EMPLOYMENT TRIBUNALS

Claimant: **Ms Julia Roberts**

Respondent: **Arriva London North Limited t/a Arriva London**

Heard at: **Watford Employment Tribunal (in public, by CVP)**

On: **8 November 2022**

Before: **Employment Judge Gordon Walker**

Representation
Claimant: Mr F Neckles, Trade Union Representative
Respondent: Mrs A Mosley-Ford, Paralegal

RESERVED JUDGMENT

1. The claim of direct disability discrimination (section 13 Equality Act 2010) is dismissed on withdrawal by the claimant, pursuant to rule 52 of the Employment Tribunal Rules of Procedure 2013.

2. The respondent's application to strike out the claims of harassment related to disability (section 26 Equality Act 2010), victimisation (section 27 Equality Act 2010), and automatic unfair dismissal (section 100 Employment Rights Act 1996) pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 is dismissed.

RESERVED REASONS

Introduction

1. The claimant was employed by the respondent as a bus driver from December 2007 to 14 October 2020. On 11 January 2021 she presented a claim of race discrimination, disability discrimination, unlawful detriment, and unfair dismissal, specifically:

    a. Direct disability discrimination (section 13 Equality Act 2010 ("EA"));
    b. Discrimination arising from disability (section 15 EA);

c. Failure to make reasonable adjustments (sections 20-21 EA);
d. Harassment related to disability (section 26 EA);
e. Victimisation (section 27 EA);
f. Ordinary unfair dismissal (section 94 Employment Rights Act 1996 ("ERA");
g. Automatic unfair dismissal (section 100(1)(c) ERA);
h. Detriment on the grounds of health and safety (sections 44 and 48 ERA);
i. Unparticularised claim(s) of race discrimination.

2. The respondent admits that the claimant was, at all material times, a disabled person by reason of her back injury, and that it dismissed the claimant for a reason related to her disability. The respondent contends that this was a proportionate means of achieving a legitimate aim. The respondent denies that it unfairly dismissed the claimant or subjected the claimant to discrimination or detriment.

3. The claim was case managed by Employment Judge Buchanan at a preliminary hearing on 8 June 2022:

    a. The claims of race discrimination and detriment on grounds of health and safety were dismissed on withdrawal by the claimant;

    b. A public preliminary hearing was listed to determine whether the claims to which the unless orders were attached should be struck out, or a deposit order made, pursuant to rules 37(1)(a) and rule 39 of the Tribunal rules, respectively.

4. On 8 July 2022 the claimant wrote to the Tribunal withdrawing the claim of direct disability discrimination (section 13 EA).

Issues for the public preliminary hearing

5. The issues for the hearing were:

    a. Should the claim of direct disability discrimination be dismissed on withdrawal pursuant to rule 52 of the Tribunal rules?

    b. Did the claims of harassment, victimisation, and automatic unfair dismissal ("the relevant claims") have no reasonable prospects of success?

    c. If so, should the Tribunal exercise its discretion to strike out the relevant claims pursuant to rule 37(1)(a) of the Tribunal rules?

Procedure, documents, evidence and parties' submissions

6. There was a bundle of 100 pages for the preliminary hearing.

7. The respondent produced a written skeleton argument, which speaks for itself. The respondent made short oral submissions in response to the claimant's submissions.

8. The claimant made oral submissions. She said that the relevant claims should not be struck out as they were fact sensitive, and the prospects of success

exceeded the relevant thresholds. The claimant referred to ***Ezsias v North Glamorgan NHS Trust*** [2007] ICR 1126; ***Ghumra v Home Office*** UKEAT/0077/15/RN; and ***McKerrow v The Princess Alexandra Hosptial NHS Trust*** UKEAT/087/11/RN.

9. Insofar as was necessary, I clarified the relevant claims with the claimant so that I understood those claims before I considered the strike out application.

The law

10. The Tribunal rules state, so far as is relevant:

> ***37.— Striking out***
>
> *(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.*

11. Discrimination claims should not be struck out except in the very clearest of circumstances: ***Anyanwu v South Bank Students' Union*** [2001] IRLR 305:

> *"For my part such 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 Steyn at paragraph 24)
>
> *" … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."* (Lord Hope of Craighead at paragraph 37)

12. Choundhury P (as he then was) in ***Malik v Birmingham City Council*** (unreported) 21 May 2019 provided a summary of the relevant legal principles (at paragraphs 30-33):

> *30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391 . The applicable principles were summarised more recently by the Court of Appeal in the case of Mechkarov v Citibank N.A [2016] ICR 1121 , which is referred to in one of the cases before me, HMRC v Mabaso UKEAT/0143/17.*
>
> *31. In Mechkarov , it was said that the proper approach to be taken in a strike out application in a discrimination case is that:*
> *(1) only in the clearest case should a discrimination claim be struck out;*
> *(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;*
> *(3) the Claimant's case must ordinarily be taken at its highest;*
> *(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and*
> *(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."*
>
> *32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. In Community Law Clinics Solicitors Ltd & Ors v*

Methuen UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that " the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."

33. A similar point was made in the case of ABN Amro Management Services Ltd & Anor v Hogben UKEAT/0266/09, where it was stated that, " If a case has indeed no reasonable prospect of success, it ought to be struck out." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in Meek v City of Birmingham District Council [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out.

13. In ***Cox v Adecco*** [2021] ICR 1307 HHJ Tayler analysed the case law, including the above guidance from ***Malik***, and provided a summary of the general propositions (at paragraph 28):

(1) No one gains by truly hopeless cases being pursued to a hearing.
(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.
(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.
(4) The claimant's case must ordinarily be taken at its highest.
(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.
(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.
(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.
(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.
(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

Conclusions

14. The claimant consented to dismissal on withdrawal and therefore the claim of direct disability discrimination will be dismissed pursuant to rule 52 of the Tribunal rules.

15. I dismiss the respondent's strike out application for the reasons set out below.

16. In essence, all the claimant's claims are about the fact that she was dismissed for a reason that was in some way related to her back injury, and she says that was discriminatory and unfair. The respondent admits that the claimant had a back injury that amounted to a disability, and that she was dismissed for a reason related to that. The facts of the case fit more naturally with the existing claims (section 15 EA, sections 20-21 EA, and section 94 ERA), but that does not mean that the relevant claims have no reasonable prospects of success. I am mindful of the fact that the claims are fact sensitive and that the first two claims are of discrimination. I have regard to the guidance set out above about striking out such claims. I deal with each claim separately below.

17. First the claim of harassment related to disability. The unwanted conduct relates to the decision to dismiss the claimant and the failure by the respondent to overturn that on appeal. The claimant failed to provide information in compliance with the unless order to explain why this related to disability. At the preliminary hearing, the claimant explained that it was related to disability because she was dismissed for a disability related reason. This seems to be an attempt to convert the section 26 EA claim into either a section 15 EA claim (which the claimant has already brought) or a section 13 EA claim (which has been dismissed upon withdrawal). However, given the respondent has admitted that the reason for dismissal was disability related, the point is arguable and is appropriate for determination at the final hearing rather than at the preliminary stage. The claimant has not articulated why this had the proscribed effect. This is a factual issue for the final hearing.

18. Second, the claim of victimisation. The facts do not naturally fit within the framework of a victimisation claim. However, the claimant's somewhat novel arguments involve factual issues to be determined at the final hearing:

    a. The protected acts are the occupational health reports. This is a novel argument and neither party referred to any legal authority on this point. It is possible that the reports are protected acts within the meaning of section 27(2)(c) EA;

    b. The detriments relate to the decision to dismiss the claimant and the failure by the respondent to overturn that on appeal. It seems inherently unlikely that the dismissal and decision on appeal were because of the occupational health report per se, rather than its specific contents. But the claimant says that she relies on the contents of the reports (specifically the history of her complaint and the opinion). It is likely that the respondent had regard to the occupational health adviser's opinion when reaching their decision.

19. Third, the claim of automatic unfair dismissal. The claimant says that she was dismissed because she complained about her own back injury which was a matter connected with her work which she reasonably believed was harmful or potentially harmful to health and safety. Again, this is somewhat novel use of the legislation. However, I can see that a complaint about the claimant's back injury could be a matter connected with her work which she reasonably believed was harmful or potentially harmful to health and safety, particularly her own. It seems much more likely that she was dismissed due to her incapacity and sickness absence, rather than the fact that she brought the back injury to the respondent's attention, but, again, this is a fact sensitive issue which should be determined at the final hearing.

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Employment Judge Gordon Walker
Date: 16 November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 7 December 2022

FOR EMPLOYMENT TRIBUNALS