EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100142/2022

Sitting at Inverness (via Cloud Video Platform)
On 20 March 2024

Employment Judge Smith

Ms R Membury	**Claimant** **In person**
Highland Health Board	**Respondent** **Represented by,** **Mr R Davies,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's claim has no reasonable prospect of success and is struck out under rule 37(1)(a) of the Employment Tribunal Rules 2013.

REASONS

Introduction

1. An oral judgment, together with reasons, was delivered at the conclusion of this preliminary hearing. Upon a request made by the claimant, these fuller written reasons have been provided pursuant to **rule 62** of the **Employment Tribunal Rules 2013.**

2. At this preliminary hearing the Employment Tribunal had before it an application by the respondent to strike out the claimant's claim on the basis that it had no reasonable prospect of success. As was confirmed by Mr Davies today, that application was brought under **rule 37(1)(a)** of the **Rules** only, and not under any of the other grounds set out in **rule 37** upon which a Tribunal has the power to strike out a claim.

The law

3. I reminded myself that the power to strike out a claim is a draconian one that brings a complete end to the proceedings. Accordingly, the test to be met is a very high one, namely that the claim must have *no* reasonable prospect of success. In discrimination claims in particular, it is established law that such claims should not be struck out save in the most obvious and plainest cases ***(Anyanwu v South Bank Students[1] Union*** [2001] IRLR 305, House of Lords). That principle does not impose a blanket ban on discrimination claims being struck out ***(Chandhok*** v ***Tirkey*** [2015] ICR 527, EAT) but serves to emphasise that the class of discrimination case which would be properly susceptible to being struck out is very limited.

4. Where the claim is brought by a party litigant (as this one is) I have reminded myself about the guidance in relation to strikeout applications brought against such individuals pursuant to **rule 37(1)(a),** as provided by the EAT in the case of **Cox v *Adecco and others*** [2021] ICR 1307. In that case HHJ Tayler reviewed the relevant authorities and drew the applicable principles together. Specifically, the nine points referred to by HHJ Tayler in his judgment (at paragraph 28) are of greatest assistance and I reproduce them as follows:

"*(1) No one gains by truly hopeless cases being pursued to a hearing.*

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but 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 strike out 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 a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.

(7) In the case of a 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 the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have 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 had it been 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 the amendment, taking account of the relevant circumstances."

Analysis

What is the claim?

5. There is quite a bit of history to this case and how it has reached the stage of this preliminary hearing, but in short, the claimant's case is solely about disability discrimination based upon her contended-for disabilities of PTSD and chronic

pain. She confirmed to me today that there is no other claim. For today's purposes, although without making a finding, I have proceeded on the assumption that the claimant is and was a disabled person at any material time in the case, taking her case at its highest.

6. In terms of the actual legal claims the claimant has presented based upon these contended-for disabilities there have, as Mr Davies (for the Respondent) rightly observes, been several occasions upon which the claimant has had the opportunity to clarify what those claims are. The claim itself must be found, of course, in the claim form and not in the text of any later document, unless such a document has explanatory value for something that does appear in the claim form or an amendment to the claim form is subsequently allowed.

7. There was on 19 December 2023 a preliminary hearing before Employment Judge Hendry, in preparation for which the claimant filed an Agenda. That Agenda did not achieve the desired objective of fully clarifying the claim. Turning to the preliminary hearing itself, it is clear from the Judge's Note that the various types of unlawful discrimination prohibited by the **Equality Act 2010** were explained by the Judge to the claimant and discussed with her on that occasion. Unfortunately, there remained a considerable degree of opacity to the claim even following that discussion, although I accept that at all times the claimant has tried her best to articulate the basis for her claim.

8. This morning I explained to the claimant what I understood to be her claim. I did this because in **Cox** it was made clear that the power to strike out is not available to a Tribunal where one does not know what the claim is. Helpfully, the claimant confirmed to me that the sole, actually-made decision and target of the claim was (as I had understood) the decision of respondent that she would not be paid a compensation payment that might otherwise have been available through a "healing process" scheme, as it deemed her not eligible for such a payment.

9. The "Healing Process" scheme was run by the respondent following a review carried out, I understand, into its internal culture, in 2019 (the "Sturrock Report").

The decision that the claimant was not deemed eligible for a compensation payment was communicated to her by letter on 31 March 2021, and within that letter the following significant paragraph is included:

> *"Outcomes*
>
> *The Healing Process Panel has recommended that no further action is required in your case. The reason for this recommendation is that the situation which you described to the panel was of your experience as a patient, which is not within the scope of the Healing Process. Whilst you did have a short period of employment with us, this was not the source of your harm and so the Healing Process cannot provide any outcome for you."*

Taking the claimant's case at its highest

Agreed core facts

10. In terms of any facts that are not in dispute, it is agreed by the respondent that this decision was made and communicated to the claimant on 31 March 2021 (indeed, the letter in question was shown to me).

11. Again in terms of undisputed facts, it is also agreed that the claimant was a patient of the respondent but also, between 2012 and 2014, coincidentally an employee of the respondent.

Assumptions made in the claimant's favour

12. The decision regarding the claimant's ineligibility for a compensation payment is said by the claimant to have been discriminatory and thus actionable in the Employment Tribunals. However, to be actionable within the Employment Tribunals it would have to be discriminatory in relation to work *and* in relation to a particular protected characteristic (in this case disability only).

13. Mr Davies submitted that the claimant's claim had no grounding in the employment relationship between the parties and instead referred to how the respondent categorised the claimant's status as part of the (quite separate) Healing Process scheme. However, in terms of taking the claimant's case at its highest, I put to one side whether there is sufficient connection between this

decision made in 2021 and the claimant's status as an employee of respondent which ended a long time beforehand, in 2014. Although I strongly doubt (as Employment Judge Hendry similarly did) that she would be able to establish that connection, I have worked on the assumption - in her favour - that she will be able to establish that the essential nexus between the decision and the employment relationship between the parties existed in relation to this specific eligibility decision.

14. The claimant presented her claim to the Employment Tribunal office on 6 January 2022. That claim was initially rejected and a decision on a reconsideration application in relation to that rejection was overturned by the EAT. The claim was later accepted as a consequence. However, even as at 6 January 2022 any claim relating to the decision communicated to the claimant on 31 March 2021 was significantly out of time, having been presented beyond the three-month time limit set by **section 123 Equality Act 2010.** In dealing with this strikeout application I have also assumed that she would convince the Employment Tribunal that it has jurisdiction to hear her claim on the basis that it is just and equitable to extend time to consider it. That assumption is made in the claimant's favour despite the fact that as a matter of law the exercise of the discretion to extend time is generally one of exception and not the rule.

15. Finally, as I have already stated (in paragraph 5, above), I have made the assumption in the claimant's favour that she was, at al! material times, a disabled person within the meaning of **section 6 Equality Act 2010** by reason of PTSD and chronic pain. At present, no concession has been made by the respondent as to whether the claimant had either impairment as at 31 March 2021 and indeed whether, if she did, she met the **section 6** definition.

The respondent's decision as a discrimination claim

16. Working on the basis of those agreed facts and the three assumptions I have made in the claimant's favour, I turned to consider whether, conceptually, any discrimination claim could be said to have no reasonable prospect of success.

The respondent's overarching submission was that no legal claim with any prospects could be said to emerge from the claimant's clarification of her case.

Direct discrimination

17. The concept of direct discrimination is set out in **section 13 Equality Act 2010** and, materially, reads as follows:

> *"13 Direct discrimination*
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

18. The claimant explained to me that her case in relation to the eligibility decision was not that the decision was made by the respondent because she had PTSD, chronic pain or the fact she was disabled generally. That clear assertion, it appeared to me, put paid to any hope of her establishing that the decision was directly discriminatory (and therefore contrary to **section 13**) because even if she could demonstrate that she had been treated less favourably than another person in materially identical circumstances to her but who did not have PTSD and/or chronic pain it would still be necessary, for the decision to be unlawfully discriminatory, for the reason for the treatment to be disability (either specifically or in general).

19. The claimant positively explained to me that the reason for her treatment here was the fact that the respondent did not want to have to pay her a compensation payment, and that they had used the apparent distinction (within the Healing Process scheme) between employees on the one hand and patients on the other to artificially achieve that goal. In my judgment, that assertion reinforced my view that no direct discrimination claim could succeed, as the reason positively asserted by the claimant was a different reason for the treatment than disability.

Harassment

20. The concept of harassment is set out in **section 26 Equality Act 2010** and, materially, reads as follows:

"26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a *relevant protected characteristic, and*

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-

fa) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

21. This point can be dealt with swiftly. In her discussion with me the claimant stated that she was not saying that the decision itself amounted to unwanted conduct that related to disability. In fact, she has never said it amounted to unlawful harassment relating to disability. I noted that the claimant's Agenda for the previous preliminary hearing initially only specifically mentioned direct discrimination, discrimination arising from disability and indirect discrimination as being the claims she thought she was pursuing. She left the specific section for harassment section blank. In these circumstances, there appeared to be no claim of harassment contrary to **section 26** but even considering the potential for amendment to include one (as I should, as *per* ***Cox***) it would be a claim that would be doomed to failure because the conduct had to relate to disability but the claimant was positively asserting it did not.

Indirect discrimination

22. The concept of indirect discrimination is set out in **section 19 Equality Act 2010** and, materially, reads as follows:

"*19 Indirect discrimination*

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

23. We discussed the concept of indirect discrimination and the starting-point concept of a TCP": a provision, criterion or practice. That is a concept common to some claims of a failure to make reasonable adjustments as well (under **section 20(3) Equality Act 2010),** to which I will return. Indirect discrimination is a quite separate concept to direct discrimination and is not, as is commonly thought, “disguised” direct discrimination: indirect discrimination is about a disadvantage caused to a particular group of people by something an employer does that is, on the face of things, neutral. It is in that sense the opposite of direct discrimination, where someone is treated comparatively worse precisely because they have a particular protected characteristic. Indirect discrimination is notoriously complex and its application in relation to disability remains a developing area of the law.

24. In order to assist the parties, prior to the commencement of the preliminary hearing I handed down the case of ***Booth v Delstar International Ltd*** [2023] EAT 22 in order that they could focus their minds on whether there could be said to be any group disadvantage caused by the Healing Process scheme for people sharing the same disabilities as the claimant. Following ***Booth,*** the proper comparison in any indirect disability discrimination claim is between a group of people sharing the specific disabilities of the claimant and a group of those who

do not. in this context it is not. a comparison between disabled people generally and those who are not disabled.

25. During our discussion the claimant confirmed there was no comparative group disadvantage, and that she was not in fact arguing that people with her specific disabilities were as a group worse off by virtue of decisions made during the operation of the compensation scheme itself.

26. Furthermore, upon further discussion with her it was clear that the claimant does not advance a case that she personally - i.e. taken on her own - was disadvantaged by the operation of the Healing Process scheme itself, as opposed to any decision the respondent made in her specific case. Her case is all about that that scheme being manipulated to produce a result adverse to her personally and in order to avoid having to pay her. That is the complete antithesis of neutral treatment, and whilst a PCP may exist in a single decision adversely-affecting only one person it must, of course, be neutral ***(Ishola v Transport for London*** [2020] IRLR 368, EAT). It must also put that person at the disadvantage itself (**section 19(2)(c))** and the claimant is not advancing that case.

27. For these reasons, in my judgment any claim that the decision communicated to the claimant on 31 March 2021 was indirectly discriminatory in relation to disability is one without any reasonable prospect of success.

Failure to make reasonable adjustments

28. Insofar as it applies to PCPs, the concept of a failure to make reasonable adjustments is materially set out in **section 20 Equality Act 2010**, which is reproduced as follows. A breach of the duty to make reasonable adjustments, should it arise, is made actionable by section 21.

> *[11]20 Duty to make adjustments*
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as* A.
>
> *(2) The duty comprises the following three requirements.*

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

29. Whilst she did not specify that she was pursuing a failure to make reasonable adjustments claim in the initial part of her Agenda for the previous preliminary hearing, she did complete the section relating to this type of claim in the latter section (in contrast to the harassment section, which was left blank).

30. However, in my judgment, no failure to make reasonable adjustments claim could possibly succeed on the information provided to me by the claimant today. That was for two main reasons. The first of these is the fact that, in common with the indirect discrimination argument, the POP upon which this claim is apparently based was not neutral but - on the claimant's own case - deliberately designed to manipulate a situation to her specific disadvantage (see paragraph 25, above). The second reason is that even when one modifies the groups for comparison - to the claimant with her specific disabilities and non-disabled people generally - the claim would be irretrievably undermined by the claimant's abandonment of any comparative group disadvantage (see paragraph 26, above).

Discrimination arising from disability

31 I then turn to **section 15 Equality Act 2010**. 'which materially is reproduced as follows:

"15 Discrimination arising from disability

(1) 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, and

(b) A *cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(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."

32. It is clear that the claimant has considered this aspect of the anti-discrimination laws that apply to disabled people in the workplace, and a discussion was had to that effect before Employment Judge Hendry. Section 15 was a claim expressly invoked as one the claimant thought she was pursuing, in her Agenda for the previous preliminary hearing.

33. In such a claim the focus is again on causation, or the reason for the treatment. In this case, that is the question of what the reason was for the decision that the claimant would not be eligible for a Healing Process compensation payment. The claimant has not identified what thing arose from her disabilities that might have had some causative impact on the decision to exclude her from the ambit of the scheme. It is very difficult - arguably impossible - to envisage how anything that could be said to arise from her disabilities could in turn be said to have had some causative effect on the decision that she was ineligible for payment. However, any such assertion would run inconsistently with her positive assertion that the reason for the treatment was that the respondent did not want to pay her the money. She does not advance a case that the respondent did not want to pay her because of something arising from her disability.

34. In my judgment, the claimant's positive case on causation would serve to fundamentally undermine any **section 15** claim even if she could establish any of the other necessary components and the respondent failed to objectively justify the treatment. Accordingly, it has no reasonable prospects of success.

Conclusion

35. To conclude, it is right to say that the Employment Tribunals have great experience in determining who was, and was not, an employee. That is, to use the claimant's own words, the crux of her case. Her disagreement with the respondent boils down to its decision that the harm she suffered, and would otherwise be compensatable for under the Healing Process scheme, was as a patient only and not as its employee.

36. However, the Employment Tribunal may only make a finding of "employee" status if it is required to do it as part of a recognisable claim that Parliament has

conferred the power upon it to determine. Here, the claimant wants a finding of employee status not as part of a recognisable employment claim, actionable in the Tribunals, but in order to overturn a decision made by another body or to bring her within the scope of the Healing Process scheme. In any event, such a finding is not necessary and would not achieve that desired outcome because the respondent already accepts that she had, between 2012 and 2014, been its employee. That kind of freestanding challenge is not something the Tribunals have jurisdiction over, unless there is such a claim.

37. In my judgment, there is no claim within these proceedings which has any reasonable prospects of success. Having fed the uncontroversial facts of what happened through the lens of every potentially applicable statutory provision, to legally describe what happened as discriminatory is doomed to failure at every turn. That is for legal and conceptual reasons, taking the claimant's case at its highest and assuming the critical questions will be resolved in her favour in every relevant instance.

38. Accordingly, whilst it is with regret, it is my judgment that this claim is struck out.

Employment Judge: P Smith
Date of Judgment: 15 April 2024
Entered in register: 16 April 2024
and copied to parties