EMPLOYMENT TRIBUNALS

Claimant: Ms Rebecca Knight

Respondent: Department for Work and Pensions

Heard at: **West Midlands Employment Tribunal (by CVP)**

On: **21st December 2023**

Before: **Employment Judge A Smith**

Representation
Claimant: Represented herself
Respondent: Mr Richard Dunn, Counsel (Miss Claire Pegg of instructing solicitors in attendance

RESERVED JUDGMENT

1. The respondent's application to strike out the claim of direct sex discrimination succeeds.

2. The respondent's application to strike out/obtain a deposit order for the claim of discrimination arising from disability is refused.

REASONS

The applications

3. The claimant entered into Early Conciliation on 29 November 2022 and obtained an ACAS certificate on 10 January 2023. The Certificate is numbered "R268738/22/44".

4. The Prospective Respondent on the certificate is “Department for Work and Pensions”. The address given for the Prospective Respondent was “Shared Services Connected Ltd, Q10 Quorum Business Park, Benton Lane, Newcastle Upon Tyne, NE12 8BU”.

5. The claimant duly completed an ET1 form which is dated 6 February 2023. The respondent’s details are “Government Recruitment Service, BP3302” with an address of “Warkworth House, Benton Park View, Longbenton, Tyne and Wear, NE98 1YX”.

6. The ET1 form gives the ACAS Certificate number as above.

7. The claimant ticked the boxes for unfair dismissal, disability and sex discrimination, holiday pay and other payments.

8. In a document attached to the ET1 the claimant set out the detail of her claims.

9. The unfair dismissal claim was subsequently struck out by the Tribunal as the claimant did not have the necessary length of service.

10. The Department for Work and Pensions completed an ET3 form in response to the claim. In this form the respondent explained that they had become aware around 10 May 2023 that they may be the “intended Respondent” and that they had asked for an extension of time to file the response, which was granted.

11. In the response, the respondent applied to strike out the claims as there had been “a substantive defect” in the ET1, as the name of the respondent was not the same as the name of the Prospective Respondent on the EC Certificate.

12. They also asked for further and better particulars and set out their defence to the facts.

13. The matter came before Employment Judge Wedderspoon on 31 July 2023 for a Preliminary Hearing. At this hearing the Judge clarified the claims. They were clarified as follows:

    a. Direct sex discrimination for dismissal;

    b. Discrimination arising from disability by dismissing the claimant;

    c. Failure to pay accrued but untaken holiday pay.

14. The Judge also listed this hearing to deal with the following issues:

    a. Whether the claims should be struck out pursuant to Rule 37(1)(c) of the ET (Constitution & Rules of Procedure) Regulations 2013, schedule 1 for non-compliance with the rules;

    b. Or a variation/set aside the case management order to accept the claim.

    c. Further case management.

15. The Judge intimated that, if the respondent applied to strike out the claims/request a deposit order, that there would be time to deal with that application at today's hearing.

16. Subsequently, by letter dated 14 August 2023, the respondent applied to strike out the claims under rule 37(1)(a) on the grounds that they had no reasonable prospect of success. A fully reasoned application was made within the letter.

The hearing

17. I had before me, and considered, an agreed bundle of 383 pages, an index to the bundle, and a skeleton argument on behalf of the respondent.

18. I also heard submissions from both parties and took those into account.

The ACAS Certificate

19. As is clear from the documents, the name of the respondent on the ACAS Certificate differs from the name on the ET1. As does the address.

The law on the ACAS Certificate

20. Under rule 12, a claim shall be referred to an employment judge if the staff of the tribunal office consider that the claim (or part of it) may be one which institutes 'relevant proceedings' and:

    a. the name of the respondent on the claim form is not the same as the name of the prospective respondent on the EC certificate to which the EC number relates — rule 12(1)(f).

21. If a claim is accepted by the Tribunal when it potentially should have been referred to a judge under Rule 12, the Court of Appeal has set out the correct procedure to follow in Sainsbury's Supermarkets Ltd v Clark [2023] EWCA Civ 386. It was found that, if no rejection occurs, the respondent cannot argue at a later stage that it should have been rejected. The appropriate course of action is to raise matters in the ET3, seek dismissal of the claim under Rule 27 for want of jurisdiction, or apply to strike out under Rule 37. In addition, the Tribunal still has the wide power to waive an irregularity under rule 6.

22. There are several cases on how Tribunals ought to apply the Rules when the defect to be considered relates to the respondent's name. The key cases are as follows.

23. The EAT approved the Employment Tribunal's decision in *Giny v SNA Transport Ltd EAT 0317/16* to reject the claim when the claimant had given the name of the employer's sole director rather than the company name. It was concluded that it was not a "minor error", but also accepted that each decision was to be made on its own facts.

24. This decision was made under the previous wording of the Rules, amended in the Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020/1003. “Minor error” is now “error” and, as such, this decision needs to be considered in light of this amendment.

25. However, in *Savage v JC 1991 LLP t/a John Campbell, Messengers at Arms and Sheriff Officers and ors EATS 0002/17,* the EAT took a slightly different approach. The EAT determined that the claimant had clearly intended to identify her employer and the certificates should have been read that way.

26. Further, in the EAT’s decision in *Chard v Trowbridge Office Cleaning Services Ltd 2017 ICR D21, EAT*, the EAT approved the principles set out in *Giny v SNA Transport Ltd* but reached the opposite conclusion on essentially the same facts. The EAT reminded Tribunals about the need to consider the overriding objective when considering issues of this kind, and when partiers are represented to avoid elevating procedural issues over substantive ones. Further, the ‘interests of justice’ aspect of rule 12(2A) should be seen as a useful pointer to what sorts of errors ought to be considered minor. An error can be minor even though it is more than just typographical.

27. The EAT in *Stiopu v Loughran EAT 0214/20* considered a claim form which named an individual and the EC Certificate named a company. The ET rejected the claim, and the EAT overturned that decision. In the EAT’s view, rule 12(2A) was a ‘rescue provision’ designed to prevent claims from being rejected for technical failures to use the correct name of the respondent (or claimant) in the EC certificate and the ET1. Further, the fact that the claimant was a litigant in person was a factor to be taken into account.

Conclusions on the ACAS Certificate

28. The names on the certificate and the ET1 are clearly different.

29. The claimant is a litigant in person, who told me, and I accept, that she included the name on the top of her contract of employment in the ET1 as she was advised to do so by her union.

30. The respondent was made aware of the claim, and have provided an ET3 form with a full response.

31. The failure of the claimant is a technical failure.

32. Considering the above and the overriding objective, and the need to act justly and proportionately, I conclude that the claimant made an error in the ET1, and it would not be in the interests of justice to strike out the claims.

33. The application on this ground is therefore refused.

The law on strike out

34. A claim or response can be struck out on the ground that it is scandalous or vexatious or has no reasonable prospect of success (rule 37(1)(a)).

35. It is a two-stage test. Firstly the Tribunal must consider whether the grounds have been established and, if so, it must consider whether to exercise its discretion to strike out (*Hasan v Tesco Stores Ltd EAT 0098/16*).

36. The overriding objective and the question of proportionality must also be taken into account (*Mallon v AECOM Ltd 2021 ICR 1151).*

37. Striking out is a draconian step and should only be taken in exceptional cases (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18*). It might be that the central facts are demonstrably untrue, but the claimant's case must be taken at its highest.

38. Caution must be exercised when considering striking out a claim brought by an unrepresented party (*Cox v Adecco Group UK & Ireland and ors 2021 ICR 1307).* In that case, the EAT gave guidance on this matter:

a. It is highly unlikely a strike out is appropriate if the central facts are in dispute.

b. Clarifying the claim is the first step before considering striking out or making a deposit order. The claimant's case must be taken at its highest.

c. An assessment ought to be made on the pleadings and the documents.

d. Reliance ought not to be placed on simply what a litigant in person can explain about their case, but also the pleadings and documents.

e. Striking out is not to be used as avoiding managing the case.

f. Respondents ought not to take advantage of a litigant in person and ought to refer the Tribunal to matters that may assist.

g. If a better pleading would assist, consideration ought to be given to the possibility of an amendment.

h. The overriding objective applied to litigants in person as well, and they should try to assist the Tribunal in understanding their claims.

39. As discrimination cases are highly fact sensitive and there is a public interest in fully examining such claims, it is important to not strike out all but the most obvious cases (*Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391).*

40. When considering strike-out in the context of a complex discrimination case, it is often necessary to differentiate between different aspects of the claim, with the test for strike-out being met in respect of some elements but not others (*Bahad v HSBC Bank plc 2022 EAT 83*).

41. However, the Court of Appeal has reminded Tribunals that they should not be deterred from striking out claims that involve disputes of fact, even if they

are discrimination claims, if they are satisfied that there is no reasonable prospect of success (*Ahir v British Airways plc 2017 EWCA Civ 1392*).

Law on deposit orders

42. In *Hemdan v Ishmail and anor 2017 ICR 486, EAT*, it was observed that the purpose of a deposit order is to identify at an early stage claims 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 if the claim fails. But it was identified that they were not to be used as strike out via the back door.

43. A broad assessment of the merits is required, and it is not necessary for the Judge to engage in a detailed analysis (*Spaceman v ISS Mediclean Ltd (t/a ISS Facility Service Healthcare) 2019 ICR 687).* But, tribunals should be wary of making an assessment of the strength of a party's case from a review of the documentary evidence where key facts are in dispute, especially in discrimination cases.

44. A mini trial is to be avoided (*Hemdan v Ishmail and anor 2017 ICR 486).*

45. Just because a tribunal concludes that a claim or allegation has little reasonable prospect of success does not mean that a deposit order must be made. The tribunal retains a discretion in the matter (*Hemdan v Ishmail and anor 2017 ICR 486).*

Conclusions on strike out/deposit

The direct discrimination claim

46. I note that disability by reason of ovarian cancer and subsequent symptoms is accepted by the respondent. Further, the claim has been fully clarified by the previous Employment Judge as follows:

> "5.1 The claimant's case is that menopause is a matter intrinsically linked to sex.

5.2 Did the respondent do the following things:

5.2.1 Dismiss the claimant

5.3 Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

5.4 If so, was it because of sex?"

47. The agreed facts as ascertained by the pleadings, the documents and the submissions before me are as follows:

    a. The claimant was employed by the respondent from 12 October 2020 until 14 September 2022.

    b. She was employed as a work coach.

    c. The respondent is a Government Department in charge of the administration of welfare payments via Job Centres.

    d. The respondent has possession of personal data for the public in order to discharge their obligations.

    e. The claimant had ovarian cancer which resulted in her experiencing menopause.

    f. The claimant undertook 10 unauthorised searches on the respondent's IT systems.

48. The claimant relies on a hypothetical comparator to establish her claim.

49. The claimant asserts that her symptoms of ovarian cancer/menopause meant that the claimant was not herself/not thinking so that she made the unauthorised searches.

50. I note that menopause is not a protected characteristic in its own right.

51. The claimant's assertion is a legal question: whether menopause is intrinsically linked to sex, so as to make dismissing because of menopause the same as dismissing because of sex.

52. I accept the respondent's submission that the claimant's assertion taken at its highest, being her misconduct flowed from a disability which impacts women, is not the same as the characteristic of sex.

53. The respondent has clear, documented reasons for the dismissal, the facts of which the claimant accepts.

54. I also note the clear directions in the respondent's Policies on accessing records.

55. I also accept the respondent's submission that the claimant has not shown a *Madarassy* "something more". She simply states that her treatment would have been different had she been a man, without any explanation for that belief. And further, without any explanation as to why it is believed that the difference in treatment would be sex.

56. I am mindful that this is a discrimination claim, brought by a litigant in person.

57. Taking the claimant's case at its highest, I conclude that the direct sex discrimination claim has no reasonable prospect of success.

58. I also conclude that it is in accordance with the overriding objective to strike out the claim. Whilst another existing claim will cover the same facts, and its removal may not shorten any final hearing considerably, its existence will require a Tribunal to consider the facts through the lens of direct discrimination and assess the stages fully in their deliberations and reasons. It would not be proportionate to do so.

<u>The discrimination arising from disability claim</u>

59. This claim has again been clarified by the previous Employment Judge as follows:

> "6.1. Did the respondent treat the claimant unfavourably by:
> 6.1.1 Dismissing the claimant
> 6.2 Did the following things arise in consequence of the claimant's disability: 6.2.1 The claimant's symptoms of ovarian cancer/ menopause meant that the claimant was not herself/not thinking so that she made unauthorised searches?
> 6.3 Did the respondent dismiss the claimant because of unauthorised searches?
> 6.4 Was the treatment a proportionate means of achieving a legitimate aim?"

60. I note again the concessions and the agreed facts above.

61. It is argued that the claimant has no reasonable prospect of proving the something arising. The something arising in this case is the claimant was "not herself" and "not thinking".

62. I was referred to the medical evidence in the bundle, including an OH report which states: "It is not clear to me how Rebecca's health concerns at the time in question could be directly relevant to accessing records".

63. I remind myself that I am not to conduct a mini trial. There is a dispute of fact here: whether the claimant can prove that not being herself and not thinking arise from her disability.

64. I cannot conclude that the claimant's assertion here is demonstrably untrue when considering the documents.

65. The respondent asserts that the claimant has no reasonable prospects of proving that the something arising caused the misconduct. Again, I cannot conclude that the claimant's assertion here is demonstrably untrue when

considering the documents. This is a matter for a full Tribunal to assess fully after hearing evidence and submissions.

66. The respondent also took me to the dates of the acts of misconduct and highlighted the number of them, and that one date was inconsistent with the claimant's case on her surgery date, and none occur in the "acute" phase post-surgery.

67. I conclude again that this is a matter which needs to be fully analysed by a Tribunal after hearing evidence and submissions. I cannot find at this preliminary stage that this factual dispute and argument would have no reasonable prospect of success.

68. The respondent pointed to the reasons given by the claimant in the internal process for her actions. The claimant told me that her inability to give full reasons came as a result of her disability. I do not make findings on that, but I conclude that I cannot determine that the claimant would have no reasonable prospect of establishing that fact at a full hearing.

69. The respondent also asked me to find that, as the claimant knew she had committed a serious wrong at the time, she was not in a "trance". However, again, this is a dispute of fact which needs to be resolved by way of full evidence and determination by a Tribunal at a final hearing.

70. The respondent also referred to the claimant's internal appeal in which she does not reference her disability and challenges the procedure alone. This may be a fact that is relevant at a final hearing, but it is one that only a panel can weigh up having heard all the evidence.

71. The respondent finally referred me to their justification defence. I conclude that the question of proportionality is highly fact sensitive in this case. I cannot assess the justification defence fully in this case without embarking on a full trial.

72. I therefore find that the claimant's claim of discrimination arising from disability does not have no reasonable prospects of success.

73. I also conclude for the same reasons that the claim does not have little reasonable prospects of success.

74. The respondent's application is therefore refused for the purposes of the s.15 claim.

Employment Judge **A Smith**

22nd December 2023

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