EMPLOYMENT TRIBUNALS

Claimant: **Mr Harrison Lunn**

Respondent: **(1) Express Medicals Ltd**
(2) Vital Human Resources Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (in private by video link - "CVP") **On: 18 August 2023**

Before: **Employment Judge R S Drake**

Appearances

For the Claimant: Mr M Lunn (Claimant's Father)

For the Respondents: (1) – Mr G Baker (of Counsel)
(2) – Ms C Hill (Solicitor)

RESERVED JUDGMENT

1. The Claimant's claim of unfair dismissal (as expressed against both Respondents) is dismissed on withdrawal by consent.

2. The Claimant's claims of unlawful disability discrimination (as expressed against either or both the Respondents) are dismissed in accordance with paragraph (a) Rule 37 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), on the grounds that I find that the claims have no reasonable prospect of success. I make this finding on the basis of the pleadings, arguments and the materials produced to me today.

Reasons

3. I heard detailed argument from all sides' representatives after clarifying with Mr Lunn that his son's complaints of disability discrimination were limited to complaints under Section 15 of the Equality act 2010 ("EqA"). I also learned from him that as neither Respondent was the Claimant's employer, he accepted that the complaints of unfair dismissal could not have any reasonable prospect of success and that he withdrew them as against both Respondents. I recognise and applaud the efforts of all representatives and commend their earnest persuasive efforts. I reserved this Judgment on the Respondents remaining applications so as to consult relevant case law and statute authorities of which I am aware, and to deliberate carefully. Both Respondents seek to strike out the claims as against each on distinct grounds but based upon what has been pleaded by the Claimant in his ET1, which he clarified by Further Information expressed by using an ET3 Form filed on 17 August ("C's Riposte") in response to both the Respondents' respective ET3 Grounds of Resistance statements. The facts relevant to the applications today are based on uncontested facts as pleaded and are thus common ground.

Findings

4. I refer to the Respondents as R1 and R2 respectively and to the Claimant as C. His claim as pleaded (in the ET1 and ET3 Riposte) is succinctly but clearly set out by and for him with the perspicacious help of his Father who represented him eloquently today, and who gave clear submissions and argument. In essence I can make the following findings that the claims and R's responses are as follows based on what C sets out in his ET1 and ET3 Riposte (his "pleadings") by which his claims are defined/bound;-

    4.1 C was "engaged" by R2 – it is apparently common ground that R2 is an "Employment Business" – i.e. it engages persons (such as C) either as PAYE contractors, or through an umbrella company, or through a person's own limited company, and then hires them out or introduces then to end users of such services, as in this case to Network Rail from 21 March 2022; It is common ground therefore that neither R1 nor R2 were C's employers for the purposes of Part X of the Employment Rights Act 1996 ("ERA");

    4.2 It is again common ground that C is epileptic and has ADD, though the precise extent is not conceded by either R; This is not necessarily relevant to the question of what their capacity was in relation to him such as to found a basis for complaining of unlawful discrimination;

    4.3 Network Rail require that all service providers or workers such as C should meet stringent medical requirements of the Railway Industry Supplier Qualification Scheme ("RISQS") for the purposes of health and safety and hold current relevant certification thereof; RISQS is a body wholly owned by the Rail Safety Standards Board Ltd and thus has no

corporate connection with either R1 or R2. C's most recent certification by a previous source of such certification expired in early December 2022 and he was required to undertake further examination by R2 as R1's then nominated occupational Health Services provider; Asd C's case is pleaded R1 and R2 have no contractual relationship with C as employer, principal or any other capacity, and they work at arm's length from each other so as to be independent of each other;

4.4 C was examined by R1 on 5 December 2022 – R1 says that he confirmed C last had an epileptic seizure in 2020, that he continued to take medication twice daily; I note that this aspect of R1's case is not contested by C in his ET3 Riposte;

4.5 R1's staff, whose opinion was later confirmed by Dr Malleson the Chief Medical Officer of R1, was that in the light of these facts, C no longer met the RISQS requirements and those of Network Rail because these required a patient to be seizure free for the last 10 years since the last attack, and that he be not required to take medication therefor; I note that C and his Father do not agree with this analysis and that they challenged it; It is not for me to determine who is right, but to test whether on the pleadings this shows that R1 or R2 committed acts of discrimination contrary to the Equality Act 2010 ("EqA")- AND - that they did so in capacities which invoke the right to complain under Sections 39, 41 or 111 of EqA;

4.6 The heart of C's complaints as pleaded is his argument that he was treated unfavourably because of something arising from disability – i.e. under Section 15 EqA – the "something arising" being the refusal/failure by R1 to certify C's fitness to work in accordance with Network Rail's stringent requirements, and that refusal related to his disability; C does not pursue any other form of unlawful discrimination, but what he does plead relies on placing and clearly pleading his case firmly within establishing that either R1 or R2 had the capacities provided for and/or falling within the circumstances defined by Sections 39, 41 or 111 EqA;

4.7 C's complaints all sound against R1, and noticeably I accept R2 submission that he does not cite in any aspect of his pleading (ET1 and ET3 Riposte) a cause of action (relying on Sections 39, 41 or 111 EqA) against R2;

Relevant Statute Law and its application

5. Section 98(1) ERA provides –

"In determining for the purposes of this part of the Act whether the dismissal of an employee is fair or unfair, it is for the employer to show …" (my emphasis)

6. The terms “employee” and “employer” are defined in Section 230 ERA (respectively) as – “an individual who has entered into or works under a contract of employment” and “in relation to an employee or worker means the person by whom the employee or worker is employed”.

7. From this I derive the principle that C’s claim for unfair dismissal is wholly dependent upon him showing that he was an employee of either R1 or R2 pursuant to an employment contract with one or other of them. He does not so plead in his ET1 nor his ET3 Riposte.

8. Section 39(2)(d) EqA (the only basis pleaded albeit without actually quoting this provision as such) provides –

> “An employer (A) must not discriminate against an employee of A's (B) by subjecting B to any other detriment … ” – in this case, the detriment argued is dismissal;

9. Section 41(1)(d) EqA (again only this is pleaded) provides –
“a principal must not discriminate against a contract worker by subjecting the worker to any other detriment … “ - again in this case the detriment argued/pleaded by C is dismissal;

10 Section 111 EqA (though not pleaded but recognised as potentially relevant) provides as follows-

> “(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which is a basic contravention of EqA -
> (2) … must not cause …
> (3) … must not induce … “

11. I refer to these Sections as the “Capacity Sections” defining a key part of what C has to be arguing.

12. From these I derive the principle that C has to have pleaded that R1 or R2 were his employer as defined by EqA, or that either were his principal in the context of working for them, or that at the very extreme they instructed, caused, or induced unfavourable treatment of him. C has not pleaded any of these basic relationships as a basis for founding discrimination claims - (my emphasis). He appears to believe all he has to argue and then prove is unfavourable treatment in the form of not certifying his fitness, but in the statute law as currently drafted in EqA that is not enough. He has to plead (and then show if the case were to proceed to a full merits hearing) that he was employed by either, or was if a contract worker, that he was engaged by either as his principal, but as already stated, he pleads none of these.

13. For the sake of completeness, I set out below the basis upon which I had to consider the position as far as set out in Rule 37(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 … has no reasonable prospect of success - (*my emphasis*) ;
(b) … (c) … (d) … *(not relevant*)";

Case Law cited and/or considered

12. Again neither side referred me to it, but I took account of the Court of Appeal's finding in **Swain v Hillman [2001] 1 All ER 91** in which it was held that a Court (or Tribunal in this case) must consider whether a party " … has a realistic as opposed to fanciful prospect of success …" in the context of assertions, as in this case, that C's case has no, as opposed to little prospect of success. In this case there is clearly on my examination no conflict of pleading on the key points such as would necessitate ventilation of evidence necessary to make factual findings on contested allegations at a full hearing. On C's own pleadings, there are no such factual disputes to be determined one way or another at a full hearing.

13. **A v B (and another) [2011] ICR D9, CA** - In this case the Court of Appeal held that a Tribunal was wrong to find a claim had no reasonable prospect of success basing this conclusion on a finding that on proper analysis it had "more than a fanciful prospect" of success. From this I derive a distinction between "no prospect" and no more than a "fanciful prospect." If a point is clear cut to show that a case as pleaded is such that neither R can fall within the Capacity Sections (39, 41 or 111 EqA), then as showing that not only acts of discrimination have occurred, but also they have occurred within a relationship provided for and defined by any of these Sections, then C's claims MUST be doomed to fail. I conclude that this is a clear example of no prospect as opposed to no more than a fanciful prospect of success.

14. **Anyanwu (and another) v South Bank Students' Union [2001] ICR 391**. - In this case 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 usually require full examination to make a proper determination.

15. This was followed by the Court of Appeal's decision in **Community Law Clinic Solicitors v Methuen [2012] EWCA Civ 571**, in which it was held that and employee's claim for age discrimination should not be struck out because the case required further examination of the facts so as to properly consider whether age discrimination could be inferred. C's case before me today as currently pleaded is easily distinguishable from **Methuen** because though C has pleaded acts of discrimination clearly, he has not pleaded sufficiently any form of argument to show that either R1 or R2 come within and/or are covered by the Capacity Sections of EqA.

16. In **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**, the Court of Appeal again held that it will only be in an exceptional case that a claim will be struck out as having no reasonable prospect of success when the central facts are in dispute. However, in the current case, C's claim as pleaded and as responded to does not show that central facts are in dispute - BUT - I find that, as pleaded C's claim shows a complete absence of pleading as to how either R1 or R2 could fall within the Capacity Sections of EqA.

17. I considered the balance of prejudice facing the Claimant if I struck out his case leaving him with no further way of arguing here his views as to what has happened, or to the Respondent if the case were not struck out causing them to have to devote considerable time and energy to meeting claims which on what I have seen and heard today, and also based on C's admissions, has no prospect of success.

18. On this analysis, I conclude that the balance of prejudice favours the Respondents leading me to conclude it is right I should strike out the claims. If C has a remedy in some other direction, such as helpfully suggested by Mr Baker, by looking at other sections of EqA which may afford a remedy against different Respondents, then he may look in that direction – it is not for me to say he should do so, but that is not a justification for not striking out a doomed claim as currently pleaded and further particularised.as against these Respondents

19. I have considered as an alternative to striking out some other form of finding which would permit C to proceed with his claim. However the cruciality of the need for him to establish that R1 or R2 fall within sections 39, 41 or 111 of EqA is so central to his case that as he has not pleaded that they do, he will not be able to adduce evidence at a full hearing to show that they do, so by definition and application of logic his claim is therefore doomed to fail at any hearing whatever order I make today. It is in the interests of justice and fulfilling the overriding objective to achieve finality where it is possible and necessary to do so and I conclude that it is not in C's interests to pursue a claim which is doomed to fail.

20. For all the reasons set out above, I conclude that paragraph (a) of Rule 37(1) is engaged and empowers me to strike out the discrimination claims in accordance with Rule 37. Therefore, I find that I have no alternative but to dismiss the claims of alleged unlawful discrimination.

Employment Judge R S Drake

Signed 19 August 2023