



EMPLOYMENT TRIBUNALS

Claimant: Ms B Tomkins

Respondents: United Services & Services Rendered Club (Tooting and Balham) Limited

Heard at: London South (by CVP) **On:** 1 March 2023

Before: Employment Judge Cheetham KC

Representation

Claimant: in person
Respondent: Allyn Walton (solicitor)

JUDGMENT

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

REASONS

1. This is a claim that was received by the Employment Tribunal on 23 February 2022. The Claimant's employment commenced on 1 January 2004 and ended on 12 November 2021. She was employed as the Bar Manager.
2. On 1 August 2022, there was a Preliminary Hearing (EJ Smith), at which directions were given and a detailed list of issues prepared. This led to an application to amend the claim and to amended grounds of response. The claims were of: whistleblowing

detriment, unfair and wrongful dismissal, discrimination arising from disability, indirect discrimination, a failure to make adjustments, victimization and harassment.

3. The Respondent made an application to strike out the discrimination claims, in the alternative sought a deposit order. That application was listed to be heard today at this Preliminary Hearing.
4. I had the benefit of receiving written submissions from Mr Walton, which he developed in his oral submissions. I was also sent written submissions (with supporting documents) on behalf of Ms Tomkins from her solicitor at the Equality and Employment Law Centre, Helen Kendrick. This meant that, although Ms Tomkins spoke only briefly during this hearing, her legal arguments had been carefully presented.

The law

5. Rule 37(1)(a) provides that all or any part of a claim or response may be struck out if it is '*scandalous or vexatious or has no reasonable prospect of success*'. Although this application referred to "misconceived", that term has been replaced by the current formulation.
6. There has, of course, been a great deal of guidance for tribunals on how to approach applications to strike out cases, particularly where they include claims for discrimination. For instance, in ***Anyanwu v South Bank Student Union*** [2001] ICR, HL, the importance of not striking out discrimination claims except in the most obvious cases was emphasized, as they are generally fact-sensitive and require full examination to make a proper determination. It has also been emphasized that, before determining whether a discrimination claim has no reasonable prospect of success, it is necessary to take the claimant's case "at its highest" (see, for example, ***Silape v Cambridge University Hospitals NHS Foundation Trust*** UKEAT/0285/16).
7. It is also relevant to refer to one aspect of the discrimination claims, namely the "reasonableness" of adjustments. The test of reasonableness in the context of the Equality Act 2010 s.20 is an objective one and it is ultimately the employment tribunal's view of what is reasonable that matters (***Smith v Churchills Stairlifts plc*** [2006] ICR 524, CA).

The discrimination claims

8. It is helpful to set out the background to this application and I am greatly assisted by EJ Smith's extended description of the claim in the Order made after the Preliminary Hearing.
9. The Claimant was unfortunately diagnosed with terminal lung cancer in May 2019, which is a deemed disability (Equality Act 2010 Sch. 1, para. 6). Although the

Respondent states in its Amended Grounds of Resistance that “(it) challenges the claim that she is a disabled person “automatically” as a result of the diagnosis” (para. 11), that cannot be correct. In fact, later in those pleadings it also states that, “the respondent does not accept that the claimant suffered from a disability” (para. 52(d)).

10. There is a dispute over when the Respondent knew about the Claimant’s disability. The Claimant states that it was from 21 May 2019. The Respondent denies this, but – as far as I can make out – does not explicitly state when it had that knowledge.
11. However, that means that there is a dispute both over whether the Claimant was disabled at the relevant time (which seems an extremely difficult argument for the Respondent to make, given that it accepts that she was diagnosed with lung cancer in May 2019) and when it knew that was she suffering from cancer.
12. The Claimant had chemotherapy between July and November 2019 and radiotherapy in December 2019. In March 2020, the national lockdown was initiated as a result of the Covid-19 pandemic and the Respondent’s premises were closed.
13. I do not need to list all of the particular allegations, but the s.15 claim refers to 11 complaints of unfavourable treatment between 28 September 2020 and 10 November 2021, some of which relate to the Claimant’s presence at work (e.g. being asked to wear a mask) and some relating to her employment more generally (e.g. refusing to hear her grievance). The reasonable adjustments claim lists 4 adjustments between July 2019 and May 2021, which relate to the Claimant’s duties and workload and to wearing a mask.

The Respondent’s application

14. The core argument raised was that the claim has no reasonable prospect of success, because it requires the tribunal, “to countenance the making of adjustments to enable the Claimant to remain at work”. However, had it done so, the Respondent would have been in breach of its primary objective of keeping those who are regarded as “clinically extremely vulnerable” nowhere near the workplace, as set out in Government guidelines.
15. It was argued that the test of reasonableness is an objective one depending on the circumstances of the case and, in this particular case, any request for adjustments lacked any element of reasonableness. In other words, there was no breach of the duty to make reasonable adjustments because the adjustments sought were not reasonable.
16. That is because Government Guidelines from March 2020 advised those who were clinically extremely vulnerable to continue shielding at home (June 2020). I was referred to those guidelines and I note that the definition of “clinically extremely vulnerable” extended to those with cancer who were undergoing active chemotherapy

or radiotherapy, which – according to her particulars of claim - was treatment the Claimant had completed by the start of lockdown.

17. The written submissions stated that, “*It is clear from the Chronology above that during the Covid-19 pandemic from March 2020 until September 2021 that C was either undergoing active chemotherapy and/or radiotherapy (see items 5, 7, 8, 11) and that from 13th July 2020 until 7th September 2021 C was under suspicion of a recurrence of her cancer condition*”. The reference to further chemotherapy and radiotherapy in March 2020 was said to be from the Claimant’s GP notes (at p. 135 of the hearing bundle), although I could not find that reference.
18. As a result, the Respondent submitted, the Claimant was in “*flagrant disregard*” of her own safety by attending work at all and should have stayed at home, because she came within the definition of clinically extremely vulnerable persons.
19. Further, in order to succeed with the claim for a failure to make reasonable adjustments, the Claimant needed to show that she was placed at a substantial disadvantage by the Respondent’s actions or omissions. It was submitted that she could not do so, because she would not have been disadvantaged by doing what the Government required of her.
20. As to the claim under the Equality Act 2020 s.15, it was submitted that the “*some things*” that arose out of the disability (such as being exempt from wearing a mask) were matters which further precluded the Claimant coming to work. There was therefore a “*logical lacuna*” which prevented that claim from succeeding.
21. Mr Walton confirmed that he was not seeking a deposit order in the alternative.

The Claimant’s submissions

22. The Claimant’s written submissions made the point that at no stage did the Respondent require her to stay at home. She asked for adjustments that would have given her a lighter workload and fewer hours, but the Respondent never responded to these requests. Furthermore, she was asked by the Respondent to attend the premises at times and was allowed to attend.
23. Further, the Government guidance was just that – it was only “*guidance*”. It was up to the individual what she chose to do and the Claimant wanted to work. She worked from home as much as she could, but, when she was well, went to the Respondent’s premises. The submissions then went through each allegation of discrimination, but it is not necessary to repeat each of these points.
24. In response to these submissions, Mr Walton’s main argument was that, in terms, it could not be reasonable for anyone to request adjustments in these circumstances. It would also have been impossible for the Respondent to acquiesce. He accepted that

there was a factual dispute, but argued that the legal proposition he was making was nevertheless sufficiently strong.

Discussion

25. I would make the obvious point at the outset that the argument based upon the Claimant being "*clinically extremely vulnerable*" by reason of her cancer does not sit easily with the pleaded challenge to the Claimant's status as a person disabled within the meaning of the Equality Act. It also implicitly vests the Respondent with knowledge of the Claimant's condition from at least the point at which the adjustments were first sought (the first of which is actually pre-lockdown in July 2019).
26. I would also note that there appears to be a factual dispute as to whether the Claimant was continuing to receive chemotherapy and radiotherapy after the start of lockdown in March 2020. The Respondent states that she did so until September 2021, but that is not what the Claimant states. There are 230 pages of medical evidence, so I will not pretend that I have worked my way through all of them for the purposes of this application. All I can say is that, along with whether the Claimant was disabled and whether and when the Respondent knew of that disability, this remains in dispute.
27. That factual dispute is also relevant to whether the Claimant was "clinically extremely vulnerable", which is at the core of the Respondent's submissions. If that were not the case and she did not fall within those guidelines, then the Respondent's argument becomes much weaker. There is also considerable force in the Claimant's submission that these were just guidelines; they were not rules that had to be obeyed, but official advice, albeit strongly given.
28. More fundamentally, while the Respondent is correct in saying that the test of reasonableness is an objective one, it is ultimately the employment tribunal's view of what is reasonable that matters. I cannot see how a judge at this stage could say that the circumstances at the relevant time were such that any request by the Claimant for adjustments was wholly unreasonable. It may be that is what the tribunal concludes in due course, but it will have to hear evidence from the Claimant and about those circumstances before it could make such a finding.
29. I also do not agree that the strength of the arguments around the adjustments claim means that the s.15 complaints also have no reasonable prospect of success. Not only does s.15 require a different legal test, but the allegations under that heading are not restricted to the Claimant's presence in the workplace, but extend to (for example) refusing to hear her grievance.
30. Therefore, while there is an attractive simplicity in Mr Walton's logic, there is too much in dispute in this case to allow it to succeed.

Case management

31. EJ Tsamados previously gave directions in this case (Preliminary Hearing, 29 November 2022). He ordered the case to be listed for 11 days on the first available date after 12 July 2023. He subsequently asked the parties (on 17 January 2023) to provide dates of unavailability for the rest of the year.
32. As this application has not succeeded, the listing remains for 11 days. The parties should send in their availability dates, if they have not already done so, as the tribunal's Listing Section has been asked to list this for the first available dates.

Employment Judge Cheetham KC

Date 15 March 2023