EMPLOYMENT TRIBUNALS

Claimant: Mrs S Thomson

Respondent: Home Office (Border Force)

JUDGMENT

1. This judgment concerns the claimant's complaint of discrimination arising from disability within the meaning of section 15 of the Equality Act 2010.
2. In this judgment,
    a. "Further particulars of claim" means the document headed "Further particulars of claim, e-mailed to the tribunal on 15 April 2024; and
    b. "Unfavourable Treatment Allegation", followed by a number, is the allegation of unfavourable treatment contained in the corresponding bullet point in the Further particulars of claim, as set out in the reasons for this judgment. (For example, Unfavourable Treatment Allegation 1 can be found in the first bullet point.)
3. Unfavourable Treatment Allegations 1 to 4 are struck out.
4. No decision has been taken about whether to strike out Unfavourable Treatment Allegation 5. It is not yet part of the claim.

REASONS

Relevant law

1. Rule 37 of the Employment Tribunal Rules of Procedure 2013 enable the tribunal to strike out part of a claim on the ground that it has no reasonable prospect of success.
2. By rule 37(2), a claim must not be struck out unless the claimant has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

3. Discrimination cases are fact-sensitive and will generally require an examination of the evidence. It will only be in a plain and obvious case that it is appropriate to strike out a complaint of discrimination at a preliminary hearing on the ground of its prospects of success: *Anyanwu v. South Bank Student Union* [2001] UKHL 14.

4. In *Ahir v. British Airways* [2017] EWCA Civ 1392, Underhill LJ stated at paragraph 16:

> "Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary for liability being established, and also provided they are keenly aware of the danger of reaching such conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for making of a deposit order, which is that there should be 'little reasonable prospect of success'."

5. To put it another way, "the need for caution when considering a strike-out application does not prohibit realistic assessment where the circumstances of the case permit": *Kaul v. Ministry of Justice & others* [2023] EAT 41.

6. Before striking out a claim, or ordering a deposit, the tribunal must first make reasonable efforts to understand the complaints and allegations. This includes carefully considering the claim form and supporting documentation that the claimant has provided: *Malik v. Birmingham City Council* UKEAT 0027/19 at para 50-51. "Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is": *Cox v. Adecco* UKEAT 0339/19.

7. It is desirable for employment tribunals to provide such assistance to litigants as may be appropriate in the formulation and presentation of their case. The fact that the litigant is self-represented is a factor relevant to what level of assistance is appropriate. When deciding how much assistance to afford a self-represented party, the tribunal must try to achieve the overriding objective and must avoid stepping into the arena: *Drysdale v. Department of Transport* [2014] IRLR 892.

8. Section 15 of the Equality Act 2010 provides, relevantly:

> "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…"

9. The correct approach to a complaint under section 15 was enunciated by Simler P in *Pnaiser v. NHS England* [2016] IRLR 174 at paragraph 31 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 on 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 processes 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 reason or 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…

(c) Motives are irrelevant…

(d) The tribunal must determine whether the reason… is "something arising in consequence of B's disability". That expression… could describe a range of causal links... 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 to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

…

(i) … it does not matter precisely in which order these questions are addressed.

Relevant procedural history

10. The claimant presented her claim on 9 August 2023.

11. Attached to the claim form was a 15-page document which I will call the "Grounds of Claim". Paragraph 1 of the Grounds of Claim listed the claimant's complaints. "Discrimination arising from disability" was one of the complaints in the list.

12. Under the heading, "My case and the Equality Act 2010", the Grounds of Claim listed three allegations of unfavourable treatment:

12.1. "…my employer …has… failed in their duty to comply with and to put in place my two new Workplace Reasonable Adjustments (condense my hours…and to change the start of my early shift…) requested by me on 12/2/23 in a timely manner. My employer … has left me worried and not knowing whether my existing reasonable adjustments (end of shift meal break and to work at Terminal 1 only) will remain in place…Section 15…applies"

(This later became **Unfavourable Treatment Allegation 1**.)

12.2. "…my employer… has failed to change my …line manager …in a timely and sensitive manner…This failure has allowed a further opportunity for intimidation to take place against me. This has taken the form of an OHS referral by my … Line Manager… The contents of which I was misled about……Section 15…applies"

12.3. "…my employer…arising from my disability, has treated me unfairly, unfavourably, and discriminated against me - …Section 15…applies".

13. On 11 October 2023, the claimant e-mailed a document with the filename, "Additions to ET1". In short summary, the document largely consisted of a timeline of events that had taken place since the claim had been presented. The final page of the document contained two bullet points which the claimant asked to include in her claim.

14. The two bullet points were:

"…my employer … has now refused to make the Workplace Reasonable Adjustment request … submitted on 12/2/23 to condense our hours from 10.5 to 12 hours." (This, too, is broadly the same as **Unfavourable Treatment Allegation 4.**)_"They have also…refused and removed our existing Workplace Reasonable Adjustment end of shift meal break…and our night shift (which has an amended start and finish time)… " (This later became **Unfavourable Treatment Allegations 2 and 3.**)

"Due to how we were treated and the failure to make reasonable adjustments in a timely manner we asked to be considered for a managed move. However on 10/10/23 my new Home Office Line Manager confirmed this would only be for me as they only considered me as being covered under the Equality Act 2010 and not [my husband]."

- "I cannot move to another department without my husband whom I have worked with at Border Force for over 22 years. He is my (unpaid) carer and my support at home and in the workplace…I believe my employer has treated myself and [my husband] unfairly, unfavourably and cruelly and we do not deserve to be treated like this."

15. A preliminary hearing took place on 4 January 2024.

16. On or about 20 December 2023, the parties jointly completed an agenda form for the hearing. Box 4.1 of the agenda form contained a draft list of the issues that the tribunal would have to determine. Under the heading, "Discrimination arising from disability", the issues included, "Was the claimant treated unfavourably…? What caused that treatment? Was the reason something arising in consequence of the Claimant's disability?"

17. At Box 2.3, the respondent asked the claimant to provide further information about her complaint of discrimination arising from disability. The requested

information included the "something arising in consequence of the Claimant's disability".

18. At the preliminary hearing, Employment Judge Holt summarised the claimant's factual allegations, but did not press the claimant to clarify her legal complaints. This was because the claimant indicated that she had sought legal advice and was intending to abandon significant parts of her claim.

19. On 21 February 2024, the claimant provided a further document headed, "Clarification of ET1". It contained a further recitation of the facts, from the claimant's point of view, and was followed by the heading, "Claim". There were six relevant factual allegations under that heading. Each one was stated to be "unfavourable treatment that arose as a consequence of my disability". The allegations were:

- "17.…It was reasonable for my employer to put in place my [adjustment] (requested on 12/2/23) and to allow me to condense my shift length from 10.5 hours to 12 hours. However, on 7/9/23 my employer refused my … request. (later to become **Unfavourable Treatment Allegation 4**).
- "18…It was reasonable for my employer to put in place my [adjustment] (requested on 12/2/23) to start my early shift at 10.30hrs. On 7/9/23, my employer eventually agreed to put this WRA request in place."
- "19. My employer did not respond to, action or put in place my two new WRA requests dated 12/2/23 in a timely manner…" (also part of **Unfavourable Treatment Allegation 1**).
- "20. My employer removed (on 7/9/23) my existing WRA … of adjusted night shift hours." (later, **Unfavourable Treatment Allegation 3.**)
- "21. My employer removed (on 7/9/23) my existing WRA… of an end of shift meal break." (**Unfavourable Treatment Allegation 2.**)
- "22. My employer instigating Stage 1 Reasonable Adjustments cannot be accommodated process (on 10/10/23) against me to move me to another role outside Border Force North was unfavourable treatment…" (This later became **Unfavourable Treatment Allegation 5**).

20. Paragraph 22 appeared to be a reference back to the second bullet point in the claimant's 11 October 2023 "Additions to ET1" document. The point that the claimant had been making there was that she had asked for a managed move, but she had been told on 10 October 2023 that a managed move would only be for the claimant and not for her husband.

21. Despite the request at Box 2.3 of the agenda form, the "Clarification of ET1" did not identify the "something arising in consequence of the claimant's disability". The document left the reader guessing at what was alleged to be the reason for the unfavourable treatment, and how it was said to have arisen in consequence of the claimant's disability.

22. A preliminary hearing took place before me on 15 April 2024.

23. On the morning of the preliminary hearing, the claimant e-mailed the tribunal, attaching a further document, this time headed, “Further particulars of claim”.

24. Under the heading, “Discrimination arising from disability”, the document stated:

“The following acts are relied upon:

- **[Unfavourable Treatment Allegation 1] -** On 12.02.2023 I sent an email to my then line manager Higher Officer Faizan Shahid (and copied in his line manager, Senior Officer Alison Stones) requesting two new, and maintaining my existing, Workplace Reasonable Adjustments (WRA). My request for WRA’s arises because of the consequences of my disability. HO Shahid or SO Stones did not speak or meet with me to discuss my need for WRA’s and they did not put them in place.

- **[Unfavourable Treatment Allegation 2] -** On 07.09.2023 the removal of my existing, agreed WRA of my meal break at the end of my shift (in place since 18.02.2021). My need for a meal break at the end of my shift arises because of the consequences of my disability. The removal of my existing, agreed WRA was a recommendation by the Independent Reasonable Adjustment Panel to HO Louise Deakin. This WRA was subsequently removed by HO Louise Deakin and confirmed in an email to me.

- **[Unfavourable Treatment Allegation 3] -** On 07.09.2023 the removal of my existing, agreed WRA to work an adjusted night shift of 15:30 – 02:00hrs in the Winter period and 16:30hrs – 03:00hrs in the Summer period that has been in place since, at least, 15.04.2018. My need for my adjusted night-shift hours arises because of the consequences of my disability. The removal of my existing, agreed WRA was a recommendation by the Independent Reasonable Adjustment Panel to HO Louise Deakin. My existing WRA was refused and removed by HO Louise Deakin and confirmed in an email to me.

- **[Unfavourable Treatment Allegation 4] -** On 07.09.2023 the refusal of my request to condense my shift length from 10.5 hours to 12 hours (which in turn, would reduce my number of attendances and journeys to and from work). My need to condense my shift length from 10.5 hours to 12 hours arises because of the consequences of my disability. The refusal of my request for condensing my shift length to 12 hours was a recommendation by the Independent Reasonable Adjustment Panel to HO Louise Deakin. My request for this WRA was refused by HO Louise Deakin and confirmed in an email to me.

- **[Unfavourable Treatment Allegation 5] -** On 10.10.2023 as a consequence of my WRA’s being refused and removed, HO L Deakin instigated Phase 1 Reasonable Adjustments cannot be accommodated process to move only me to another role outside of Border Force North as she stated only I was considered disabled under the Equality Act 2010. Phase 1 action involves being moved to a different work location to my husband who is my carer, support and means of transport to work. This process was instigated against me because of my needs that arise from the consequences of my disability. Emails on 04.10.2023 and

16.10.2023 between senior managers confirmed that following Phase 1 they intended to move swiftly into Phase 2 (this is the phase when a suitable alternative role is not identified in Phase 1).

- **[Unfavourable Treatment Allegation 6] -** On 04.12.2023, I had a meeting with Regional Director Christina Brown which she had agreed to hold to review the refusal and removal of my WRA's. My request for WRA's arises because of the consequences of my disability. At the meeting RD Christina Brown failed to review my WRA's and stated my WRA's would be considered under the Employment Tribunal process."

25. At the preliminary hearing, I tried to help the claimant to clarify her complaint of discrimination arising from disability.

26. We started by identifying the allegations of unfavourable treatment. The claimant confirmed that all the allegations of unfavourable treatment that she wished to pursue were now contained in the "Further particulars of claim" document.

27. I asked the claimant some questions about Unfavourable Treatment Allegation 1. This was her complaint that the respondent had treated her unfavourably by refusing her request for "two new adjustments". I asked the claimant to identify what she thought was the respondent's reason for that refusal. I explained to her that it would have to be a reason that arose in consequence of her disability. The claimant was unable to identify any such reason.

28. The claimant told me that she would not be able to identify such a reason for the other allegations of unfavourable treatment either.

29. The only reason that the claimant could think of for any of the alleged unfavourable treatment was "they did not want people with disabilities working at Manchester Airport".

30. I also had to make disputed decisions at the preliminary hearing. One of these decisions was about whether the claimant should be given permission to amend her claim or not.

31. I refused the claimant permission to amend her claim to complain that she had been harassed on 4 December 2023. The proposed allegation of harassment arose out of the same meeting as Unfavourable Treatment Allegation 6.

32. The claimant did not mention Unfavourable Treatment Allegation 5 at the hearing. Had she done so, I would have had to decide whether the claimant should have permission to amend her claim to include that complaint. It relates to something allegedly done after the claim was presented.

33. Following the preliminary hearing, a case management order was sent to the parties on 23 April 2024.

34. Part Two the case management order was headed, "Strike-out/Dismissal Warning". The warning notified the parties that I was thinking of striking out the complaint of discrimination arising from disability. There was a summary of the reasons for my provisional view that the complaint had no reasonable prospects of success.

35. The claimant was given an opportunity to make written representations or request a hearing.

36. The claimant has not requested a hearing. She did make written representations.

37. Relevantly, those representations stated (with my editing):

> "I am a litigant in person. I have had limited professional advice in the drafting and presentation of my claim to date.
>
> In the further particulars of claim document submitted to the ET on 15th April 2024, I request that **[Unfavourable Treatment Allegation 5]** …is not struck out. Please can you re-consider that HO Deakin's decision to instigate formal Phase 1 Reasonable Adjustments cannot be accommodated against me was unfavourable treatment due to something arising in consequence of my disability namely my need for WRA's which provide, and would provide, support and flexibility because of the difficulties I experience because of the impact of my MS… the Respondent decided that they wanted to move me out of Border Force North instead of granting me the WRA's I needed."

38. The claimant did not make any representations as to why Unfavourable Treatment Allegations 1 to 4 should not be struck out. Nor did she make any representations about Unfavourable Treatment Allegation 6.

39. The respondent made representations in reply by e-mail dated 20 May 2024. Those representations simply relied on my summary in the strike-out warning.

Conclusions

40. I am satisfied that the claimant has had a reasonable opportunity to make representations.

41. In my view, unfavourable Treatment Allegations 1 to 4 have no reasonable prospect of success. There is no reasonable chance that the claimant will ever allege, let alone prove, that the unfavourable treatment was for a discriminatory reason.

42. The claimant has to identify a reason in the mind of the respondent for treating her unfavourably, and then show that that reason arose in consequence of her disability.

43. She has now had 6 opportunities to identify such a reason:

    43.1. The Grounds of Claim

    43.2. The Additions to ET1 document

    43.3. The Clarification of ET1 document

    43.4. The Further particulars of claim

    43.5. Orally at the preliminary hearing and

    43.6. Her written representations in response to the strike-out warning.

44. If the claimant was ever going to allege a section 15 reason in relation to Unfavourable Treatment Allegations 1 to 4, it would have happened by now.

45. The claimant has stated that she believes that the reason for the unfavourable treatment was that the respondent did not want people with disabilities working at Manchester Airport. This would be direct discrimination. (The complaint of direct discrimination has been withdrawn.) It would not be discrimination arising

from disability, because the reason for the unfavourable treatment is the disability itself, rather than anything that had arisen in consequence of it.

46. This is one of the cases where the high hurdle for striking out a complaint of discrimination has been crossed. Unfavourable Treatment Allegations 1 to 4 are therefore struck out.

47. Unfavourable Treatment Allegation 5 is different.

48. There are two important differences between Unfavourable Treatment Allegation 5 and the allegations that have been struck out.

49. The first difference is that Unfavourable Treatment Allegation 5 is not susceptible to being struck out. This is because it is not yet part of the claim. No decision has been made as to whether the claimant should have permission to include it.

50. The second difference is that the claimant has now clarified Unfavourable Treatment Allegation 5. In her written strike-out representations, the claimant has alleged that the reason for commencing Phase 1 of the formal procedure was her need for adjustments. I take the claimant to be saying here that: (a) as a consequence of her disability she made a request for adjustments; (b) the respondent decided that it could not accommodate that request; and (c) because of the gap between the adjustments that the claimant had requested and those which the respondent was prepared to accommodate, the respondent initiated a procedure which was understood by the claimant to put her at a disadvantage. This formulation would be arguable as a complaint of discrimination arising from disability.

51. I would not, however, wish to encourage the claimant into a false sense of optimism. She still needs permission to amend her claim. The tribunal is likely to want to establish when the claimant first applied for permission to include Unfavourable Treatment Allegation 5. My provisional view is that she sought to introduce this complaint for the first time on 15 April 2024. She raised complaints about the meeting on 10 October 2023 in previous documents, but the unfavourable treatment that was alleged in those documents appears to have been quite different. Any decision on permission to amend would therefore need to take account of the statutory time limit. The harder it would be for the claimant to obtain an extension of the time limit, the less of a disadvantage she would face if permission to amend were refused.

52. I have made case management orders for Unfavourable Treatment Allegation 5. If that allegation is pursued, those orders make provision for a proportionate process for deciding whether to give the claimant permission or not.

53. I have not made any orders in relation to Unfavourable Treatment Allegation 6. I have already refused permission to introduce a related complaint of harassment. The claimant did not mention this allegation in her written strike-out representations. From this, I have concluded that the claimant is no longer asking to amend her claim to introduce this allegation.

Employment Judge Horne
5 June 2024

SENT TO THE PARTIES ON
18 June 2024

FOR THE TRIBUNAL OFFICE