Case Number: 3310720/2021

THE EMPLOYMENT TRIBUNAL

SITTING AT: **READING** (by CVP)
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**

BETWEEN:

Mr G Dredd

Claimant

AND

Zirkon Ltd

Respondent

ON: **22 March 2023**
Appearances:
For the Claimant: **In person**
For the Respondent: **Mr R Ryan, counsel**

JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Tribunal is that the respondent's application to strike out the claim fails.

REASONS

1. These reasons were given orally on 22 March 2023. The claimant requested written reasons.

2. By a claim form presented on 28 May 2021, the claimant Mr George Dredd brings claims of unfair dismissal and disability discrimination in terms of failure to make reasonable adjustments. The claimant was employed for the respondent as a Spray Operative; he worked as a Japanese knotweed site technician. The respondent is a land services and land remediation company.

3. It was confirmed by the parties at the outset of this hearing that this is not a claim for failure to comply with the right to be accompanied nor a claim for failure to provide payslips.

4. Disability is not conceded by the respondent.

The procedural background

5. There have been two prior preliminary hearings in this case, both of which were used for case management. The first was a year ago on 14 March 2022 before Employment Judge Hawksworth and the second was seven months ago on 3 August 2022 before Employment Judge Eeley.

6. The issues in the case were set out in the Order made by Judge Hawksworth on 14 March 2022. The respondent concedes that the dismissal was unfair. Remedy for unfair dismissal is in issue. There were aspects of the reasonable adjustments claim that remained in need of clarification by the claimant, notably the PCP's (provision, criterion or practice) and the substantial disadvantage relied upon in each case. The claimant was also asked to set out the reasonable adjustments for which he contended. The relevant sections of the Equality Act, sections 20 and 21, were clearly set out in the Judge's Order.

7. The disability relied upon is mixed anxiety with depression (Order of 14 March 2022 paragraph 11).

8. The claim was not listed for a full merits hearing at the Case Management Hearing on 14 March 2022 because the parties were unable to give an accurate time estimate, particularly because the reasonable adjustments claim had not been clarified. Judge Hawksworth also said that if disability was not conceded it may be necessary to list a preliminary hearing to determine disability status.

9. With the consent of the parties a further Case Management hearing was listed and this took place on 3 August 2022.

10. The claimant provided further particulars on 11 April 2022 setting out a number of adjustments that he said should have been provided.

11. On 10 May 2022 the respondent made an application to strike out the reasonable adjustments claim for non-compliance with an Order or direction, pursuant to Rule 37(1)(c) – set out below. The respondent also argues that the reasonable adjustments claim should be struck out on grounds that it is scandalous, or vexatious, or has no reasonable prospects of success, in accordance with Rule 37(1)(a). The respondent asked that this application be dealt with on 3 August 2022.

12. In the alternative the respondent sought a deposit order under Rule 39 on grounds that the reasonable adjustments claim had little reasonable prospect of success.

13. By a letter from the tribunal dated 7 June 2022 (bundle page 55), the file having been referred to Employment Judge Hawksworth, the claimant was informed that his further particulars of 11 April 2022 did not identify the PCP's relied upon and the claimant was ordered to provide further information by 21 June 2022. He was to set out the PCP's and the substantial disadvantage that each PCP put him to, in comparison with non-disabled persons. The respondent had 14 days thereafter to file an Amended Response.

14. The hearing listed for 3 August 2022 was converted to a public preliminary hearing to consider the respondent's application of 10 May 2022. The hearing was listed for 2 hours.

15. The claimant provided further particulars on 21 June 2022 (bundle page 57). The parties have since been replying to one another's documents.

16. The hearing on 3 August 2022 did not go ahead as a preliminary hearing in public. Judge Eeley noted that the claimant did not have access to the bundle in a paper format and the hearing was by video (CVP). He did not have a second screen to look at the documents. The judge considered that he could not participate fairly in the hearing.

17. The hearing was relisted for 5 October 2022. It was postponed due to the claimant's ill health to 1 March 2023 and further postponed on the respondent's application (as set out in the tribunal's letter page 117) to today, 22 March 2023. It was made clear by the Judge at the hearing on 3 August 2022 that disability status was not for consideration at this hearing (Case Management Summary paragraph 4) and neither was the issue of time limits.

18. The case has not yet been listed for a full merits hearing.

The issues for this hearing

19. The issues for this hearing were set out by Employment Judge Eeley as to:

    a. Determine the respondent's application for strike out or a deposit in relation to the claim for failure to make reasonable adjustments.
    b. Obtain any further necessary clarification of the issues in the case.
    c. Give case management orders for the final full merits hearing.

20. The respondent was Ordered to send the claimant a paper copy of the bundle by 17 August 2022. The claimant confirmed that he had this. a

Documents

21. The tribunal had a preliminary hearing bundle of 148 pages, including the index.

22. Neither side produced written submissions. The tribunal had oral submissions only. All submissions were fully considered including authorities, whether or not expressly referred to below.

23. No witness evidence was taken.

The claimant's PCPs

24. The PCPs relied upon by the claimant were set out from page 57 of the bundle as follows.

    i. Failure to actually provide access to staff handbook containing company policies and procedures
    ii. Failure to leave adequate time between jobs
    iii. Failure to provide updates and information on current and future working arrangements, and Failure to provide a reasonable notice period of my return to work and failure to follow Zirkon's own procedures
    iv. Failure to provide a phased return to work and failure to follow own guidelines
    v. Failure to offer or provide accommodation in areas to prevent excessive driving
    vi. Making changes to my contract of employment without fully disclosing changes
    vii. Failure to provide clear instructions or a designated person to be able to report injuries and accidents to
    viii. Blocked out of all systems following termination – no access to contract, payslip, personal contents of my van
    ix. Failure to provide adequate notice of meeting
    x. Zirkon's practice was to book all jobs through 'Mapanything' software.
    xi. Zirkon's practice was to book last minute meetings, which did not allow for me to prepare or have a mentor or advocate present in meetings with me
    xii. Zirkon's customary practice was to discuss everything with staff on the phone or in a meeting
    xiii. Zirkon had no mental health trained staff to report to or offer wellbeing checks or one-to-one peer support
    xiv. Zirkon's practice was for all employees (with one exception) to work 9:00-17:30
    xv. Zirkon's practice was to not provide clear areas of work to avoid crossing paths with other operatives and to avoid an unnecessary amount of new unknown jobs
    xvi. Zirkon practice was to completely ignore their duty of care towards me; they made no referrals or offers of a referral to an Occupational Health assessment for me; they failed to provide any form of support for my disability; they did not provide any support and no offer of telephone counselling or help line access) or training to raise awareness of mental health issues within the company

xvii. Zirkon's practice was to give full control over the way my jobs were booked to the office-based team

xviii. Zirkon policy did not provide proper support and applicable guidance for Health and Safety issues

xix. The company did not provide/have any policies surrounding mental health to show an understanding, and to provide a level playing field for me amongst colleagues who did not have my disability

xx. Managers were not trained, open and fair about mental health matters

The respondent's application

25. The respondent's application was set out at page 48 of the bundle. Essentially the respondent says that in terms of understanding the case against them, the claimant has not complied with the previous Order or direction and that the reasonable adjustments claim has little or no reasonable prospect of success.

26. I asked the respondent if they accepted any of the 20 points relied upon, amounted to a PCP under section 20(3) Equality Act? The respondent said it was extremely difficult if not impossible, to understand the PCP, the substantial disadvantage and a date. Counsel for the respondent said it was "*impossible"* to identify anything from that document. In discussion with counsel we established that neither Judge Hawksworth's Order or the tribunal's letter of 7 June 2022 had required the claimant to plead dates, although I understood why the respondent would wish to have this information.

27. I also asked if they accepted that any of the ways in which the claimant said these matters affected him, were capable of amounting to a substantial disadvantage. The claimant had given information as to how the PCP affected him; by way of example point 3 on page 59 – *"this caused me anxiety and panic…..added to my mental health struggles".*

28. We took a break of half an hour to allow Mr Ryan to take instructions from the respondent as to whether they accepted that the claimant had complied with the Tribunal's order and direction in terms of his pleaded case. I reminded Mr Ryan that this did not mean that the respondent accepted that they applied the PCP, it remained open to them to deny this, but I wished to understand whether, on any of the 20 points, there was an acceptance that the claimant had complied with what he had been Ordered to do.

29. The respondent conceded that the following were PCPs: Points iv, x, xii, xiv, xx.

30. I also asked whether substantial disadvantage been pleaded. The respondent said "*not necessarily".*

31. The respondent submitted that the particulars did not have the necessary elements for the case to go forward. The respondent relied orally upon the decision of the EAT in ***Chandok v Tirkey EAT/0190/14*** that the ET1 was not just something to get the ball rolling and that the claimant had been represented.

32. The respondent also relied upon ***Hoppe v HMRC EA/2020/00093*** at paragraph 34

> *"However, this was, it seems to me, one of those particularly challenging cases not infrequently encountered by tribunals, in which a litigant in person has not pleaded his complaints with clarity, and, following tribunal orders has, as it was vividly put in* Cox v Adecco *[2021]* UKEAT/0339/19, *9 April 2021 at [29], then produced further material that "makes up for in quantity what it lacks in clarity." In such a case, faced with a strike-out application, the tribunal should make a reasonable attempt, reviewing the material it has got, to identify if it can, at least the core complaints and issues that the claimant appears to be raising."*

33. The respondent considered the main case or the core issue to be the unfair dismissal claim and that there was a lack of particularity and a lack of substance on the reasonable adjustments claim. The respondent said that the concerns were not raised at the time and there was no document to show that the respondent was aware of the disadvantage so it had no reasonable prospects of success as well. Whilst some ingredients of a reasonable adjustments claim were identified it did not appear to be an adjustments claim with reasonable prospects of success. Other than the points conceded above, the respondent said all the others were "*not even PCP's*" and on that basis and if the tribunal was minded to say that there was some form of claim then a deposit should be ordered and this claim should be seen for what it really was, namely an unfair dismissal claim.

34. In the written application but not orally, the respondent relied upon the decision of the Court of Appeal in ***Ishola v Transport for London 2020 IRLR 368*** in support of their argument that the respondent's policies and procedures relating to Covid and furlough are not PCP's. In that case the Court of Appeal said that the function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. Simler LJ said at paragraph 38:

> *"In context, and having regard to the function and purpose of the PCP in the* Equality Act 2010, *all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to*

anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

35. The respondent's Covid and furlough policies shows how things "*will be done"* (see above) during the furlough scheme and the pandemic. The policies carry an indication of how things will be done in future, albeit during the pandemic, if a similar case arises. This does not make it a one off matter.

36. The respondent also relied upon the decision of the Court of Appeal in ***Newham Sixth Form College v Sanders 2014 EWCA Civ 734*** at paragraph 14 that the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustments necessarily run together. An employer cannot make an objective assessment of the reasonableness unless it appreciates the nature and extent of the substantial disadvantage imposed by the PCP.

The claimant's response to the application

37. The claimant said that to the best of his ability and from what he had looked at online and that there was no set definition of a PCP, this was the best he could. He said he would be happy to clarify more details. On dates, the claimant said that the respondent blocked him from their systems, so he cannot access that information and the respondent should be able to look at the entries and when logs were created.

38. On prospects, the claimant said that there were emails which would back up what he said. The respondent said that they could not reasonably be expected to know about the effects of his disability but the claimant said that in June 2020 they knew about this and even further back to June 2018. The claimant said he made reference to his anxiety in letters he sent to the respondent.

39. The claimant also said he had at least 20-30 screen shots and emails to back up his case and that there was a clear trail of evidence.

The relevant law

40. In relation to strike out, Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides as follows:

(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) ….
(c) for non-compliance with any of these Rules or with an order of the Tribunal.

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

41. In relation to a deposit order, Rule 39 provides

(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.
(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

42. **I**n ***Anyanwu v South Bank Students' Union 2001 ICR 391*** the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination. It may be necessary to determine whether discrimination is to be inferred.

43. There is no blanket prohibition on the strike out of claims presented under the Equality Act 2010 and the tribunal is entitled to strike a claim out where it has reached a tenable view that the claim cannot succeed (see ***Jaffrey v Department of the Environment, Transport and the Regions 2002 IRLR 688*** at paragraph 41 – Mr Recorder Langstaff (as he then was)).

44. The claimant's case must be taken at its highest when considering a strike out application, the test does require that there is a reasonable, rather than merely fanciful, prospect of success and if the Tribunal is satisfied that there is no such reasonable prospect then strike out is available even where there are disputes of fact - ***Ahir v British Airways plc 2017 EWCA Civ 1392, CA*** (Underhill LJ)***.***

45. In ***Balls v Downham Market High School and College 2011 IRLR 217*** the EAT said that the test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test. If can be unfair to strike out if there

are crucial facts in dispute and there has been no opportunity to test the evidence. Strike out is a draconian power.

46. In terms of the application of a PCP, the Court of Appeal in ***Ishola v Transport for London 2020 IRLR 368*** held that not all one-off acts necessarily qualify as PCPs. In order so to qualify, they must be capable of being applied in future to similarly situated employees.

Conclusions

47. The Order for further particulars made on 14 March 2022 and in the letter of 7 June 2022, were not Unless Orders. This does not mean that the claim cannot be struck out for non-compliance with such Orders.

48. I took into account of the fact that the claimant is a litigant in person, albeit he has had the past assistance of Ms Squibb-Williams who is a retired barrister. The claimant has been acting in person since 1 May 2022. My understanding was that Ms Squibb-Williams was not an employment practitioner.

49. The claimant has not completely failed to comply. He has done his best, as a litigant in person. The respondent conceded that points iv, x, xii, xiv and xx above, were capable of amounting to PCPs.

50. Dealing with the written argument, which was not advanced orally, as to whether Covid policies cannot be PCP's, I could see no reason why policies that applied during furlough or Covid could not have been applied more than once during the furlough scheme or the pandemic. They could have been applied more than once during that period.

51. I had no particular difficulty in understanding the nature of the PCP's the claimant wished to rely upon. A few required a little fine tuning but this was not a abject failure to comply. The PCP's could be fine-tuned in case management.

52. In terms of the substantial disadvantage, I could see that the claimant had set this out in each case. The claimant has after each entry set out a heading "*IDE*" meaning indirect discriminatory effect. Whilst this was not a particularly helpful description from a legal point of view, this not being a claim for indirect disability discrimination, it did the job of setting out the disadvantage to which the claimant says he was put. I find that he has complied with this requirement.

53. The claimant did not appear to have set out the adjustments for which he contended. Ultimately it is for the tribunal to make a decision on what, if any, adjustment would have been reasonable and these may not the adjustments for which claimants contend. Whilst it is helpful to know what the claimant contends for, it is not essential to understanding the case under section 20(3).

54. For these reasons it does not warrant a strike out under Rule 37(1)(c).

55. I have gone on to consider whether under Rule 37(1)(a) the reasonable adjustments claim has no reasonable prospects of success or under Rule 39 whether that claim has little reasonable prospect of success.

56. The claimant's position is that there is documentary evidence to support his claim and if he is right about that, it will come forward in the disclosure exercise.

57. I am mindful of the decision of the House of Lords in ***Anyanwu*** which highlights the importance of not striking out discrimination claims except in the most obvious cases. They are generally fact sensitive and require full examination to make a proper determination. The claimant's case must be taken at its highest when considering a strike out application (see ***Ahir*** above).

58. Whist it is the respondent's view that the disability claim is not the "*core issue*", it is nevertheless a claim that the claimant brings and is entitled to bring. If he succeeds it has the potential to give rise to an award for injury to feelings which is not available as a remedy for unfair dismissal.

59. There is a dispute of fact as to whether documents exist that made the respondent aware that the claimant was put at a substantial disadvantage. The respondent submitted that there were no such documents; the claimant said that he sent letters to the respondent. That issue cannot be resolved without the evidence.

60. I am unable to say that this reasonable adjustments claim has little or no reasonable prospects of success. The respondent has today conceded that points iv, x, xii, xiv and xx are capable of amounting to PCPs. They need to say whether they admit applying such PCPs. I have taken the view that the other points relied upon, sufficiently identify PCP's and in each case a substantial disadvantage. It is simply a case of fine tuning these.

61. Thereafter, these matters need to be considered in evidence. By way of example, on point (vii) I am unable to form a view on what is before me, as to whether the respondent failed to provide clear instructions and if so, whether this put the claimant at a substantial disadvantage. Similarly on point (xvii) I am unable to form a view on whether the respondent's practice was to give full control to the office based team over the way jobs were booked and whether this then put the claimant at a substantial disadvantage of creating anxiety and stress for him. On each point, the evidence needs to be heard.

62. I therefore decline to strike out the reasonable adjustments claim or to order a deposit as a condition of being allowed to continue to advance any such argument.

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Employment Judge Elliott
Date: 24 March 2023

Judgment sent to the parties and entered in the Register on: 11.4.2023
GDJ for the Tribunal