



EMPLOYMENT TRIBUNALS

Claimant: Mr B Lökkason

Respondent: Superbowl UK Newport Ltd

In Chambers: Wrexham **on:** 23 August 2023

Employment Judge: T. Vincent Ryan

REPRESENTATION:

Claimant: Written submissions

Respondent: Written submissions

DECISION

(Rule 72 ETs (Constitution & Rules of Procedure) Regs 2013)

1. My decision is that there is no reasonable prospect of my decision of 14 July 2023 (to refuse the claimant's application to admit expert psychologist's or psychiatrist's evidence at the forthcoming remedy hearing in support of a Personal Injury claim and as evidence of mitigation of pecuniary loss – "the original decision") being varied or revoked.
2. In the alternative, as I have spent considerable time reading and taking account of detailed written submissions and documents in relation to the claimant's application for a reconsideration of the original decision, I confirm the original decision. To all intents and purposes I have had to carry out a reconsideration anyway.
3. A hearing was not required in accordance with the overriding objective. The respondent's position was that a hearing was never required, and the claimant has accepted that the matter could be dealt with on the papers.

REASONS

4. Brief chronology:

- 4.1. The claimant's employment: 21 January 2019 - 8 December 2019.
- 4.2. The claimant's claim form was presented to the Tribunal on: 29 November 2019.
- 4.3. The claimant's further and better particulars of claim were presented to the Tribunal on: 4 September 2020.
- 4.4. The full merits hearing took place: 6 – 10 March 2023.
- 4.5. Liability judgment sent to the parties: 25 April 2023.
- 4.6. The claimant's first mention in correspondence of wanting to adduce expert medical evidence: 8 June 2023.

5. Correspondence with regard to preparation for the remedy hearing:

5.1. each party has provided comments and observations in response to the Tribunal's request for same in relation to each piece of incoming correspondence received from the other party.

5.2. For the purposes of this decision I have re-read the following correspondence received from the claimant, being emails dated:

- 5.2.1. 16 May 2023
- 5.2.2. 8 June 2023
- 5.2.3. 27 June 2023
- 5.2.4. 4 July 2023
- 5.2.5. 19 July 2023
- 5.2.6. 20 July 2023
- 5.2.7. 11 August 2023
- 5.2.8. 16 August 2023.

5.3. for the purposes of this decision I have re-read the following correspondence received from the respondent, being emails dated:

- 5.3.1. 16 May 2023
- 5.3.2. 26 May 2023
- 5.3.3. 13 June 2023
- 5.3.4. 29 June 2023
- 5.3.5. 4 July 2023 (two separate emails of the state)
- 5.3.6. 10 August 2023

- 5.4. for the purposes of this decision I have re-read the Tribunal's correspondence with both parties including case management orders and decisions.
6. Key documents with regard to remedy: for the purposes of this decision I have re-read the following:
- 6.1. The claimant's letter of resignation: although there is no such requirement there is in fact no mention of any personal injury.
- 6.2. The claimant's ET1 with addendum: amongst other things the claimant says that he could not then return to work for the respondent (this predated his resignation) as result of treatment he received from the respondent, that he could not return to what he considered to be a hostile environment. There is no mention of personal injury.
- 6.3. The claimant's further and better particulars/amendment: there is no mention of personal injury. It is stated that the claimant was made anxious by additional social stressors due to his autism (paragraph 1); that the respondent's treatment was "not helpful for the management of his mental health" (paragraph 2); that "injustice "upset" him and he struggled to rationalise what he was being told (paragraph 10); that he felt the respondent had no understanding or appreciation of autism or the difficulties that autistic people face in the workplace, and this led to him obtaining "sick notes" (fit notes) referring to stress and anxiety (paragraph 21).
- 6.4. The Claimant's schedule of loss of the 21 February 2020: in this schedule the claimant referred to stress and anxiety, having to stabilise, and to deal with both "old" and "new routines" in consequence of no longer being employed, the consequence he says of the treatment he received from the respondent. In correspondence the claimant's representative has also cited an observation made by the appointed Intermediary at that time in correspondence, but the Intermediary was not a representative, advocate or witness.
7. The claimant's disability: the claimant has said that at all material times he was autistic, living with ADHD and with generalised anxiety disorder. The Tribunal confirmed in its liability judgment that the claimant is a disabled person by reason of autistic spectrum condition (ASC) and ADHD, and that they took notice that anxiety is a common feature of those conditions such that all references to those conditions include an understanding that the claimant lived with anxiety. The claimant's disabling conditions predate his employment; to the best of the Tribunal's knowledge it cannot be said that there has been any remission or abatement of the disabling effects of these conditions to date.
8. Some specific matters taken into account in relation to all relevant factors under consideration:
- 8.1. at various times prior to the liability hearing in March 2023, the claimant sought and obtained legal advice; it is specifically noted that he had the benefit of professional legal input when further and better particulars of claim

were provided 4 September 2020; that led to some amendment of the claim albeit some attempted amendments were refused.

- 8.2. The first specific mention of any personal injury claim being advanced was in correspondence received from the claimant's newly appointed legal representative in June 2023, several weeks after the liability judgement was sent to the parties.
 - 8.3. The claimant's application envisages a psychologist or psychiatrist making a report in relation to diagnosis and causation of a specific injury with prognosis in 2023/2024 referring back to allegations in respect of conduct by the respondent in 2019.
 - 8.4. In the claimant's application and subsequent responses to the respondent's submissions there has been no suggestion of any new injury caused to the claimant during the course of his employment. There is a contention that the claimant suffered anxiety resulting from treatment that affected him, perhaps an exacerbation of an existing condition but one that is chronic regardless.
 - 8.5. The Tribunal consists of an experienced panel capable of dealing with the complexities of determining remedy issues, taking into account all relevant circumstances. It has gained an understanding of the claimant. It has relied, and will rely, for additional guidance in relation to the claimant's vulnerabilities on the ETBB.
 - 8.6. A Tribunal can award personal injury damages (*Sheriff v Klein Tugs (Lowestoft) Ltd* 1999 ICR 1170 CA), in which case it was said that a claimant ought expressly to claim personal injury damages in discrimination proceedings or risk losing the opportunity to do so; absent expressly claiming such damages the matter may be considered *res judicata*; the lost opportunity would be in respect of civil proceedings in the High Court or County Court.
 - 8.7. Medical evidence in support of such a claim is not required but it is advisable in respect of causation and prognosis where they are in issue. In this regard I have also expressed my view, on the balance of probabilities, as to the likely utility of medical evidence in all the above circumstances at this late stage. I say this in full appreciation that I have no medical qualification; I rely on the factors affecting the pursuit of the interests of justice set out in Rule 2, in the light of the circumstances that I have set out in detail above.
 - 8.8. In considering remedy issues and making an award a Tribunal must be wary of an overlap between any award for injury to feelings and any personal injury damages.
9. Conclusion:
- 9.1. The balance of prejudice in allowing the claimant's application would manifestly be against the respondent, and it would be unfair. By thus expressly excluding determination of the question of personal injury damages, the Tribunal cannot be said to have determined the issue and the claimant may be entitled to pursue a personal injury claim in the High Court

or in the County Court such that he is not unfairly prejudiced by my refusal of the application.

- 9.2. It would not be in the interests of justice to allow the claimant to pursue a claim for personal injury damages in these proceedings at this stage.
- 9.3. With regard to mitigation of loss, the burden is on the respondent to prove the failure to mitigate, and the claimant is at liberty to adduce relevant evidence in support of his claim for financial losses and damages for injury to feelings.
- 9.4. It would not be in accordance with the overriding objective to prevent expert psychological or psychiatric evidence, including us has been requested, the potential for the expert to attend the remedy hearing to give oral evidence; this would cause delay and expense, not least because of the potential for the respondent to then wish to counter that evidence with its own expert evidence.
- 9.5. It may well be that in the period of over two months since the claimant first raised this prospect he has obtained sufficient medical evidence in any event.

Employment Judge T.V. Ryan

Date: 25 August 2023

JUDGMENT SENT TO THE PARTIES ON 30 August 2023

FOR THE TRIBUNAL OFFICE Mr N Roche