



EMPLOYMENT TRIBUNALS

Claimant: Ms A Diallo

Respondent: Adelphi Group Ltd

Heard at: Liverpool (by video hearing)

On: 3 October 2024

Before: Employment Judge Buzzard

REPRESENTATION:

Claimant: Mrs C Trayers (Counsel)

Respondent: Mr S Wyeth (Counsel)

JUDGMENT having been sent to the parties on **8 October 2024** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. This hearing determined an application to strike out the claimant's claims on the basis that they have no reasonable prospects of success.
2. The claimant had two claims. These were:
 - 2.1. A claim of discrimination arising from disability; and

- 2.2. A claim of discrimination by failure to make reasonable adjustments.
3. Both of these claims related to the same underlying factual issue. The claimant had applied for, and been offered, a job with the respondent. The parties are agreed that the claimant had agreed that she would relocate to do the job.
4. The claimant did not relocate, and shortly after joining the respondent informed them that she was not able to relocate. The respondent dismissed the claimant on that basis.
5. There is no dispute that the claimant had previously been seriously assaulted by her then flat mate. That assault had resulted in a significant custodial sentence for the claimant's former flat mate.
6. The claimant's claims rely on disabilities said to have been caused by that assault, namely PTSD, severe anxiety and depressive disorder. The claimant's claim form explains that she changed her plan to relocate because she was told that her former flat mate was going to be released and she needed to reside in a place where she felt safe.

Relevant Strike Out Law

7. The power to strike out all or part of a claim is contained in Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, the applicable parts of which state:

37 Striking out

(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 has no reasonable prospect of success;

8. The power to strike out is discretionary and is to be applied in a two stage test. At the first stage the tribunal must find that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim or response.
9. There has to be a reasonable attempt at identifying the claims and the issues before considering strike out. Reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case.
10. The power to strike out on the grounds of no reasonable prospect of success should only be exercised in rare circumstances. In cases where central facts are

in dispute additional care should be exercised before striking out. *A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts*, but where the facts sought to be established are totally and inexplicably inconsistent with undisputed contemporaneous documentation it may be appropriate to strike out.

11. A claimant's case must ordinarily be taken at its highest.
12. Whilst additional care when considering striking out discrimination claims is required, there is no bar to such a step. In the words of Underhill J (in *Hawkins v Atex Group Ltd* [2012] IRLR 807) '*Judges should not be shy of making robust decisions in a case where there is realistically only one possible outcome even if the issue is formally one of fact*'.

The hearing

13. At this hearing both parties had the benefit of representation by counsel, both of whom made detailed oral submissions.
14. In addition to this, the Employment Tribunal was presented with a bundle of documentary evidence which the parties referred to in their submissions.
15. No evidence was heard from any witness. The Employment Tribunal were, as well as contemporaneous documents, referred to the contents of the claimant's claim form and pleadings. Those pleadings were prepared with the assistance of professional legal representatives.
16. In addition, the Employment Tribunal was referred to the matters discussed and agreed at a previous preliminary hearing for case management. These matters were recorded in a note produced by the judge after that hearing and which was sent to the parties.

The Claimant's discrimination arising from disability claim:

17. This claim relies on dismissal as being the unfavourable treatment. There is no dispute that the claimant was dismissed because she was not relocating as discussed in her application and offer.
18. The claimant claims that her not relocating was '*something arising*' from disability. It was only whether the claimant had any reasonable prospect of meeting this part of the relevant legal tests that the respondent's application for strike out of the claim relied on. If the claimant cannot meet this part of the test, her claim of discrimination arising from disability claim must fail.
19. In her particulars of claim the claimant recites what she told the respondent at the time regarding her not relocating. This is that she wanted to "*provide some clarity on my sudden hesitancy to relocate*". This was described as being related

to the fact *“I have been given news that my abuser will be released from prison (if she hasn’t already)”*.

20. The respondent submits that these assertions at the time, which form part of the claimant’s pleadings, are not consistent with the known and accepted facts. Specifically, the following points were identified as of particular importance:
 - 20.1. The documentation shows the claimant was informed of the release from prison of her former flat mate months prior to her application for employment with the respondent. This documentation does not appear to be in dispute. Accordingly, the claimant has no reasonable prospect of showing that the disclosure of this information caused her a *“sudden hesitancy”* to relocate after accepting the job offer, as her pleadings (and comments to the respondent at the time) state.
 - 20.2. Specifically, a *‘Victim Contact Report’* sent to the claimant and dated 22 March 2023 confirmed the following:
 - 20.2.1. The offender had a conditional release date of July 2023;
 - 20.2.2. The offender was eligible for home detention from March 2023; and
 - 20.2.3. The offender’s licence would expire at the end of the sentence, which was May 2024.
 - 20.3. The victim contact report describes itself as providing the claimant with *“an account of our conversation and any other relevant information following our recent meeting”*.
 - 20.4. The claimant did not apply for the job with the respondent until 15 May 2023, some months after the date of the Victim Contact Report.
 - 20.5. The claimant’s application for the role was sent to the respondent by a recruitment agent on 1 June 2023. In that it is stated that the claimant is *“happy to relocate”*. A current full CV for the claimant was attached to that application.
 - 20.6. The claimant was offered the job following an interview. The claimant pleads in her claim form that at the interview she indicated that she was happy to relocate, because *“she did not see it as being a problem”*.
 - 20.7. The written offer clearly refers to the claimant relocating and offers to send her information about estate agents to assist with that process. In her acceptance email the claimant stated that she would be *“happy to receive the contact information of local estate agents and information about the area”*.
 - 20.8. The claimant signed her contract of employment on 25 July 2023.

21. Based on these facts, the respondent submits that the claimant has no reasonable prospect of showing that the facts pleaded in her claim are correct. Having considered the documents, it is found that this is a persuasive argument. The facts set out by the claimant in her pleaded claim appear in a relevant way, that is fundamental to her claim, to contradict the accepted documentary evidence. Specifically, the claimant had not received news that could have caused a '*sudden hesitancy*' to relocate when she suggested. The news she refers to had been given to her months before her application and was in fact fully known to her at the point she applied and stated she was happy to relocate.
22. It is acknowledged that the claimant's representative described this as a factual dispute. It is not clear however, that any facts are in dispute, rather the conclusions to be drawn from those facts are in dispute. At the least, the chronology of events does not appear to be in dispute.
23. Regardless, it appears clear that the claimant's pleaded case is directly contradicted by the chronology of events. That contradiction is in relation to a point that is central to the claimant's claim, going to the reason why the claimant did not relocate. It is not a peripheral point.
24. It is found that the claimant has no reasonable prospect of establishing that the reason she could not relocate was as set out in her pleaded claim. Not being able to relocate is the '*something arising*' relied on, and therefore the pleaded basis for that inability is something that this claim must be predicated on.
25. If the claimant has no reasonable prospect of establishing that her pleaded basis for connecting the inability to relocate to her disability, she cannot have any reasonable prospects of her claim succeeding as pleaded. No application to amend the claim has been made or was made at this hearing, despite this being specifically raised with the claimant's representative at this hearing.
26. In addition, it is noted that the claimant's particulars of claim, read as whole, clearly pleads that she could not relocate was because she had received news of the offender's release. The release of the offender is clearly not something that arises from the claimant's disability.
27. In all the circumstances, balancing the prejudice to both parties, strike out of this allegation is the just and equitable outcome. It appears that to succeed in this claim the claimant has to explain why both her communication with the respondent at the time of the alleged discrimination, and importantly her later pleaded claim, is wholly incompatible with and contradicted by undisputed documents in relation to a fundamental assertion upon which this claim relies.
28. Whilst it is possible the claimant could seek argue that she had been reluctant to divulge information at the time of the alleged discrimination and had accordingly provided misleading information to the respondent, the same cannot be said of the time when she submitted her Employment Tribunal claim. It is relevant that her pleaded claim was prepared with professional legal assistance.

29. Accordingly, the claimant's claim of discrimination arising from disability is struck out.

The claimant's discrimination by failure to make reasonable adjustments claim:

30. This claim is that the respondent applied to the claimant a provision, criterion or practice ("PCP") that caused her a substantial disadvantage that a person without her disability would not encounter.
31. There is some dispute about the precise terms of the PCP, that is not significant for the purposes of this hearing. The PCP was, in essence, that the claimant had to relocate to make attendance at the workplace on a regular basis workable. The dispute is over whether a specific distance or commute time limit was imposed.
32. For a claim of discrimination by failure to make reasonable adjustments to succeed the respondent must have been aware, or if not aware in a position where they should reasonably have been aware, that the claimant had a disability which would cause her a disadvantage if the PCP was applied to her.
33. In this case the claimant's pleadings, and the documents at the time, show that the claimant had informed the respondent that her problem was a "*sudden hesitation*" caused by becoming aware of the release of the offender.
34. As discussed above, it is found that the claimant has no reasonable prospect of showing that this pleaded case is correct, i.e. that learning of the release of the offender had caused the claimant to be unable to relocate. She had been aware of that release all along.
35. Whilst something else could well have caused the claimant to have a problem with relocating, it does not appear there is any prospect of the claimant establishing that it is the apparently misleading facts pleaded.
36. If the claimant has no reasonable prospect of establishing that the pleaded causative link between her disability and the substantial disadvantage is true, given the pleadings repeat what she told the respondent at the time, there appears to be no reasonable prospect of her establishing that the respondent should have known of that link. Without that knowledge, there is no reasonable prospect of the claimant's claim succeeding.
37. It is noted that at this hearing the claimant suggested at this hearing a different cause for the substantial disadvantage. The claimant has not made any application to amend her claim, despite the possibility of this being raised by the Employment Tribunal with the claimant's representative at the hearing, and thus it must be judged on the basis it was pleaded. It is found that the claimant has no reasonable prospect of establishing this claim as it is pleaded.
38. In all the circumstances and balancing the prejudice to both parties, strike out of this allegation is the just and equitable outcome for the same underlying reasons

as with the claimant's claim of discrimination arising from disability discussed above.

39. Accordingly, the claimant's claim of discrimination by failure to make reasonable adjustments is struck out.

Employment Judge Buzzard

13 November 2024

Judgment sent to the parties on:

18 November 2024

For the Tribunal:

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>