EMPLOYMENT TRIBUNALS

Claimant		Respondent
Christian Mallon	v	**Steer Energy Solutions Limited**

Heard at: **Birmingham** **On:** **6 April 2023**

Before: **Employment Judge Wedderspoon**

Representation:

Claimant: **In Person**

Respondents: **Mr. Cullen, Counsel**

JUDGMENT

1. The application for a strike out order is dismissed.
2. The application for a deposit order is dismissed.

REASONS

Background

1. The claimant has autism and dyspraxia. By claim form dated 18 September 2021 the claimant brought complaints of disability discrimination in respect of an unsuccessful application for a job with the respondent. The claimant's case is that he disclosed in his application form by attaching his CV to a linked in profile that he was disabled. He states that this put the respondent on notice he was disabled and that he required a reasonable adjustment in the application process. He received an email of rejection from the respondent on 19 July 2021 and he alleges that no reasonable adjustments were made to the application process. ACAS conciliation was started on 21 July 2021 and completed on 19 August 2021.
2. This case was previously case managed by Employment Judge Wolfenden at a preliminary hearing on 27, 28 and 29 September 2022 alongside a number of other complaints brought by the claimant against other respondents in the circumstances that the claims raised similar issues.
3. The claimant clarified his claim at the hearing on 27 September 2022 as a failure to make reasonable adjustments namely an alleged failure to offer the claimant the opportunity to make an oral application for a role with the respondent as part of the recruitment process. By order of the Tribunal dated 18 October 2022, the claimant was required by 8 November 2022 to send to the respondent and the tribunal a schedule of loss setting out what losses and how much compensation he was seeking to recover.
4. The respondent confirmed that they did not proceed with the recruitment of the senior research and development engineer role and therefore were

unable to provide details of the job's salary and benefits. The respondent requested that the claimant provide a schedule of loss by no later than 20 January 2023.

5. By email dated 1 December 2022 to the Tribunal, the respondent accepted that the claimant's disability status at the material time because of his dyspraxia and autism.

The hearing

6. The purpose of the hearing today was to consider the respondent's application dated 15 November 2022 as to whether the claimant's claims should be struck out as being misconceived or having no reasonable prospect of success and/or whether a deposit order should be made in circumstances where it is alleged the claim has little reasonable prospect of success.
7. The Tribunal was provided with an electronic bundle of 795 pages. The claimant attached a number of cases he relied upon running to 557 pages.

The Law

8. Pursuant to Rule 37 (1) of Schedule 1 of the Employment Tribunal Rules 2013 at any stage of the proceedings either on its own initiative or on the application of a party, the Tribunal may strike out all or part of the claim or response on any of the following grounds including (a)where a claim 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)non-compliance with any of these rules or with an order of the Tribunal; (d)that it has not been actively pursued; (e)that the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
9. Pursuant to schedule 1 of the Employment Tribunal Rules of Procedure 2013, the overriding objective enables the Tribunal to deal with cases fairly and justly. Dealing with a case fairly and justly so far as practical includes ensuring the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay so far as compatible with proper consideration of the issues and saving expense. The Tribunal seeking to give effect to the overriding objective, must in interpreting or exercising any power given to it by the Rules. The parties and representatives shall assist the tribunal to further the overriding objective and in particular shall cooperate generally with each other and with the tribunal.
10. HHJ Tayler in the recent case of **Smith v Tesco Stores (2023) EAT 11** provided a detailed analysis of the case law in this area. At paragraph 36-37 HHJ Tayler stated the EAT and the Court of Appeal have repeatedly stated that great care that should be taken before striking out a claim and that strike out of the whole claim is inappropriate if there is some proportionate sanction that may for example limit the claim or strike out only those claims which are misconceived or cannot be tried fairly.
11. In **Blockbuster Entertainment Ltd and James 2006 EWCA Civ 684** Lord Justice Sedley stated *"this power of strikeout, as the employment tribunal reminded itself, is a Draconian power not to be readily exercised. It comes*

into being as in the judgement of the tribunal happened here party has been conducting its side of the proceedings unreasonably. The two cardinal conditions for its exercise are either that the unreasonable conduct had taken the form of deliberate and persistent disregard of required procedural steps all that it has made a fair trial possible. If these conditions are fulfilled it becomes necessary to consider whether even so striking out is a proportionate response.

12. When considering the issue of proportionality the Court of Appeal noted at paragraph 18 "*the first object of any system of justice is to get triable cases tried. There can be no doubt among the allegations made by Mr. James are things which if true, merit concern and adjudication. There can be no doubt either that Mr. James has been difficult quarrelling and uncooperative in many respects. Some of this may be attributable to the heavy artillery that have been deployed against him although I hope that for the future he will be able to show the moderation and respect for others which he displayed in his oral submissions to this court. But the courts and tribunals of this country are open to the difficult as well as to the compliant so long as they do not conduct their case unreasonably".*
13. In the case of **Cox v Adecco Group UK & Ireland and others 2021 ICR 1307** HHJ Tayler at paragraph 28 gave important guidance when considering potential strikeout applications. He stated (1) no one gains by truly hopeless cases being pursued to a hearing; (2) strikeout is not prohibited in discrimination or whistleblowing cases that; especial care must be taken in such cases as it is very rarely appropriate; (3) if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed it is highly unlikely that strikeout will be appropriate (4)the claimant's case must ordinarily be taken at its highest (5) it is necessary to consider in reasonable detail what the claims and issues are. Put bluntly you can't decide whether a claim has reasonable prospects of success if you don't know what it is (6) this does not necessarily require the agreement of the formal list of issues although this may greatly assist (7) in the case of the litigant in person the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain claim a litigant in person may become like a rabbit in headlights and fail to explain the case they set out in writing (8)Respondents, particularly if legally represented in accordance with their duties to assist the Tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person should assist the Tribunal to identify the documents in which the claim is set out even if it may not be explicitly pleaded in a manner that would be expected of a lawyer (9) if the claim would have reasonable prospects of success properly pleaded consideration should be given to the possibility of an amendment subject to the usual test of balancing the justice of permitting or refusing amendment taking account of the relevant circumstances . HHJ Tayler commented that strikeout was a last resort and not a shortcut stage.
14. Rule 39 of the employment tribunal rules 2013 provides

    "(1) where a preliminary hearing the tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party "the paying party" to pay a

deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument"

15. In the case of **Garcia v Leadership Factor Limited (2022) EAT 19** it was stated that deposit orders have a valuable role to play in discouraging claims or defences but have little reasonable prospects of success without adopting the far more Draconian sanction of dismissing this claim or response altogether. The deposit order office paying party opportunity for reflection.
16. In **Hemdam v Ishmail & Al-Megrahy (UKEAT/0021/16)** it was stated 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 by creating a risk of costs ultimately if the claim fails. Further it was stated the claims or defences with little reasonable prospect cause costs to be incurred and time to be spent by the opposite party which is unlikely to be necessary. They are likely to cause both wasted time and resource and unnecessary anxiety. They also occupy the limited time and resources of courts and tribunal's that would otherwise be available to other litigants and do so for a limited purpose or benefit. Mrs Justice Simler stated *"the purposes emphatically not in our view to make it difficult to access justice or to affect the strikeout through the back door"*. It was further stated that the test is less rigourous than the strikeout test; there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence.

17. Evaluating the likelihood of success for these purposes entails a summary assessment and not a mini trial of the facts. Where the Tribunal considers that an allegation has little reasonable prospects of success the making of a deposit order does not follow automatically which involves a discretion which is to be exercised in accordance with the overriding objective having regard to all the circumstances of the particular case.

18. In **Sami v Nanovinics UK Limited (2022) EAT 72** the EAT noted that the observations in **Hemdam** were guidance and should not be understood as replacing the wording of rule 39 of the ET rules nor preventing a tribunal in appropriate cases from deciding that a factual allegation has little reasonable prospects of success. The assessment by the tribunal is a broad one following **Jansen Van Rensburg v Royal Borough of Kingston upon Thames UKEAT/0096/07.**

Respondent's submissions

19. The respondent submitted 8 July 2021 posts advertised for a senior development/engineer position via LinkedIn. The advertisement was not included in the bundle of documents. The claimant made an application for the role. On 16 July 2021 the respondent reviewed the application and the claimant's profile on LinkedIn and concluded it he was not suitable for the position. It's case is that it did not consider at any time the claimant's CV. The claimant's application was rejected on 19 July. Within 17 minutes of the rejection claimant contacted respondent to ask why reasonable adjustments had not been considered. On 20 July 2021 the respondent offered to make reasonable adjustments to its application process for the claimant. The Claimant did not accept the offer to speak to HR and instead contacted ACAS.

20. The respondent submitted pursuant to section 20 of the Equality Act 2010 the claimant has to establish a PCP which was applied which placed him at a disadvantage and that a reasonable adjustment should have been made to remove that disadvantage. The respondent submitted that this was one of the plainest and most obvious cases which should be struck out. The claimant cannot demonstrate the respondent was aware of his disability; its case is that it did not see the CV which referenced the disability.
21. It was submitted that the claimant has no reasonable prospect of establishing in the circumstances that the respondent was privy to the fact that the claimant was a disabled person; this claim must fail. The respondent relied upon a decision concerning another of the claimant's claims Dr. **Mallon v A.G. Barr in the Glasgow ET 4100929/2022** where it was considered that the claimant had an ulterior motive in making the claim; see paragraphs 12 to 14 case. It was submitted that the claimant had an ulterior motive here; why else would he not take up the offer to speak to HR. stated that there was an ulterior motive to make a claim. Further the respondent relied upon the case of **Mallon v Blacktrace Holdings Limited & ors** whereby the claimant rejected the claimant because he did not meet the essential criteria; the claimant accepts here he did not have two year minimum experience of solid works. This claim is vexatious.
22. In another claim **Mallon v Electus Recruitment Solutions Limited 1403362/2020** it was held that the claimant was not disadvantaged by having a written application submitted reviewed.
23. In summary the respondent submitted there was an absence of actual or constructive knowledge of the claimant's disability. The claimant will not be able to establish a section 20 Equality Act 2010; it has no reasonable prospects of success or in the alternative, the respondent submitted that claim had little reasonable prospects of success and should have a deposit attached.

Claimant's submissions

24. The claimant submitted that his claim has reasonable prospects of success. He had tried to obtain a number of different jobs over a number of years. At 40, he was diagnosed with dyspraxia; at age 46 diagnosed autism and at age 47 diagnosed with A.D.H.D. His case is that he did share his CV by LinkedIn. Furthermore the reference to "experience of solid works" on the job advert was preferred criteria not essential. So, it does not explain why he was not selected. Although the respondent says it missed the fact that the claimant stated he was disabled in his application, the claimant challenges this. Having denied the claimant a reasonable adjustment why should he then speak to HR.
25. The claimant gave evidence as to his means. He had limited income from selling items on eBay he earns about £9 to £10,000 per annum. He has savings of some £1,500; a mortgage debt of about £175,000; in debt of about £10,500; credit card debt of approximately £1,800 to £2000. At the moment he has £196 in his current account. The claimant heard at the tribunal to determine the case.

Conclusion

26. Cases determined by other Employment Judges in the Tribunal may provide guidance but do not require other Employment Judges to follow. Cases are fact sensitive.

27. The starting point is to consider the issues in the case (see **Cox v Adecco**). The issues are :-
(a)whether the respondent applied a PCP by requiring an application for the job to be made in writing;
(b)whether the PCP placed the claimant at a substantial disadvantage;
(c)whether the respondent had actual or constructive knowledge that the claimant was (i)disabled and (ii)placed at a substantial disadvantage by the application of the PCP;
(d)whether a reasonable adjustment would have removed the disadvantage.

28. Striking out a claim is a Draconian step which is only to be taken in the clearest of cases (**Anyanwu & another v South Bank University and South Bank Student Union (2001) ICR 391**). In **Mechkarov (2016) ICR 1121** it was said that the proper approach to be taken in a strike out application in a discrimination case is that
(a)only in the clearest case should a discrimination claim be struck out;
(b) where there are court issues of fact that turn to any extent on oral evidence they should not be decided without hearing oral evidence;
(c)the claimant's case must ordinarily be taken at its highest;
(d) disproved by or is totally and inexplicably inconsistent with undisputed contemporaneous documents it may be struck out; and
(e) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

29. Where factual issues are in dispute the Tribunal should be cautious to strike out a claim before hearing all the evidence. There are factual disputes in this case including (1) whether the respondent read the claimant's CV which disclosed the claimant's disabilities and (2) whether the experience of solid works was essential criteria for the post. The Tribunal is not permitted to conduct a mini trial at a preliminary stage; the conflict of evidence between the parties as to whether the respondent read or did not read the CV can only be resolved upon hearing evidence. Unfortunately, the advertisement has not been included in the papers before me so whether experience of solid works was merely desirable as opposed to essential is not clear; this is dispute of evidence which can only be resolved via the disclosure process and hearing the evidence of the parties.

30. There is no dispute that a paper application was required for the role; the dispute is whether the claimant was placed at a substantial disadvantage by that application process or whether indeed the respondent was or should have been aware of it. There is no dispute that a reasonable adjustment was possible because the respondent offered this following the claimant raising a concern he had not been shortlisted.

31. In the circumstances that there is a factual dispute between the parties whether the respondent read the claimant's CV or whether experience of "side works" was desirable as opposed to essential criteria for the post it cannot be said that the claimant has no reasonable prospects. It can not be shown that there are no reasonable prospects of establishing that the respondent knew about his disability or that he was placed at a substantial disadvantage by the submission of a written application process. In the circumstances the Tribunal refuses to strike out the claim. These issues must be determined by hearing all the evidence at a substantive hearing. Furthermore, upon a summary assessment the Tribunal does not find that

this claim has little reasonable prospects of success either in the context that there are number of factual issues of dispute which must in reality determined upon hearing all the evidence.

32. The respondent has stated that there is a lack of genuineness behind the claimant making such an application. If the claimant really wanted this role, upon being offered reasonable adjustments to have refused at and to have issued the claim. The respondent's case is that the claimant's claim is vexatious. In reality that is a matter which can only be determined on hearing the claimant's version of events at a substantive hearing. The Tribunal declines to conduct a mini-trial and determines that it cannot be said that the claimant's claim has no reasonable prospect or little reasonable prospect of success. The Tribunal declines to make a strike out or deposit order in the circumstances.

Employment Judge Wedderspoon

21 April 2023