EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108294/2022

Held in Chambers on 8 December 2023

Employment Judge P O'Donnell

Ms C Taylor	**Claimant**
The Firm of the Red Practice	**First Respondent**
Peter Ewing	**Second Respondent**
Simon Cooper	**Third Respondent**
Sarah Joanne Carter	**Fourth Respondent**
Nathan de la Haye	**Fifth Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:

1. The claim of direct discrimination is struck out under Rule 37(1)(a) & (c) of the Tribunal Rules of Procedure.

2. The claim of breach of the duty to make reasonable adjustments in respect of, and only in respect of, the alleged failure to permit an occupation health referral and the alleged failure to allow the claimant to return to work on a phased basis after a period of absence are struck out under Rule 37(1)(a) of the Tribunal Rules of Procedure.

3. The respondents' application for strike-out is, otherwise, refused.

REASONS

Introduction

1. The claimant has brought a number of complaints under the Equality Act 2010 against the respondents alleging disability discrimination and victimisation.

2. There has been a lengthy case management process which has sought to specify the basis of the claims being pursued and identify the issues in dispute between the parties which require to be determined by the Tribunal.

3. In the course of the case management process, the respondents have made an application to strike-out the claim which is the subject of this hearing. The claimant objects to that application.

4. The application is made on multiple grounds; reasonable prospects of success; conduct of the case; failure to comply with Orders. The application is made in respect of the claims of indirect disability discrimination, direct disability discrimination and the alleged breach of the duty to make reasonable adjustments. The claims of harassment and victimisation are not subject to the strike-out application.

5. A hearing to determine the application had been listed previously with the intention that it would be attended remotely by the parties. That hearing did not proceed as planned for reasons relating to the claimant's health. After further discussion with parties, the Tribunal directed that the application would be determined at a hearing in chambers with parties lodging written submissions.

6. For the sake of brevity, the Tribunal does not intend to set out the detail of the submissions lodged by both sides. The submissions have been noted and the Tribunal will address relevant issues in its decision below.

Relevant Law

7. The Tribunal has power to strike-out the whole or part of claim under Rule 37:-

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 is scandalous or vexatious or has no reasonable prospect of success;*
>
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
>
> *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*
>
> *…*

8. The process for striking-out under Rule 37 involves a two stage test (*HM Prison Service v Dolby [2003] IRLR 694, EAT; Hasan v Tesco Stores Ltd UKEAT/0098/16*). First, the Tribunal must determine whether one of the specified grounds for striking out has been established; second, if one of the grounds is made out, the tribunal must decide as a matter of discretion whether to strike out or whether some other, less draconian, sanction should be applied.

9. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18*) given the draconian nature of the power.

10. Similarly, In *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*, the House of Lords was clear that great caution must be exercised in striking-out discrimination claims given that they are generally fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

11. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume she will make out the facts she offers to prove unless those facts are conclusively disproved or fundamentally inconsistent with contemporaneous documents (*Mechkarov v Citibank NA 2016 ICR 1121, EAT*).

12. The question of what amounts to scandalous, vexatious or unreasonable conduct is not be to construed narrowly. It can be matters which amount to abuse of process but can involve consideration of wider matters of public policy and the interests of the justice (*Ashmore v British Coal Corpn [1990] IRLR 283*).

13. Rule 37(1)(b) was considered in *Bennett v London Borough of Southwark [2002] IRLR 407* and a number of principles can be identified:-

    a. The manner in which proceedings are conducted by a party is not to be equated with the behaviour of the representative but this can provide relevant evidence on this point.

    b. Sedley LJ observed that the Rule was directed to the conduct of proceedings in a way which amounts to abuse of the tribunal's process.

    c. It can be presumed that what is done in a party's name is done on their behalf but this presumption can be rebutted and so a party should be given the opportunity to distance themselves from what the representative has done before a claim or response is struck-out.

    d. The word 'scandalous' in the rule is not used in the colloquial sense that it is 'shocking' conduct. According to Sedley LJ, it embraces both *'the misuse of the privilege of legal process in order to vilify others',* and *'giving gratuitous insult to the court in the course of such process'* (para 27).

    e. Fourth, it must be such that striking out is a proportionate response to any scandalous, vexatious or unreasonable conduct. The Tribunal needs to assess whether, in light of any conduct found to fall into the relevant description, it is still possible to have a fair trial (see also *De Keyser Ltd v Wilson [2001] IRLR 324*).

14. The approach to be taken by the Tribunal in addressing the issue of strike-out under Rule 37(1)(b) was summarised by Burton J, in *Bolch v Chipman [2004] IRLR 140*:

a. The Tribunal must reach a conclusion whether proceedings have been conducted by, or on behalf of a party, in a scandalous, vexatious or unreasonable manner.

b. Even if there is such conduct, the Tribunal must decide whether a fair trial is still possible.

c. If a fair trial is not possible, the Tribunal must still consider whether strike-out is a proportionate remedy or whether a lesser sanction would be proportionate.

d. If strike-out is granted then the Tribunal needs to address the effect of that and exercise its case management powers appropriately.

15. In considering an application under Rule 37(1)(c), the question for the Tribunal, in exercising its discretion on the second stage of the test, is whether there is a real or substantial or serious risk that, as a result of any non-compliance with an Order, a fair trial will no longer be possible (*National Grid Co Ltd v Virdee* [1992] IRLR 555, EAT).

Decision

16. The Tribunal notes that there are different issues to be addressed in of each of the claims in respect of which the application is made, in particular, the submissions regarding the prospects of success of each claim are different. The Tribunal will, therefore, deal with each claim in turn.

17. There is one general point which cuts across the various individual claims which the Tribunal will address first. The respondents' submissions make frequent reference to the claimant potentially introducing "evidence" at some further stage of the proceedings and the fact that this will disadvantage them. However, in respect of this application, the Tribunal is concerned with the claimant's pled case and not what evidence might be led at a final hearing to support the pled case.

18. If these references relate to the possibility that the claimant will seek to lead evidence in respect of something other than her pled case then the Tribunal can understand those concerns on behalf of the respondents. There are, however, ways in which such concerns can be addressed and the Tribunal will discuss these further below.

19. On the other hand, if the respondents are seeking to suggest that the claimant is required to specify every piece of evidence she intends to lead then this is simply wrong. The pleadings need to set out the case which the claimant offers to prove but not every last piece of evidence which will be led to prove that case. The Tribunal is not prepared to strike-out a claim simply because the claimant has not specified all of her evidence in circumstances where there is, otherwise, fair notice of her claims set out in her pleadings.

20. Starting with the claim of indirect disability discrimination, the first issue raised by the respondents relates to what is said to be a failure to specify the government guidance referred to in the PCP said to be applied to the claimant and others by the respondents.

21. It is quite correct that the claimant has not complied with the previous Orders made in respect of this matter but the Tribunal considers that parties may have gone down something of a “rabbit hole” in respect of this issue as a result of the way in which the PCP has been set out.

22. Reading the ET1 and subsequent particulars as a whole, it is quite clear that the core of the indirect discrimination claim is that the claimant was allegedly required to see patients in her room. Whether or not this was in breach of government guidance is wholly irrelevant to the questions of whether such a PCP was applied, whether that PCP disadvantaged or would disadvantage people who shared the claimant’s medical condition or whether it disadvantaged the claimant.

23. Indeed, the framing of the PCP does not require any reference to government guidance at all in order to provide fair notice and the reference to this guidance appears to be superfluous.

24. The only issue to which the question of whether or not the respondents were complying with government guidance might be relevant is that of objective justification. If either party seeks to rely on the guidance in respect of that issue then it will be for them to produce evidence of what the guidance was at the relevant times and whether or not it was breached.

25. The respondent also makes submissions regarding what it says are inconsistencies or contradictions in the particulars lodged by the claimant at different times. For example, they draw attention to assertions made in later particulars that suggest that there was no requirement for the claimant to see patients in her room and she could exercise her judgment to see patients elsewhere.

26. Although the Tribunal appreciates the point which the respondents seek to make, it considers that whether the PCP was applied is ultimately a matter of fact to be determined at the final hearing after all the evidence is heard. Inconsistencies and contradictions in her stated case can be put to the claimant in cross-examination and submissions can be made to the Tribunal about such matters.

27. In these circumstances, the Tribunal does not consider that the failure by the claimant to provide certain information regarding the PCP (or inconsistencies in the information provided) renders a fair trial impossible on this claim nor does it mean that, taking the claimant's case at its highest, the claim of indirect disability discrimination does not have reasonable prospect of success.

28. The second issue raised by the respondents in relation to the claim of indirect discrimination is one of causation, both in relation to whether those sharing the claimant's medical condition would be placed at a disadvantage by the PCP and whether the claimant was, herself, placed as a disadvantage.

29. The claimant's pled case on this is not that people with her condition would have been more likely to catch covid as a result of the PCP but that, if she or others did catch covid, it would have a greater impact on them.

30. The respondents make the point that this creates a problem of causation for the claimant. In effect, they argue that the disadvantage relied on is too remote from the PCP for the test for indirect discrimination to be satisfied.

31. This is undoubtedly an argument that the respondents are entitled to make but the Tribunal considers that this is something which can only be determined at a final hearing after all the relevant evidence has been heard. The present Tribunal is not in a position (having heard no evidence) to make any assessment of whether the disadvantage pled is too remote from the PCP. For this reason, it does not consider that it can conclude that the claim of indirect discrimination has no reasonable prospects of success on this basis.

32. Similarly, the respondent's argument that the claimant cannot demonstrate that she has been disadvantaged by the PCP is one that can only properly be assessed after hearing all the relevant evidence. The Tribunal notes the various comments made by the respondents about the difficulties which they say the claimant will face in proving this issue but the Tribunal is required to take the claimant's case at its highest.

33. For all these reasons, the application to strike-out the claim of indirect disability discrimination is refused.

34. Turning to the claim of direct disability discrimination, the Tribunal notes that this is an *esto* case to the indirect discrimination claim said to arise from the same factual matrix (that is, the alleged requirement for clinicians to see patients in their own room).

35. The respondents are correct that the claimant has not complied with the Order to provide further specification of her comparator and the basis on which she says that any decision regarding how patients were to be seen was made on the grounds of her alleged disability. The Tribunal has reviewed the claimants reply and it comes nowhere close to providing the information which the claimant was required to provide.

36. This is an issue which goes to the question of whether a fair trial of this claim is possible and the answer has to be that it is not possible for there to be a

fair trial given that the respondents do not have fair notice of the case they have to answer in respect of direct discrimination. The Tribunal does not consider that any other alternative would resolve this; the claimant has had two opportunities to provide this information and has failed to do so.

37. In these circumstances, the Tribunal strikes-out the claim for direct disability discrimination under Rule 37(1)(c).

38. However, the Tribunal also considers that the claim of direct discrimination does not have reasonable prospects of success and would also strike it out under Rule 37(1)(a).

39. A claim of direct discrimination requires a difference in treatment between a claimant and others whereas indirect discrimination involves the same treatment having a different effect. It is possible for a claim of direct discrimination to be advanced as an *esto* case to an indirect claim but not if they are being advanced on the same factual basis. In such circumstances, as in this case, a claimant would be seeking to argue that they have been treated differently from others in circumstances where they allege that everyone was treated the same.

40. In this case, the claimant alleges that every clinician was required to see patients in their own room and that simply cannot, even taking it at the highest, amount to a difference in treatment. The claim of direct discrimination does not, therefore, have reasonable prospects of success.

41. The final claim is the alleged breach of the duty to make reasonable adjustments. There are, in fact, three separate claims under this hearing arising from three alleged PCPs; a failure to reinstate a separate room for seeing patients, a failure to permit an occupation health referral and a failure to allow the claimant to return to work on a phased basis after a period of absence.

42. The Tribunal will address the second and third allegations first as these have common issues raised by the respondent. The Tribunal considers that any

claim based on these PCPs do not have reasonable prospects of success for the following reasons.

43. First, there is the fundamental problem for the claim that her pled case does not actually set out a statable claim of a breach of the duty to make reasonable adjustments in respect of these matters. She has fallen into the trap which many parties and lawyers fall in relation to the issue of reasonable adjustments by "putting the cart before the horse" and, is in effect, asserting that the duty was breached because an adjustment has not been made without first setting out how the duty was engaged and how the adjustment would overcome any disadvantage.

44. To put it another way, the claimant's pled case is that not making an adjustment is a PCP which engages the duty to make that adjustment. This is circular logic and does not address the proper legal test.

45. Even reading the pleadings as a whole, it is not possible to identify the PCP said to be applied which placed the claimant at a disadvantage as a disabled person triggering the duty to make the adjustments being suggested.

46. As a result, the pled case does not provide the respondent with fair notice of the claim they have to answer and, as with the direct discrimination claim, the claimant has already had multiple opportunities to set out her case in respect of these matters.

47. Second, the claimant has been Ordered to confirm when she requested an occupational health referral and a phased return. The plain reading of her response to this is that she did not make any such requests and so it cannot be said that the respondent was actually refusing to do something that they had been asked to do.

48. Third, in respect of the claim relating to the occupational health referral, there is clear authority that steps that might be taken by an employer to investigate reasonable adjustments (such as occupational health referrals and consulting with the employee) are not, in themselves, a reasonable adjustment because

they do not actually avoid any disadvantage (*Tarbuck v Sainsbury Supermarkets Ltd [2006] IRLR 664*).

49. In these circumstances, the Tribunal strikes-out these claims of an alleged breach of the duty to make reasonable adjustments under Rule 37(1)(a).

50. The remaining claim alleging a breach of the duty to make reasonable adjustments arises from the same factual matrix as the indirect disability discrimination claim, that is, the requirement to see patients in the clinician's room with the adjustment being the provision (or reinstatement) of a separate room in which to see patients.

51. The way in which this claim is pled does face a similar issue as the other claims relating to the duty, that is, the adjustment is pled as the PCP. However, unlike those other claims, it is possible when reading the pleadings as a whole to identify that the PCP is the same one as relied on in the indirect disability discrimination claim.

52. The main criticism made by the respondents regarding this claim relates to the issue of their knowledge (actual or constructive) of the claimant's disability. It is said that this is not clearly set out and, in particular, that there is some suggestion in the claimant's pleadings that there was not the requisite knowledge until some months after the PCP was said to have been applied.

53. The Tribunal can see some force in what is said by the respondents and the Tribunal does agree that the claimant has set out lengthy and discursive particulars on this point which can be difficult to follow. However, it is clear that the claimant is saying that the requisite knowledge may have existed at some point over a lengthy period and not just at the very last date when she says there can be no doubt that there was knowledge.

54. Ultimately, this is a matter for a Tribunal, having heard all the evidence, to make findings of fact and apply those to the legal tests. The present Tribunal does not consider that, taking the claimant's case at its highest, it can be said that she has no reasonable prospects of success in showing that there was

the requisite knowledge at the time at which she says the PCP was applied and the duty to make reasonable adjustments was breached.

55. For this reason, the respondent's application in respect of the claim of a breach of the duty to make reasonable adjustments in respect of the provision of a room for seeing patients is refused.

56. In addition to the application in respect of the individual claims, the respondents also make a broader application relating to the conduct of the proceedings. The Tribunal has already touched on this issue which is a concern raised by the respondents about the manner in which the claimant has replied to previous Orders and directions. One particular concern expressed by the respondents is that the claimant may seek to introduce new claims or issues without formal amendment of her pleadings.

57. The Tribunal does agree that the claimant's correspondence can be difficult to follow at times. Taking the example for her submissions for this hearing, they are very lengthy, discursive and repetitive; considerable time is spent on irrelevant matters such as criticisms of her former solicitors, the respondent's agent and the Tribunal process; it can be difficult to identify from the volume of material what are matters of background and what are the relevant arguments; the claimant is tending to litigate by correspondence rather than simply setting out the necessary information.

58. However, the Tribunal also bears in mind that the claimant is a party litigant trying to navigate the legal process and dealing with complex areas of law. She is clearly making her best efforts to comply with Orders and this is not a case where there is insufficient detail being given but, rather, almost too much information making it difficult to clearly understand the claimant's case.

59. The Tribunal can understand the respondent's concerns about the claimant introducing new issues rather than simply specifying her existing claims. Indeed, at the aborted hearing attended by parties, the present Judge had made clear to the claimant that any reply to the application to strike-out had to be focussed on the case as pled and not introduce new matters in attempt to fix any defects in that case.

60. Having considered all of these issues, the Tribunal was of the view that strike-out under Rule 37(1)(b) was not an appropriate sanction in these circumstances; the conduct of the claimant has not reached the necessary threshold of scandalous or unreasonable conduct; strike-out is a draconian step where the concerns set out above can be dealt with by way of robust case management. In particular, a detailed list of issues for the final hearing would be a method of focussing the minds of both parties on what the Tribunal will be determining and any attempt to lead evidence on issues beyond the scope of the list of issues would be refused. Similarly, other case management powers such as the timetabling of evidence under Rule 45 could be used to ensure that parties only lead relevant evidence.

61. For these reasons, the application to strike-out on the basis of the claimant's conduct of the proceedings is refused.

62. The Tribunal considers that there should now be a further case management hearing listed to determine further procedure. Parties should provide their availability in January and February 2024 for such a hearing within 14 days of the date this judgment was sent to parties.

Employment Judge: **P O'Donnell**
Date of Judgment: **15 December 2023**
Entered in register: **15 December 2023**
and copied to parties