EMPLOYMENT TRIBUNALS

Claimant: **Mr James Linton**

Respondent: **The Athelstan Trust**

Heard at: Bristol (in public) **On:** 13 August 2024

Before: Employment Judge C H O'Rourke

Appearances:

For the Claimant: Mr R Downey - counsel
For the Respondent: Ms J Linford - counsel

PRELIMINARY HEARING JUDGMENT

1. As conceded by the Respondent, the Claimant was disabled at the relevant time, subject to the requirements of s.6 of the Equality Act 2010.

2. The Respondent's application for strike out or deposit orders in respect of the Claimant's claims of automatic unfair dismissal and discrimination arising from disability are dismissed.

REASONS

Background and Issues

1. At a previous preliminary hearing of this Tribunal, on 25 January 2022, it was determined that the Claimant was not disabled, subject to the terms of s.6 of the Equality Act and that a deposit order be made in respect of his claim of automatic unfair dismissal, on the basis that it had little reasonable prospects of success.

2. The Claimant appealed, successfully, to the Employment Appeal Tribunal, and in her Order of 19 February 2024 [181], Mrs Justice Eady, President, remitted the issue of disability for rehearing to a differently constituted Tribunal and set aside the deposit order, indicating, in respect of the latter that it would be open, if advised, for the Respondent to make a fresh application.

3. The Respondent having conceded, on 12 August 2024, that the Claimant was disabled at the relevant time, that issue is not considered further.

4. The Respondent did, however, by way of Ms Lynford's skeleton argument, also dated 12 August 2024, make the following applications:

    a. For either strike out or the making of a deposit order in respect of the claim of automatic unfair dismissal, on grounds of protected disclosure; and

    b. For either strike out or the making of a deposit order in respect of the claim of discrimination arising from disability, on the basis that the Respondent was unaware, or could not have been expected to be aware of the Claimant's disability.

Submissions

5. In summary, Mr Downey made the following submissions:

    a. Subject to the principle in **Serco Ltd v Wells EAT [2016] ICR 768**, the EAT held that an employment judge should be sparing in the exercise of his or her power under rule 29 to vary or revoke an order made by a previous judge. His Honour Judge Hand QC, sitting alone, pointed out that the Tribunal Rules, like the CPR, were drafted with regard to the principle that it is desirable for there to be finality and certainty when judicial orders and decisions are made, meaning that challenges to an order should normally be pursued via an appeal. The phrase 'necessary in the interests of justice' should be interpreted narrowly. For example, if there has been a material change of circumstances, or if the order was based on a material omission or misstatement, a variation or revocation may be appropriate. HHJ Hand went on to state that there may be other rare and out-of-the-ordinary cases in which variation or revocation should be sought but considered it unwise to attempt to define such cases. Mr Downey contended that no such change in circumstances, or omissions or misstatements applied in this case and that accordingly, the deposit order made by the previous Tribunal, in respect of the protected disclosure claim, having been set aside by the EAT, could not now be revisited by this Tribunal.

    b. That the application now made for a strike out/deposit order in respect of the disability discrimination claim was very late (he only being aware of it on sight of Ms Lynford's skeleton argument this morning) and that the grounds for the application had not been detailed. He was offered further time, by way of short adjournment of today's hearing, to a later time today, to consider the application, but did not consider that necessary and stated that he was, nonetheless, willing to respond to it. In any event, I queried with Ms Lynford as to whether a strike out/ deposit order could be appropriate in this case, as her argument centred on the issue of the Respondent's awareness (actual or constructive) of the Claimant's disability and in respect of that issue, the burden of proof rests on the Respondent (s.15(2) '*Subsection (1) does not apply if A*

shows that A did not know, and could not reasonably have been expected to know, that B had the disability'). In contrast, however, in respect of the making of a deposit order, the burden of proof (in this case) is on Claimant (the Tribunal '*… must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim …'* (**Jansen van Rensburg v Royal London Borough of Kingston-upon-Thames UKEAT/0096/07**)). It seems, therefore, somewhat counterintuitive to consider the making of a strike-out/deposit order on a claimant, in respect of an issue for which the burden of proof rests on a respondent. Mr Downey concurred with that suggestion, stating that that was to be his case, in any event.

c. Generally, that the Respondent had delayed excessively in declaring its position on disability, only conceding the issue yesterday, resulting in wasted preparation costs for the Claimant. I pointed out that if that was the case, then effective remedy for the Claimant lay in an application for costs.

6. Ms Linford had provided a written skeleton argument, in which she set out her submissions in respect of both remaining matters.

Conclusions

7. In respect of the protected disclosure claim and any strike out/deposit order, I accept Mr Downey's submission that the matter having been determined by a previous tribunal and that determination having then been set aside by the EAT, the principle in **Serco** is engaged. That is, namely that there should be finality and certainty in respect of litigation and that to permit the Respondent a 'second bite of the cherry', in the absence of any material change of circumstances (which there has not been) would not be in the interests of justice or be in compliance with the 'Overriding Objective' in Rule 2, particularly in relation to proportionality and avoiding delay. The situation is analogous to that when, following a judgment, a party makes an application for reconsideration, on the same arguments as advanced at the substantive hearing, seeking to relitigate that matter, when the appropriate route is that of appeal. I therefore dismiss that application.

8. In respect of the 'knowledge of disability' application and while there may be valid arguments to make on that issue, I don't consider, bearing in mind my preliminary views as to the burden of proof being on the Respondent to show its case, that I can somehow 'reverse' that burden onto the Claimant to show why I should not make such an order, when it is for the Respondent, on the hearing of evidence and submissions, to satisfy the initial burden. While there may be documents in the bundle that allude to this issue, I don't consider that that burden can be properly met, without oral evidence, under cross-examination. I therefore also dismiss that application.

Judgment and Case Management

9. The Judgment is set out above. Following this part of the Hearing, a case management hearing was held, and a case management order of same date has been issued, progressing this claim to a final hearing.

Employment Judge O'Rourke
Date: 13 August 2024

Sent to the parties on: 15 August 2024

For the Tribunal Office: