



EMPLOYMENT TRIBUNALS

Claimant: Mr P Moralee

Respondent (1): Chief Constable Simon Chesterman Respondent
(2): Civil Nuclear Constabulary

HELD at: Newcastle Employment Tribunal

BY: Cloud Video Platform (CVP)

ON: 21 August 2023

BEFORE: Employment Judge Martin

REPRESENTATION:

Claimant: In person, supported by Mr Gary Parker, his McKenzie Friend
Respondent: Mr D Kcstilitz (Counsel)

JUDGMENT ON A PUBLIC PRELIMINARY HEARING

The Judgment is:

1. The claimant's complaint of direct disability discrimination under section 13 of the Equality Act and discrimination arising from disability under section 15 of the Equality Act are struck out and are hereby dismissed.
2. The claimant's complaint of a failure to make reasonable adjustments under Sections 20/21 of the Equality Act is dismissed upon withdrawal.

REASONS

1. This case came before me today to deal with a number of applications: - Firstly, an application by the claimant for leave to amend his claim to add a claim of Section

- 15 Equality Act 2010 - for discrimination arising from disability and an additional claim relating to a failure to make reasonable adjustments under section 20/21 of the Equality Act 2010. Secondly, the respondent had made an application to strike out the claimant's claims of disability discrimination and/or for a Deposit Order.
2. The Tribunal decided to deal with both of those applications simultaneously. The Tribunal also had an application for an anonymisation order on the part of the claimant which the Tribunal determined should be considered consequent to the other two applications.
 3. The Tribunal heard submissions from both parties in relation to both applications. It also the bundle of documents, further documents provided by way of the written skeleton by the respondent's representative and the further details of the application for leave to amend in the email sent by the claimant on 17 August 2023.
 4. The law which the Tribunal considered in relation to the two applications was as follows: -
 - 4.1. Rule 37 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which provides that, at any stage of the proceedings, either on its own initiative or in the application of a party, a Tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospect of success.
 - 4.2. Rule 39(1) of Schedule 1 of the same rules provides that where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring a party (the paying party) to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument.
 - 4.3. Rule 39(2) the Tribunal shall make reasonable enquiries into a paying parties' ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
 - 4.4. Rule 39(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.
 - 4.5. Rule 39(4) if a paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out.
 - 4.6. Rule 39(5) if the Tribunal at any stage, following the making of a deposit order, decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order, the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purposes of any costs application unless the contrary is shown and the deposit shall be paid to the other party, otherwise it shall be refunded.
 - 4.7. The case of **Selkent Bus Company Limited v Moore** [1996] ICR 836 which set out the test to be considered on any application for leave to amend. This includes considering the nature of the amendment being sought whether it is a new claim being advanced or a re-labelling, whether it is a minor or substantial amendment; the applicability of any time limits;

the timing and manner of the application and any issues of prejudice or hardship to either party.

- 4.8. The case of **Cox v Adecco** [2021] ICR 1307 where it was held that, although strike out is not prohibited in cases of discrimination where a case of reasonable prospects of success turns on factual issues which are disputed, then strike out is normally not appropriate. It also held that the claimant's case on such an application should be taken at its highest and proper consideration should be given to the claims and issues in the case.
- 4.9. The case of **Hemdan V Ishmal** [2017] IRLR 228 where the EAT held that the purpose of the deposit order is to identify at an early stage cases with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails.
5. The claimant was a police sergeant with the respondent and employed to carry firearms. He relies on two mental health conditions PTSD and a major depressive condition. The claimant was dismissed on 30 August 2022. It should be noted by way of background that, for the last couple of years a lot of public disquiet has been expressed around issues concerning the police relating to misogynistic behaviour on the part of officers.
6. The claimant was dismissed on 30 August 2022 for gross misconduct for sending racist and misogynist texts and sexually explicit photographs whilst at work. This followed on from a police investigation after a complaint was made albeit the police did not pursue charges. As is normal practice the case was heard at a special hearing. It was adjourned on two occasions, including to allow the claimant to produce medical evidence. A copy of the medical expert's report produced by the claimant is in the bundle at page 155 of the bundle. His medical expert states in that report that, having reviewed the documents and assessed the claimant, it is her opinion that no significant mental health issues accounted for the poor judgment of the claimant when sending the texts. Just before the rescheduled hearing the claimant asked for a further adjournment to obtain legal advice. He also raised issues about why the hearing was being conducted by video. He indicated he had no experience of such video hearings and only a mobile telephone. The respondents responded by indicating that the claimant would be given access and assistance to the federation offices and be able to use their equipment and seek their assistance - pages 164-165 of the bundle. As it transpires the claimant did not attend the hearing.
7. An earlier public preliminary hearing took place in this case on 23 March 2023 at which the claims and issues in the case were identified as a claim of direct discrimination and a claim of a failure to make reasonable adjustments; the details of which are set out in the Order. That Order was sent to the parties on 3 April 2023. The parties were asked to notify the Tribunal if they wanted to add any claims or disagreed with the issues were not correct. The claimant did contact the Tribunal on 16 April indicating that he wanted to include a claim under section 15 and an additional claim under the failure to make reasonable adjustments. That email is dated 16 April 2023. The respondent were asked for comments. Their response was sent on 17 May in which they indicated that they did not object to

the section 15 claim replacing the section 13 claim. The claimant subsequently indicated he wanted to pursue claims under both sections 13 and 15.

8. The claimant was then ordered on a number of occasions to indicate clearly what amendments were being sought. He made an application on 23 July and then provided the subsequent document on 17 August 2023; both of which are difficult to follow in terms of the factual and legal claims being pursued. Accordingly, they were discussed at the outset of the hearing by Employment Judge Martin with a view to trying to clarify the claims and issues and the amendments being sought.
9. During the hearing today, the claimant confirmed that the unfavourable treatment about which he was complaining under Section 15 EA 2010 was firstly unfavourable treatment relating to the disciplinary process. The “something arising” in consequence of his disability being his inability to concentrate and the handling of electronic documentation. Secondly, the unfavourable treatment was his dismissal with the “something arising” in consequence of his disability being the behaviour for which he was dismissed which he asserted was a consequence of his disability.
10. The claimant’s case in relation to the additional reasonable adjustments claim was as follows: - the additional provision criterion of practice (PCP) was the conduct of the disciplinary hearing, which he said substantially disadvantaged him because he was not able to concentrate and handle large documents. He said the reasonable steps the respondent should have taken was to have the hearing to be in person. That claim to a degree mirrors the first part of his section 15 claim.
11. There was no evidence before the Tribunal that the claimant had raised any issue about the hearing being in person to the respondent. The respondent says that all the matters raised by the claimant were addressed, however that matter was not raised by him – page 164/165 of the bundle. They also say that they provided assistance and equipment for the claimant to have access to the federation offices and assistance for video hearing, but the claimant did not actually take up that offer because he did not attend the hearing.
12. During the course of the preliminary hearing the Tribunal took note of the claimant’s means. He is now working, earning £40000 a year. He has some savings, albeit that he also has some liabilities including maintenance for his children.
13. The Tribunal decided to deal with the applications in sequence, but simultaneously.
14. The Tribunal concluded that the claimant should be given leave to amend his claim to add the claims under section 15 and the additional adjustments claim for the following reasons: -
 - 14.1. First it was clear that the claimant had sought to raise the matter of the amendment at an early stage and in accordance with the Order made at the preliminary hearing. It is noted that, at that stage, the respondent did not seek to object to that application.
 - 14.2. The Tribunal consider that it is difficult for litigants in person to frame these types of claims. It notes that the claim is effectively similar to the claims already identified and that this was really just a re-labelling exercise; with the factual details already outlined in the claim form.

- 14.3. Finally, the Tribunal considered that there would be no real prejudice to the respondent in allowing the amendments. The Tribunal had already decided to hear the application to strike out the claims and/or for a deposit order, which seemed largely have been the basis of their objections to the application to amend. The Tribunal did think that there would be a disadvantage to the claimant in him not being able to put the claim in the way he wished to do so.
15. The Tribunal then went on to consider whether the claims, including the claims for which the claimant had been given leave to amend, had any reasonable prospect of success.
 16. The Tribunal considered that the claimant's claim under Section 13 for direct discrimination had no reasonable prospect of success, even if one were to assume for these purposes that the claimant was disabled for both conditions of PTSD and depression. The Tribunal considered that it was inconceivable that the claimant was subject to a disciplinary process and ultimately dismissed because he was disabled and not because he engaged in very serious misconduct. It is also inconceivable that the respondent would not have dismissed a non-disabled comparator in similar circumstances, particularly bearing in mind the current climate around such allegations of misconduct by a police officer. Further, the claimant in his own written submissions, suggested at page 227 paragraph 23 that the respondent did not take account of his disability. Therefore, he cannot have it both ways.
 17. Equally the Tribunal, having given the claimant leave to add a claim under Section 15 EA 2010 of discrimination arising from disability, did not nevertheless consider it had any reasonable chance of success.
 18. His claim of unfavourable treatment is being dismissed with the "something arising" being the behaviour for which he was dismissed, which he asserted was something arising from his disability is completely contradictory to the medical evidence which he himself produced at page 55. Any suggestion of any further medical evidence is irrelevant as the respondent was clearly not aware of anything other than that medical evidence out before it at the time when they dismissed the claimant. The second part of his Section 15 claim, which is also the additional claim for reasonable adjustments, is the conduct of the hearing. Those claims are untenable in the light of the fact that the claimant did not actually attend the hearing. Therefore, those claims do not even get off the ground.
 19. The Tribunal went on to consider the claimant's claims for a failure to make reasonable adjustments. The Tribunal did not consider they should be struck out at this stage on the basis that they have no reasonable prospect of success as there may be factual issues of dispute which the Tribunal consider ought to consider. The Tribunal did however consider that those claims had little reasonable prospect of success. The reasonable adjustments upon which the claimant was relying were either offered to him or provided to him or not raised by him at all. Therefore, it is difficult to see how it could be argued that the respondent acted unreasonably in failing to take those steps, bearing in mind the efforts which they went to to get the claimant to attend the hearing; having adjourned it on two separate occasions at his request.

20. The Tribunal had initially therefore ordered the claimant to pay a deposit order of £1000 to pursue his complaint of a failure to make reasonable adjustments; having reiterated to him the risks which he may run if he pursued that claim.
21. A discussion then took place about further directions in this case. Employment Judge Martin indicated that the anonymisation order should be considered at the final hearing if it was still to be pursued.
22. The claimant then stated that he would not be paying the deposit order and would therefore not be pursuing his claim for disability discrimination for a failure to make reasonable adjustments. He subsequently decided to withdraw that claim. He was content for it to be dismissed upon withdrawal.

Employment Judge Martin

Date: 14th September 2023