery partnership that engaged the claimant as a locum general practitioner. She started work there on 29 April 2021, only working until the following day, being 30 April 2021, when her engagement was terminated. GPs at the surgery were normally required to wear face coverings and be vaccinated against Covid 19.
37. The claimant did not wear a mask in her clinic room. When the respondent questioned her about it on her first day she contended that she had a medical exemption and produced a lanyard in support.
38. On 30 April Dr Maclusky, a GP partner at the practice, spoke to the claimant to find out more about her situation. She then revealed she had not been vaccinated against Covid 19 and she was disabled due to anxiety. The claimant accepts she did not inform the practice of her condition prior to commencing work.
39. The claimant's case is that Dr Maclusky aggressively required her to explain why she was exempt and asked personal questions about her disability. She said it was inappropriate and demeaning to ask about her vaccination status.
40. Dr Maclusky sought advice from Dr Tom Morton, the Local Medical Council representative. Dr Morton indicated that he would ask for a considered opinion at national level. Upon receipt of this on 30 April, he forwarded it to Dr Maclusky. This resulted in the claimant's engagement being terminated that same day by the respondent.
41. The claimant says the termination was because she refused to wear a face covering, and the respondent says it was because she was unvaccinated.

42. In an email to the surgery dated 16 May 2021 (bundle page 111) the claimant sets out her belief that her surgery was cancelled due to her exemption from wearing a mask.
43. In an email dated 3 June 2021 sent from the Practice Manager to the claimant (bundle page 135) it says "*The cancellation was purely based on the risks to you as an unvaccinated Doctor unable to wear a face mask and other PPE working in primary care.*"
44. The respondent says that reasonable adjustments were put in place to deal with the lack of a face mask, and the claimant says that the respondent refused to put reasonable adjustments in place.
45. In his request for advice from Dr Morton (bundle pages 96-97), Dr MacClusky sets out measures the surgery had taken. These are recorded as: informing patients that the claimant had a medical reason for not using a face mask; informing patients that they had a choice of whether or not to wear a face mask/visa; ventilating the room.
46. Following the claimant's departure, the respondent received several complaints from patients relating mainly to her attitude, including her not wearing a mask, having the windows closed and telling patients to remove their masks. The respondent emailed the claimant in a courteous manner about the complaints asking for her comments, followed by similarly courteous chase ups after receiving no substantive reply.
47. On 24 May 2021 the respondent referred the claimant's conduct to the General Medical Council. They responded on 25 May and, amongst other things, suggested that NHS England be informed. On 3 June 2021, NHS England wrote to the respondent saying they were investigating.
48. On 11 June 2021 the claimant instructed counsel to send a letter before claim to the respondent referring to alleged breaches of the Equality Act.

Discussion and Conclusion

49. I have taken the claimant's case at its highest. Consequently, for the purposes of this application, I have proceeded on the basis she was disabled at the relevant time due to an anxiety condition, and that she had a medical exemption from wearing a face mask.

Strike Out

Direct discrimination

50. The claimant's case is that her locum position was terminated because of her exempt status due to being unable to wear face masks and visors as a result of her disability.
51. This amounts to a section 15 claim of unfavourable treatment because of something arising in consequence of her disability. It is not a direct discrimination claim with respect to being treated less favourably than others because of her anxiety condition.

52. As no direct link has been claimed or demonstrated between the actions complained of and the claimant's anxiety, there is no reasonable prospect of the direct discrimination claim succeeding. Consequently, using my discretion, it is struck out.

Harassment

53. The claimant was working in a clinical setting seeing patients face to face at a time when Covid 19 was prevalent, and in circumstances where she had not previously explained her aversion to wearing a mask or being vaccinated to the respondent. Consequently, Dr Maclusky, had a duty to ask her about these things as they posed a safety risk to patients and staff.

54. There is no evidence, except the claimant's word, that Dr Maclusky was aggressive in the way he questioned her. However, even if this were the case, she is unlikely to be able to demonstrate that any such aggression was related to her anxiety condition, or that his conduct was meant to be for an harassing purpose or reasonably had that effect. Consequently, there are no reasonable prospects of her proving this was harassment.

55. With respect to the emails from the surgery, they were courteous requests asking for her comments on the complaints against her and, as such, are quite proper. It is highly unlikely that she would be able to show that they related to her anxiety condition and/or that they were written with an harassing purpose in mind, or reasonably had that effect. Therefore, there are no reasonable prospects of proving this was harassment.

56. Taking account of the content of the complaints, the respondent was carrying out its professional duty by referring the claimant to NHS England and the General Medical Council. There is no evidence to suggest that the referral related to her disability, or that it was done for anything other than proper professional reasons. Consequently, there are no reasonable prospects of demonstrating this was harassment.

57. In summary, there are no reasonable prospects of succeeding with any of the harassment claims and therefore, using my discretion, they are struck out.

Victimisation

58. The claimant claims that the referral to the General Medical Council and subsequently NHS England were detriments following her letter of claim of 11 June 2021. However, the referrals pre-date the letter and consequently, they cannot flow from it.

59. Therefore, there are no reasonable prospects of success in proving victimisation and, using my discretion, this claim is struck out.

Deposit Order

Section 15 Discrimination

60. The claimant's complaint is that Dr Maclusky terminated the working relationship because the claimant was unable to wear face masks or face visors

due to her anxiety.

61. Given the conflicting evidence before me, the claimant has an arguable case and I am unable to conclude that there is little prospect of this claim succeeding. Consequently, the application for a deposit order with respect to this allegation is refused.

Reasonable adjustments

62. There is a conflict of evidence over whether, and if so, what reasonable adjustments were put in place. The claimant has an arguable case and therefore, on the information before me, I am unable to conclude that there is little prospect of this claim succeeding. Consequently, the application for a deposit order with respect to this allegation is refused.

Employment Judge Liz Ord

Date 10 October 2022

JUDGMENT SENT TO THE PARTIES ON

14 October 2022

FOR THE TRIBUNAL OFFICE