



EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING

Claimant: Miss E Thomas

Respondents: British Transport Police

Heard at: Midlands East (remotely by video)

Before: Employment Judge Shore

On 31 January 2024

REPRESENTATION:

Claimant: Mr A Jones, Counsel

Respondent: Mr N Caiden, Counsel

JUDGMENT AND REASONS

The judgment of the Tribunal is that:

1. The claimant's single claim of direct discrimination because of the protected characteristic of disability has better than little reasonable prospects of success and shall not be struck out under Rule 37 or be made the subject of a deposit order under Rule 39. The respondent's application is dismissed.
2. All the claimant's other claims have better than little reasonable prospects of success and shall not be struck out under Rule 37 or be made the subject of a deposit order under Rule 39. The respondent's application is dismissed.
3. The issue of whether all the claimant's other claims were presented out of time and, if they were, whether they should be allowed to proceed based on justice and equity will be determined at the final hearing.

4. The Interim Anonymisation Order made by Regional Employment Judge Swann on 16 November 2023 shall continue to the end of the final hearing unless varied or revoked by the Tribunal.

REASONS

Background

1. On 7 November 2023, a preliminary hearing was held at Leicester before Regional Employment Judge Swann. Both parties were represented by the same Counsel as today.
2. There is no need for me to set out the background to the claim, as it is set out in REJ Swann's order and other documents.
3. A List of Issues was agreed and REJ Swann made case management orders that included an anonymisation order in respect of the claimant and the respondent.
4. The claimant has made claims of indirect discrimination and harassment that relate to gender reassignment. All those claims were, on the face of it, presented out of time. The claimant also made a single claim of direct discrimination because of gender reassignment about an incident on 7 June 2023 which was presented in time. Because of the operation of section 123(1)(a) and 123(3)(a) of the Equality Act 2010 the claimant seeks to show that all the acts complained of are part of conduct extending over a period.
5. Today's public preliminary hearing was ordered by REJ Swann to consider the following:
 - 5.1. Should the claimant's claim of direct discrimination more particularly set out as an issue at paragraph 8(iii) of the aforementioned respondent's list of issues (now adopted as amended by the parties as the final list of issues for the Tribunal) should be struck out as having no reasonable prospect of success or in the alternative whether a Deposit Order should be made on the basis that it has little reasonable prospect of success.
 - 5.2. If the said claim of direct discrimination is struck out, then the Tribunal will determine whether or not the remaining claims have been lodged out of time and if so whether time should be extended on a just and equitable basis to enable those claims to proceed. If (as accepted by the respondent) no strike out order is made, then the question of timeliness is one to be determined as part of the overall finding of the Tribunal at the final Hearing once all the evidence has been heard.
6. REJ Swann ordered that, once the question of strike out/deposit was determined, the hearing would be consider the anonymisation order as follows:
 - 6.1. An application for an Anonymity Order in accordance with Rule 50(3)(b) having been made by the Claimant, the Tribunal hereby

grants an Anonymity Order in that the identification of the Claimant and the Respondent will be anonymised up to and including the Preliminary hearing above and in its listing or in any documents entered on the register or otherwise forming part of the public records until that time. This Order will remain in force until a full determination of whether the Order should be made permanent will be considered at the second part of the aforesaid Preliminary hearing so that in accordance with Rule 50(4) any party or any person with legitimate interest may have the opportunity of making such representations as may be appropriate in regard to continuation of the Order or otherwise or the basis on which it is to be granted. The Tribunal will therefore deal with the Anonymisation Order that is being sought on a permanent basis by the Claimant in the second part of the Preliminary hearing and if time permits, the Judge will give his or her determinations in regard to all of the above applications at the conclusion of the said hearing.

Housekeeping Matters

7. In preparation for the hearing, I was provided with:
 - 7.1. An amended List of Issues as agreed following the PH before REJ Swann;
 - 7.2. The respondent's skeleton argument for this hearing;
 - 7.3. The claimant's skeleton argument for this hearing;
 - 7.4. The claimant's witness statement dated 22 January 2024;
 - 7.5. A witness statement of Collette Osborne, Head of People Delivery for the respondent, dated 29 January 2024; and
 - 7.6. A bundle of documents consisting of 253 pages.
8. I read all the documents before the hearing. I found the claims and the issues in the case to have been accurately set out.
9. The hearing was conducted remotely by video with the agreement of the parties.
10. The hearing began at 10:00am. I indicated to the parties that I would deal with the strike out/deposit first and then consider the anonymity order.
11. In relation to the anonymity order, Mr Caiden confirmed that it was agreed that the order in respect of the claimant should remain in place. However, there was no agreement about the order in respect of the respondent. The point that the respondent sought to make was that the claimant operated in a small area and there was a possibility that the claimant could be identified by the jigsaw method if the respondent was not anonymised.

12. Mr Jones reminded me of the principles of open justice and the requirement that any anonymity order had to be as light as it could be whilst still performing the function it was made to carry out. We returned to this matter later.
13. It was agreed that neither witness who had provided a statement would give live evidence.
14. Mr Caiden made oral submissions that referred to his skeleton argument. Mr Jones did the same.

Relevant Law

15. I was mindful of the overriding objective to deal with cases justly and fairly in Rule 2 and the Tribunal's wide case management powers under Rule 29.
16. Rules 37 and 39 deal with Strike Outs and Deposit Orders:

Striking out

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 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;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) 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.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

17. The consequences of a Deposit Order on a claimant who goes on to contest the claim are set out in Rule 76 (I have only reproduced the relevant part) – the claimant who loses is treated as having acted unreasonably in pursuing the claim:

When a costs order or a preparation time order may or shall be made

76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; ...

18. Both Counsels' summary of the law in their skeleton arguments were accurate, if pointing in different directions. There is no need for me to reproduce either in these reasons.

Findings

19. I considered the written and oral submissions of Mr Caiden and Mr Jones carefully and considered the overriding objective to deal with cases justly and fairly in Rule 2 and the Tribunal's wide case management powers under Rule 29.
20. The starting point in considering a strike out application is paragraph 24 in the Judgment of Lord Steyn in **Anyanwu v South Bank Students Union** [2001] UKHL 14:

“For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases.

Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest”.

21. The point in **Anyanwu** was emphasised in **Ezsias v North Glamorgan NHS Trust** [2007] EWCA Civ 330. Any dispute over the evidence must concern evidence that will be relevant to deciding the issue at the final hearing.
22. The factual basis of the claim that is the subject of the application for strike out is the allegation that on 7 June 2023, the respondent required the claimant, who had been absent from work due to ill health since March 2023, should return to work on Temporary Duty Restriction (TDR) until such time as the respondent had published a policy on transitioned officers that covered the operating procedure to be employed if a transitioned officer was required to conduct an intimate search of a suspect or prisoner. Perhaps unusually, the parties are agreed on the factual basis. The mischief is in the interpretation of the evidence.
23. The TDR would have meant that the claimant would return to work but would not be required to undertake intimate searches.
24. The central point made by the respondent in its application was that, for a claim of direct discrimination to succeed, the claimant has to have been subjected to a detriment (**Shamoon v Chief Constable of Royal Ulster Constabulary** [2003] UKHL 11 – paras 34-35 - stated *“a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances [as an] unjustified sense of grievance cannot amount to detriment”*). It was submitted that the claimant was not subjected to a detriment.
25. At paragraph 18 of his skeleton, Mr Caiden submitted that:

25.1. “there does not appear to be any “less favourable” treatment compared with a hypothetical comparator. If someone is saying that it is not clear how they can do an aspect of their job given the policy, being told by HR to return to work but do aspects of the job that are not covered by the policy is likely to be said too. That is the hypothetical comparator that is required and so the Claimant has failed to establish a prima face case. Indeed, this would appear to

be the standard type of approach if the individual were disabled; come back to work but do not do aspects of the job that are not covered by the policy, which is the point made in the Grounds of Resistance at [27(i)];

- 25.2. in any event, it is obvious that on the facts pleaded the reason the Claimant was told not to undertake certain duties was not because she was undertaking gender reassignment, it was because she was stating that she believed the policy was not covering her, so she did not know what to do. That is precisely what the Grounds of Resistance at [7(iv)] advance “the Claimant who was concerned in relation to conducting searches was informed she would not have to do this duty pending a desirable resolution being reached by her” (p.44). Equally this is the point made in the Grounds of Resistance at [27(ii)], p.50, that the act is not because the Claimant was undergoing gender reassignment but it was owing to its reasonable understanding of her wishes and that another person undergoing gender reassignment may have been content to return to full duties with the clarification that the Respondent provided, which in the Claimant’s view did not amount to adequate policy statement;
- 25.3. in the further and alternative, objectively a “detriment” cannot be shown on the facts and case advanced in the pleading. As noted in paragraphs 9 above, **Shamoon** and **Cordant Security Ltd** make plain the test is objective: it is what a reasonable worker would regard as disadvantageous. The Claimant is complaining of not being able to do or know how to do aspects of her job because a policy is in her opinion not clear and she is off sick at the time, so being told to return but not to undertake such aspects until the policy is clarified is objectively not disadvantageous. In some ways it is doing exactly what the Claimant wants – that is being told you do not have to do the bit that is unclear in order to protect you. This cannot be a detriment. This is the point that is made in the Grounds of Resistance at [27(i)] (p.49) and explained by reference to the counter-factual, the alternative is returning to work and being made to do something for which the Claimant alleges there is no clear policy. That scenario would be the “detriment”, this the removal of that risk is not objectively a “detriment”.”

26. Mr Jones’s response to the detriment point in his skeleton was:

- 26.1. “The question is whether *“a reasonable worker would or might take the view that he had thereby been **disadvantaged** in the circumstances [as an] unjustified sense of grievance cannot amount to detriment”*: **Shamoon v Chief Constable of Royal Ulster Constabulary** [2003] UKHL 11;
- 26.2. The test is objective **Shamoon and Cordant Security Ltd v Singh** [2016] IRLR 4 (EAT) at [20]-[21] and [25].

- 26.3. ...the Respondent heavily focuses on “*removal of the risk*”, referring to the risk of non-compliance/complaint. However, the Respondent fails to consider the disadvantage caused by returning to work on restricted duties as was being suggested.
- 26.4. In essence, the Respondent suggests that the way to address the Claimant’s concerns is to ignore them and get her to return to work but not do the job she is employed to do. That gives rise to its own disadvantages in terms of skill retention, career progression and mental wellbeing when at work.
- 26.5. As set out in the Claimant’s witness statement the suggestion of being placed onto Temporary Duty Restriction until such a time as a policy on transitioned officers was in place did cause the Claimant that disadvantage.
- 26.6. In **Deer v University of Oxford** [2015] IRLR 481 at paragraph 25 Elias LJ said this: “*The concept of detriment is determined from the point of view of the claimant: a detriment exists if a reasonable person would or might take the view that the employer’s conduct had in all the circumstances been to her detriment.*”
- 26.7. In **Ministry of Defence v Jeremiah** [1980] QB 87 it was held that requiring only male supervisors to carry out dirty work was an unlawful detriment. The Claimant will argue here that requiring transgender officers not to perform their full duties is not materially different in rationale.
- 26.8. In light of the Claimant’s evidence, it is hard to contend how a reasonable worker would (or might) take the view as to disadvantage in the circumstances.”
27. I find that within the arguments of the parties on the issue of detriment set out above, there are disputes of evidence that I cannot resolve on the papers before me. The claimant says that an offer for her to return to work without being able to perform her full duties is a detriment. The respondent says that its offer for the claimant to return without the requirement for her to carry our searches addresses and removes her concerns about there being no policy on searches by transitioned officers and is, therefore, a positive thing for the claimant, not a detriment.
28. The question can only be fairly and justly answered in a full hearing after hearing evidence that is tested in cross-examination. The claim cannot be said to have no or little reasonable prospect of success.
29. I have not addressed all the points raised by the parties in their submissions, as I have found that there is a significant dispute on the evidence as set out above and it would not be proportionate to go into granular details on the other grounds that were argued. I would add, however, that I did not think there was much mileage in the forensic prejudice argument of the respondent.

30. I do not know and cannot predict how the final hearing will determine this matter, but I understand why the application was brought and find that it had some merit.

Time Points

31. Because I did not strike out the direct discrimination claim, the time points on the other claims are to be determined as part of the final hearing per the order of REJ Swann.

Other application for strike out/deposit

32. Mr Caiden invited me to strike out or deposit the claimants claim of indirect discrimination because of gender reassignment about the changing room facilities at the respondent's Gravesend training facility. I find that the fact that I was taken to so many pages of documents which were then disputed by Mr Jones as to their dates, accuracy or relevance led me to the swift conclusion that this matter should be determined at a full hearing. The claim cannot be said to have no or little reasonable prospect of success.

Anonymity

33. I find that the order in respect of the claimant should remain in force until the end of the final hearing, when a decision can be made as to where to make it permanent. It was not in the interests of justice to make it permanent today.
34. The parties did not agree about the order in respect of the respondent. I find that until disclosure and witness statements exchange is complete, neither side will know the scope of anonymity that may be needed in respect of the respondent to properly protect the human rights of its staff in a way that is proportionate to the interests of open justice.
35. The existing anonymisation order shall remain in force until the end of the final hearing or until the Tribunal varies any part of the order relating to the respondent.

Employment Judge S A Shore

Date 1 February 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

...23 March 2024.....

FOR THE TRIBUNAL OFFICE

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