



EMPLOYMENT TRIBUNALS

Claimant: Miss S Gibson

Respondent: Romac Logistics Limited

Heard at: Manchester (by CVP)

On: 8 March 2023
20 April 2023
(in Chambers)

Before: Employment Judge McDonald

REPRESENTATION:

Claimant: Litigant in person

Respondent: Ms Gould of Counsel

JUDGMENT

The judgment of the Tribunal is that the respondent's application to strike out the claimant's claims of failures to make reasonable adjustments; discrimination arising from disability and victimisation is refused.

REASONS

Introduction

1. On 8 March 2023 I conducted a public preliminary hearing in this case. It was conducted remotely by CVP. At that hearing I heard the claimant's application to amend her claim and the respondent's application to strike out or for deposit orders in relation to some of her other claims.
2. I have set out my decisions on the applications to amend and the reasons for those decisions in my case management order of today's date. I have set out my decision on the strike out applications in the Judgment of today's date. I have set out my decision on the deposit order applications in the deposit order of today's date. The 3 documents should be read together.

Summary of the Case

3. The claimant was employed by the respondent from 13 September 2021 as a Human Resources Business Partner at its Head Office in Worsley. The respondent concedes that the claimant is a disabled person by reason of autism, anxiety and depression.
4. The respondent accepts that on starting her employment the claimant made its Finance Director, David Graham ("Mr Graham") aware of her autism. It disputes that it had knowledge of her anxiety and depression.
5. The claimant says that she raised protected disclosures under section 43B of the Employment Rights Act 1996 with Mr Graham and others from 20 October 2021 onwards. Those disclosures were in relation to new employee details being received but with no right to work documentation attached. The claimant says that she raised this issue both verbally and by email.
6. The claimant was off sick on 26 and 27 October 2021. The claimant says that on Friday 29 October 2021 she began work on an audit of employee files. Some of the files did not have the required right to work documentation. She says she raised her concerns with Mr Graham, and they discussed the process that would need to be followed. Where employees could not provide the required documentation, they might have to be dismissed. The claimant says she then discussed these points by phone with Lorraine Blackburn at the respondent's Middleton depot. She says that during the conversation with Ms Blackburn and for about 10 minutes afterwards Mr Graham shouted at her about what she had told Ms Blackburn. The claimant said this increased her anxiety.
7. On 1 and 2 November 2021 the claimant was absent from work due to sickness. The claimant says the true reason for her absence was her anxiety, but she did not share that with Mr Graham because Mr Graham was the cause of the anxiety by his behaviour on 29 October 2021.
8. The claimant was dismissed with immediate effect on 2 November 2021. The letter of dismissal was sent by email and WhatsApp by David Graham. The respondent says that the reasons for dismissal were:
 - a) unprofessional conduct;
 - b) standard of work falling below the level expected of a HR Business Partner; and
 - c) poor timekeeping.
9. The Claimant was paid in lieu of her one week notice period and for any accrued but untaken holiday.
10. The claimant says she was not invited to a disciplinary hearing, was not given adequate notice of any allegations or concerns prior to her dismissal and as a consequence was not afforded the right to be accompanied at a hearing or given the opportunity to provide any mitigation.

11. On 2 November 2021 the claimant appealed against her dismissal. There was a delay in her doing so because Mr Graham (she says) did not provide her with the email address for the appeal officer, Rob McAddo. On 11 November 2021 the claimant withdrew her appeal because she did not wish to be reinstated and subsequently filed her claim at the Tribunal.
12. The claimant says that following her Tribunal claim being filed with the Tribunal the respondent's third-party HR Business Partner, Ms Mitchell, viewed the claimant's LinkedIn profile on numerous occasions. The claimant says that this caused her distress and as a result she suffered a depressive episode.

My decisions on the applications to amend

13. As I explain in my case management order, I decided that the amendments to add claims of discrimination arising from disability and of victimisation should be allowed (the latter subject to a deposit order). I considered whether those allegations had any reasonable prospects of success in deciding whether to grant the application to amend. Had I decided they had no reasonable prospects of success I would have refused the application to amend. I do not therefore grant the application to strike out those claims.
14. I have set out the claims which will proceed to a final hearing (subject to the claimant paying the deposit in relation to the victimisation claim) in the List of Issues annexed to my case management order.

Relevant Law

Striking out

15. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 ("the ET Rules") gives the Tribunal the power to strike out all or part of a claim on the grounds it has no reasonable prospect of success.
16. Rule 37(2) says that 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.
17. Caselaw provides guidance on the exercise of this power:
 - a. It will only be in an exceptional case that a complaint will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation (**Ezsias v North Glamorgan NHS Trust [2007] I.C.R. 1122, Court of Appeal**).
 - b. A Tribunal should not be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person (**Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18/BA EAT**).

- c. The Tribunal should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents (**Mbuisa**).
- d. Discrimination issues should, as a general rule, be decided only after hearing the evidence. 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 (**Anyanwu and anor v South Bank Student Union and anor** 2001 ICR 391, HL).
- e. Whether the necessary test is met in a particular case depends on an exercise of judgment. It may not be assisted by attempting to gloss the language of the rule by reference to other phrases found in the authorities such as 'exceptional' and 'most exceptional'. However, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'. (**Ahir v British Airways Plc** [2017] EWCA Civ 1392)

Failures to make reasonable adjustments under the Equality Act 2010 ("the EqA")

- 18. Section 39(5) of the Equality Act A provides that a duty to make reasonable adjustments applies to an employer.
- 19. That duty appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(3)
- 20. Section 20(3) provides as follows:-

"The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".
- 21. The duty does not apply if the respondent did not (nor could reasonably be expected to know) both that the disabled person has a disability and that they are likely to be placed at a substantial disadvantage by the provision, criterion or practice (Schedule 9 Para 20 of the EqA).

The strike out application

- 22. The claimant says the respondent failed to make reasonable adjustments to 3 provisions, criteria or practices (PCPs) it applied to her.
- 23. For a reasonable adjustment claim to succeed the Tribunal at the final hearing will have to be satisfied on the evidence before it:
 - a. that a PCP was applied to the claimant;
 - b. that that PCP placed her at a substantial disadvantage in comparison with persons who are not disabled;

- c. that it was reasonable for the respondent to have made an adjustment to the PCP to avoid the disadvantage.
- 24. The claim will fail if the Tribunal finds that the respondent did not (nor could reasonably be expected to know) that the disabled person had a disability and that they are likely to be placed at a substantial disadvantage by the relevant PCP.
- 25. The 3 reasonable adjustment claims are set out at section 6 of the Scott Schedule at pages 127-137 of the preliminary hearing bundle. In summary, using the numbering in the Scott Schedule, they are:
 - a. A failure to make reasonable adjustments to the claimant's working times (6(a))
 - b. Not following the ACAS Code of Practice by not holding a disciplinary hearing and not allowing the claimant to be accompanied to a disciplinary hearing (6(b))
 - c. Requiring the claimant to work in the office full time (6(c)).
- 26. The respondent's application for strike out and for a deposit order are in relation to reasonable adjustment claims 6(b) and 6(c) only.

6(b) PCP of not holding a disciplinary hearing/not allowing the claimant to be accompanied to such a hearing

- 27. The claimant says the respondent applied to her a PCP of not following the ACAS code of practice on disciplinary and grievance procedures, namely not holding a disciplinary meeting with the claimant and not allowing the claimant to be accompanied to this meeting. She says that put her at a particular disadvantage because the respondent did not take into account her disabilities with the dismissal and did not afford her the right to provide any arguments in mitigation.
- 28. The respondent did not hold a disciplinary hearing in the claimant's case and so also did not allow the claimant to be accompanied to such a hearing. Ms Gould submitted, however, that this did not amount to a PCP. To be a PCP, the claimant would have to show the respondent would have followed the same approach as it did in dismissing her with others. Otherwise, it was a one-off decision about which applied only the claimant.
- 29. The claimant in other parts of her claim (e.g. the proposed direct disability and s.15 claims) seemed to suggest that the disciplinary hearing had not been held in her case because she was off sick when the decision to dismiss was taken. The respondent has not yet filed a response to the claim because the PCP had not been clarified when it filed its current response so it is not clear what it says about whether it applied such a PCP. There was no evidence before me about whether the respondent had a practice of not holding disciplinary hearings when deciding to dismiss, particularly when an employee is in a probationary period or off sick. I find there are no ground on which I can say there was no (or even little) reasonable prospect of the claimant showing the PCP was applied.

30. I accept being dismissed without a disciplinary hearing causes a disadvantage to any employee because they are denied the opportunity to state their case including any case in mitigation. However, it seems to me there are more than little reasonable prospects of the claimant being able to show that the disadvantage would be greater for her as a disabled person with her particular disabilities. She was denied the opportunity to explain the effect of her disabilities on any behaviour which led to the dismissal. I also find that given her disabilities there is more than little reasonable prospect of the claimant being able to show that being denied the right to attend a meeting with a companion would have a greater impact on her than on a non-disabled employee given the additional difficulties she might face in putting forward her case in a stressful meeting. It does seem to me there is more than little reasonable prospect of the claimant showing that the proposed adjustment was reasonable given its nature. Finally, it does not seem to me that I can say there is no (or even little) reasonable prospect of the claimant being able to show that the respondent had knowledge of her disabilities or that it had knowledge that not holding a disciplinary hearing and allowing her to be accompanied would cause the claimant a substantial disadvantage. That will have to be decided by a Tribunal as a matter of fact but the respondent concedes that it had knowledge at least of the claimant's autism.
31. In reaching my decision I need to take the claimant's case at its highest (in the absence of any contradicting evidence). In the circumstances I refuse the respondent's application to strike out the claim relating to this PCP. I also refuse the application for a deposit order in relation to the claim

6(c) PCP of requiring the Claimant to work in the office full time

32. The third reasonable adjustment claim based on a PCP of requiring the claimant to work in the office full-time. The claimant says that she discussed with Mr Graham at the start and throughout her employment the possibility of her working from home due to anxiety and autism. She says that request was denied. The claimant says the requirement to work in the office full-time was a PCP which placed her at a substantial disadvantage. That substantial disadvantage is that because of her anxiety and depression she would wake up with a lack of energy. She says that because of her autism the constant requirement to mask her symptoms when around people would leave her feeling fatigued. She says a reasonable adjustment would have been to allow her to work from home. She says that the respondent had the resources to allow her to do so because although there was sometimes a requirement to work from the office, for example when it was necessary to print off her letters and contracts, she says a flexible hybrid approach should have been considered because her role did not always require her to be in the office.
33. Ms Gould submitted that in relation to this claim the respondent's primary application was for a deposit order on the basis that there was little reasonable prospect of this claim succeeding. That was on the basis there was little reasonable prospect of the claimant showing that the respondent applied a PCP of not allowing home working which it applied to others than the claimant. The claimant was the only HR person in the office. She also submitted that

there was little reasonable prospect of the claimant showing the respondent had (or ought to have) knowledge that the requirement to work in the office caused the claimant a substantial disadvantage compared to a person not having her disabilities.

34. In reaching my decision I need to take the claimant's case at its highest in the absence of contradicting evidence. A Tribunal will need to decide whether, as the claimant says, she made Mr Graham aware of why she needed to work from home. There is no evidence either way (and no amended response yet from the respondent to clarify the point) as to whether it applied a PCP of requiring staff to work from the office full time. In the circumstances I cannot say there is no (or even little) reasonable prospect of the claimant's claim succeeding, I refuse the respondent's application to strike out the claim relating to this PCP. I also refuse the application for a deposit order in relation to the claim based on PCP2.

Employment Judge McDonald

Date: 1 August 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

3 August 2023

FOR THE TRIBUNAL OFFICE

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