



EMPLOYMENT TRIBUNALS

Claimant: Mr Leonard Worby

Respondents: Royal Mail Group Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (in public by video link – “CVP”) **On:** 29 September 2023

Before: Employment Judge R S Drake

Appearances

For the Claimant: In Person

For the Respondents: Ms S Griffiths (Solicitor)

RESERVED JUDGMENT

1. The claims of discrimination because of something arising in consequence of disability as defined by Section 15 of the Equality Act 2010 (“EqA”) is struck out under Rule 37(1)(a) of the Employment Tribunals (Constitution & Rules) Regulations 2013 (“the Rules”) as having no reasonable prospect of success. Therefore, they are dismissed.
2. The original additional claims of unfair dismissal and the right to a Redundancy Payment have already been dismissed as of 16 June 2023.
3. No further case management Orders are necessary as the claims in their entirety are dismissed.

REASONS

Introduction

NB – I refer to the parties as “C” and “R” and to pages in the agreed hearing bundle of documents as PP1 – 111 respectively.

4. The scope of the issues for me to consider today are as set out in (part of) EJ Miller’s Case Management Orders promulgated at a Preliminary Hearing on 31 July 2023 (PP48-54). He set today’s hearing to consider inter alia the following –
 - 4.1 whether C’s discrimination claims had any reasonable prospect of success,
- or –
 - 4.2 If so, whether the claims should be struck out under Rule 37(1) – and/or –
 - 4.3 whether if they had only little reasonable prospect of success a Deposit Order should be made under Rule 39 as a condition of permitting C to proceed;
5. EJ Miller recorded (PP52-53) after detailed discussion with C, who was then and is also today a litigant in person, that his remaining claims following dismissal of unfair dismissal and redundancy claims, were to be framed under Section 15 EqA and that he had particularised his claims as noted in paragraphs 2.1 to 2.3 inclusive being the only specific particulars of unfavourable treatment perpetrated by employees of R upon which C sought to rely as the bases of his claims.
6. Because C is a litigant in person, I exercised great care in ensuring that he understood today's procedure, and also the scope and extent of the issues which I was to determine. I allowed at least two substantial breaks for C to collect his thoughts after hearing Ms Griffiths’ submissions on behalf of R, and to peruse and address me on case law (referred to below) which had been brought to my attention by Ms Griffiths. The hearing of R’s submissions and C’s responses thereto and then his submissions took all morning. I was greatly assisted by the care and diligence applied by both sides in preparing their arguments and referring to the agreed documents bundle. I applaud their efforts. I further noted that though R does not yet concede or accept that C has a disability as defined by Section 6 EqA, this point would only become relevant and the subject of further directions if the claims went beyond today, but they do not.
7. In my deliberations, I considered all the contents of the agreed bundle but in particular those specifically referred to and highlighted. Especially by C. I noted that C had set out his claim extensively but succinctly in his ET1 and then had two opportunities to set out his claims in greater detail thereafter.

Relevant Statutory Law

8. This is as follows in respect of EqA claims: -

Section 15 EqA provides -

“(1) A person (A) discriminates against a disabled person (B) if -

(a) A treats B unfavourably because of something arising in consequence of B’s disability; and –

(b) B cannot show that the treatment is a proportionate means of achieving a legitimate aim - (I note that this last point was not relevant for the purposes of today’s hearing)

My emphases relevant to this case are added.

9. 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)”.

Relevant Case Law

10. The case law to which I am directed included the following: -

10.1 In paragraph 31 of the EAT’s Judgment in **Pnaiser v NHS England & Anor [2015] UKEAT/0137/15/LA**, Simler P finds as follows: -

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom; in other words it must ask whether A treated B unfavourably in the respects relied upon by B. No question of comparison arises;

(b) The Tribunal must determine what caused the impugned treatment or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought process of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reasonable cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The “something that causes” the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or

more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or a cause of it;

- (c) Motives are irrelevant. The focus of this part of the inquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant ...;*
- (d) The Tribunal must determine whether the reason/cause (or if more than one) a reason or causes is "something arising in consequence" of B's disability. That expression "arising in consequence of" could describe a range of causal links. Having regard to the legislative history of section 15 the statutory purpose which appears from the wording of it namely to provide protection in cases where the consequences or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability;*
- (e) However the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be established the requisite connection as a matter of fact; (my emphasis)*
- (f) This stage of the causation tests involves an objective question and does not depend on the thought processes of the alleged is discriminator...'*

Thus I am guided that there are two elements which must be looked at. The first is the causation and the second is whether the unfavourable treatment is arising "in consequence" of the disability.

10.2 In paragraph 59 of the Court of Appeal's decision in *Robinson v DWP* [2020] EWCA Civ 859, Baen LJ concludes as follows: -

*"The Tribunal (at first instance) found that both of the Claimant's grievances were dealt with fully, but the second one, including the appeal, was not dealt with in a timely manner. The Respondent does not dispute this, but Mr Kirk (Counsel for the Respondents) points to the absence of any finding of fact which could establish even on a prima facie basis, that managers delayed the resolution of the grievance because of the Claimant's disability or the symptoms arising from it. Mr Kirk rightly says that the Tribunal did not engage with their thought processes. The case is in this respect on all fours with the case of *Dunn* (an earlier case). As in that case, the delay in dealing properly with the Claimant's problems was deplorable, but not discriminatory."*

Thus, I am guided to consider whether on what C in this case today says that the acts of which he complains were because of his disability and whether they were discriminatory.

Findings

11 I found the following: -

11.1 it appears to be common ground between the parties that following industrial injuries which gave rise to C suffering osteoarthritis of the left knee, he was moved with his consent from outdoor physically demanding postal delivery work to “in-office” administrative and management work of sedentary nature as an adjustment to meet his physical limits following injury. He was prepared to accept this and since the original injury in 2015 his in-office work seemed to progress satisfactorily for everyone concerned.

11.2 It again appears to be common ground between the parties that thereafter C found himself in conflict with another employee subordinate to him who felt that she had should have been preferred for assignment to C’s role. C says he was exposed to all sorts of unpleasant behaviour by this lady subordinate amounting to bullying and harassment. However, I find that none of this features in the pleading of his case as being particulars of unlawful discrimination;

11.3 The first crucial part of C’s complaints is that his grievance about the behaviour of his subordinate was not dealt with by senior management expeditiously, effectively, or to his satisfaction in that there was extensive delay by management, and then his grievance was not upheld and nor was his appeal. It is clear that he argues these as the particulars of his complaint and this is recorded by EJ Miller in paragraphs 2.1 of his identified issues as noted above;

11.4 The second key element of C’s complaint is that had he not been assigned to his indoor post because of injury and disability, he would have not had to face bullying and harassment by his subordinates some several years after his reassignment, and then in turn would not have had to raise a grievance, and then in further turn does not have to face the consequences of rather poor management of the grievance process.

11.5 In terms, C is saying that though there are many links in the chain between disability giving rise to a change of his assignment and ultimately his exposure to bullying and harassment, and the unsatisfactory conduct a grievance process, that this amounts to a viable argument that he has been treated unfavourably because of something arising in consequence of his disability. I recognise but this is an example of the frequent misunderstanding which exists in the lay mind in confusing “subsequence” with “consequence” and assuming that because a person has a disability

and this causes a change in his circumstances, everything else which follows and which is unfavourable is therefore attributable to the disability causing the reassignment.

Conclusions

- 12 Cases differ on their facts as found by a Tribunal. There are factual differences between what was found as fact in the **Robinson** case and in the present case but I find that the general principles set out in paragraph 59 of **Robinson** are applicable to the case before me now and that in relation to the complaints about the grievance process, I am bound by the Court of Appeal's decision. I therefore and conclude that because of an absence of pleading by the claimant that the poor conduct of grievance process was discriminatory, I cannot find that it was in any way tainted by considerations or awareness of C's disability to the extent that it would make poor conduct of grievance procedure discriminatory. He merely says that it was discriminatory because it was in the wider context of his much earlier reassignment to in-office work which was because of his disability and therefore thus must be enough to make R's failures themselves discriminatory.
- 13 This leads on the main argument raised by C about the fact of reassignment being because of disability this makes all subsequent unfavourable treatment tainted by unlawful discrimination as the events complained of would not have happened but for reassignment. As already pointed out above, this argument is fallacious, since any amount of other intervening events could have occurred between reassignment and the acts complained of which may have had more direct bearing on them, but do not show that there is sufficient causal link between disability and the events complained of. C needed to argue, but did not do so, that the acts of poor management of grievance process were themselves directly tainted by discrimination as opposed to being subsequent to his reassignment because of disability. This brings into play application of paragraph 59 of **Robinson**. Further, paragraph 31(e) in **Pnaiser** applies as emphasised by me above.
14. In short, this case is a good example of the fallacious view that because something unfavourable happens after an event, in this case C's reassignment, it can only happen because of that event. This simply does not follow sufficiently to make the disability a sufficiently proximate cause of any unfavourable treatment.
15. Judges are now discouraged from use of Latin maxims once frequently used by Counsel to express basic legal principles. That is perhaps a pity, since a pithy Latin phrase can sometimes express very complex principles very succinctly. I express one now in lay terms thus - "It is wrong to say that because an event has occurred without which the circumstances would not exist in which subsequent events occur, therefore it is the cause of those subsequent events as there is a difference between "subsequence" and "consequence". In Latin, it is quoted thus - "Causa sine qua non est causa causans". Applying that principle to this case and the way it has been expressed by C as valiantly as he has tried to do so, to meet the section 15 test of showing that unfavourable treatment is because of

something arising in consequence of disability requires, as guided by case law, that C shows/argues that there is a sufficiently direct linkage of cause and effect. That is not shown as being arguable in this case on the way it has been pleaded by C.

16. Accordingly I conclude that the disability discrimination claims must be struck out as in my judgment, they have no reasonable prospect of success.
17. In light of the finding above, I do not need to consider whether the claims have little reasonable prospect of success, nor to consider what if any further directions are necessary particularly where disability is not conceded. The claims are concluded on the basis of the findings above bring the proceedings to a conclusion.

Employment Judge R S Drake

29 September 2023

Reasons for the judgment having been given after the hearing. These written reasons will not be augmented by further reasons.

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