



EMPLOYMENT TRIBUNALS

Claimant: Anthony McCartney

Respondents: (1) Marshmallow Technology Limited
(2) Oliver Kent-Braham
(3) Alexander Kent-Braham

Heard at: London Central (by CVP) **On:** 13 December 2024

Before: Tribunal Judge Jack, acting as an Employment Judge

Representation

Claimant: Mr H Murphy, counsel

Respondent: Mr N Pourghazi, counsel

PRELIMINARY HEARING IN PUBLIC RESERVED JUDGMENT

The judgment of the Tribunal is as follows:

1. The claimant's complaint of indirect disability discrimination contrary to section 19 of the Equality Act 2010, having been withdrawn by the claimant, is dismissed under Employment Tribunal Rule 52.
2. The claimant's complaint of victimisation contrary to section 27 of the Equality Act 2010, having been withdrawn by the claimant, is dismissed under Employment Tribunal Rule 52.
3. The application to strike out the complaint of direct disability discrimination against the respondents in respect of the claimant's dismissal is refused.
4. The application for a deposit order in respect of the complaint of direct disability discrimination against the respondents in respect of the claimant's dismissal is refused.
5. The complaint of direct disability discrimination in respect of the first respondent's rejection of the claimant's request to commence grievance proceedings is struck out under Employment Tribunal Rule 37(1)(a) because it has no reasonable prospect of success.

REASONS

Background

1. The claimant's claim was presented on 28 December 2023 and brought complaints of direct disability discrimination, indirect disability discrimination, failure to make reasonable adjustments and victimisation. The claimant relies on his wife's disability (cancer). The respondents accept that the claimant's wife was disabled at the relevant dates for the purposes of the Equality Act 2010 ('EA') (Amended Grounds of Resistance, paragraph 18).
2. The complaint of failure to make reasonable adjustments was dismissed by EJ Klimov on 5 August 2024 following withdrawal by the claimant. The claimant has since stated that he wishes to withdraw the complaints of indirect disability discrimination and victimisation. Mr Murphy confirmed that I should dismiss those complaints.
3. What remains are two complaints of direct disability discrimination in respect of: (i) being dismissed; and (ii) refusing to commence grievance proceedings.
4. This preliminary hearing in public is to consider the respondents' applications: (i) to strike out the claimant's claim (or part of it), and (ii) in the alternative, to make a deposit order with respect to specific allegations or arguments advanced in the claim.
5. The respondent's applications dated 17 October 2024 are for an order under rule 37 striking out the claimant's remaining claims on the basis that they have no reasonable prospect of success or, alternatively, for an order under rule 39 that the claimant pay a deposit of £1,000 in respect of each of his remaining claims on the ground that they have little reasonable prospects of success. If the claims are not struck out, the respondents seek a deposit order of £1,000 in respect of each of the two direct discrimination complaints.
6. Each party provided a detailed skeleton argument and an authorities bundle. The claimant had also supplied a copy of *Bennett v MiTAC Europe Ltd* [2022] IRLR 25. Mr Pourghazi and Mr Murphy each made detailed oral submissions.

The Law

Strike Out

7. A Tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospect of success: rule 37(1)(a).
8. If a tribunal considers that a complaint has no reasonable prospect of success, it must then decide whether to exercise its discretion to order strike-out: *Hasan v Tesco Stores Ltd* EAT 0098/16.

9. The Court of Appeal in *Mechkarov v Citibank N.A* [2016] ICR 1121 set out the approach to be taken in a strike out application in a discrimination case at paragraph 14:

“(1) only in the clearest case should a discrimination claim be struck out;

(2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

(3) the Claimant's case must ordinarily be taken at its highest;

(4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and

(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.”

10. The House of Lords has emphasised that “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”: *Anyanwu v South Bank Students Union* [2001] 1 W.L.R. 638, Lord Steyn, paragraph 14. That is not to say that strike out is never appropriate: “... I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail”: *Anyanwu*, Lord Hope, paragraph 39.

11. The Court of Appeal emphasised in *Ezsias v North Glamorgan NHS Trust* [2007] I.C.R. 1126, LJ Kay, paragraph 29 that:

“It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.”

12. The then President of the EAT, Mr Justice Langstaff, said this in *Romanowska v Aspirations Care Ltd*, EAT 0015/14: “where the reason for dismissal is the central dispute between the parties, it will be very rare indeed that that dispute can be resolved without hearing from the parties who actually made the decision. Only the employer, through its relevant manager or managers, actually knows what the decision was”, paragraph 15. He continued: “To know what was in the mind of the employer it was necessary for the Tribunal to be in a position to hear and evaluate evidence. Only then would it know what the principal reason for dismissal was”, paragraph 21.

13. In *Ahir v BA plc* [2017] EWCA Civ 1392, CA, Underhill LJ said this:

“19. ... the whole problem with a strike-out is that the [claimant] has no chance to explore what may lie beneath the surface, in particular, by obtaining further disclosure and/or by cross-examination of the relevant witnesses. I am very alive to that. However, in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it.

...

24. ... in a case of this kind, where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. ... ”

Deposit Orders

14. Where a Tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring a party to pay a deposit of no more than £1,000 as a condition of continuing to advance that allegation or argument: rule 39(1).
15. If the question of whether a claim has reasonable grounds of success turns on factual issues that are disputed, it is highly unlikely that a deposit order will be appropriate, just as it is highly unlikely that strike out will be appropriate: *Amber v West Yorkshire Fire and Rescue Service*, [2024] EAT 146, paragraph 26.

Performance and Disability Discrimination

16. Less favourable treatment because of stereotypical assumptions about the impact of disability on performance can amount to direct disability discrimination. Further, even when there are genuine concerns about the performance of a claimant, this does not mean that the disability of another person cannot have been a material factor in the decision to dismiss them: *Bennett v MiTAC Europe Ltd* [2022] IRLR 25, EAT, paragraphs 55 and 56.

Detriment

17. A “detriment” exists if a reasonable worker would or might take the view that by reason of the treatment complained of he had been disadvantaged. An unjustified sense of grievance cannot amount to a detriment: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL, paragraphs 34-35.
18. *Derbyshire v St Helens Metropolitan Borough Council* [2007] ICR 841, HL, at paragraph 68: “An alleged victim cannot establish detriment merely by

showing that she had suffered mental distress: before she could succeed, it would have to be objectively reasonable in all the circumstances”.

Analysis and Conclusions

19. The claimant was employed by the first respondent as Chief Financial Officer from 21 November 2022. The second and third respondents are Co-Chief Executive Officers of first respondent. The first six months of the claimant’s employment was a probationary period. In late March 2023, the claimant informed the second respondent that his wife had been diagnosed with breast cancer (Particulars of Claim, paragraph 7). On 5 May 2023, the claimant’s wife had surgery to treat her cancer (Particulars of Claim, paragraph 10). On 16 May 2023, shortly before the end of his probationary period, the second respondent informed the claimant in a Zoom meeting that he was being dismissed, and wrote to the claimant to say that his employment with the respondent was being terminated. The parties now agree that the claimant’s employment ended on 31 August 2023.
20. The claimant’s solicitors wrote to the first respondent on 4 December 2023, and requested the first respondent commence formal grievance processes. The first respondent’s solicitors replied on 15 December 2023, stating that the first respondent would not commence its formal grievance process.
21. Early Conciliation commenced on 27 November 2023 and ended on 12 December 2023. The claim was presented on 28 December 2023.
22. The claimant claims that because of his wife’s disability he was treated less favourably by: (i) being dismissed by the respondents; and (ii) the first respondent’s rejecting his request to commence grievance proceedings (Particulars of Claim, paragraph 21).
23. The claimant says that this less favourable treatment was because of his wife’s disability for three reasons (Claimant’s Further and Better Particulars, 22 August 2024, paragraph 6):
 - a. No performance concerns had been raised with the claimant prior to 16 May 2023 and, to the contrary, the second respondent and third respondent had been complimentary regarding the claimant’s performance (particularly in the performance review meeting on 21 March 2023). The claimant invites the Tribunal to draw an inference from this that the real reason for termination was not performance-based, but some other reason;
 - b. The second respondent did not identify any areas of underperformance in the Zoom call on 16 May 2023 and was vague about how exactly it was said that the claimant was alleged to be underperforming. The claimant invites the Tribunal to draw an inference from this that the real reason for termination was not performance-based, but some other reason;
 - c. The claimant only disclosed to the second respondent on 21 March 2023 that his wife was suffering with cancer. The claimant invites

the Tribunal to draw the inference that the real reason for his dismissal was his wife's cancer diagnosis, given the temporal proximity between when the claimant informed the second respondent of his wife's cancer diagnosis and the date on which he was dismissed.

Dismissal Complaint

24. Mr Murphy referred, for example, to the feedback shared with the claimant during his probation review meeting that he had been assessed as "Almost there". The claimant's case is that on 14 March 2023 at a performance review, the second respondent stated that he was happy with the Claimant's performance, and made no comments critical of the claimant's performance (Particulars of Claim, paragraph 6). Further, on 16 May 2023, the claimant had a Zoom call with the second respondent, who stated that "things weren't working out" and that there was no other solution but for the claimant to leave the first respondent's employment immediately, as he was not the "right fit" for the first respondent (Particulars of Claim, paragraph 16). The second respondent did not identify any areas of underperformance in the Zoom call on 16 May 2023 (Further and Better Particulars, paragraph 6). He argued that these are facts from which a Tribunal could infer, in the absence of any other explanation, that the respondents directedly discriminated against the claimant on the basis of his wife's disability.
25. Mr Pourghazi argued that the primary facts alleged by the claimant are totally inconsistent with the relevant contemporaneous documents. He took me to a number of documents in the hearing bundle to show that (contrary to a. above) there were performance concerns about the claimant that had been communicated to him. He further argued that the note of feedback given by the second respondent at p. 213 of the hearing bundle is totally inconsistent with the alleged primary fact that the second respondent did not identify any areas of underperformance in the Zoom call on 16 May 2023 and was vague about how exactly it was said that the claimant was alleged to be underperforming (i.e. with b. above). This document is undated but is said to have been created on or around 16 May 2023, and is said to be notes of what the second respondent planned to say at that meeting and which was amended after the meeting had occurred. The dismissal letter at p. 214 further confirms that the reason for dismissal were performance concerns, and that those concerns had been discussed in a meeting earlier the same day. He further argued that the only primary fact to link the dismissal to disability is the timing of the dismissal, eight weeks after the claimant had disclosed his wife was suffering from cancer (c. above) and eleven days after her surgery. But the most obvious explanation for the timing of the dismissal is simply that the claimant's probationary period was coming to an end. So this is a case in which there is on the face of it a straightforward and well-documented innocent explanation for what occurred, and the claimant is not able to do more than merely assert that that explanation is not the true explanation.
26. I am not to conduct a mini trial. It does however appear from uncontested documents that the respondents had performance concerns about the claimant and that some of those concerns were communicated to him in

January and February 2023. However even when there are genuine concerns about the performance of a claimant, this does not mean that the disability of another person cannot have been a material factor in the decision to dismiss them: *Bennett v MiTAC Europe Ltd*. So these documents are not totally inconsistent with the claimant's case.

27. Further, the document at p 213, purporting to record what was said in the dismissal meeting, is disputed. It is inconsistent with the claimant's case, but the claimant does not accept that it is an accurate record of what was said at the Zoom meeting on 16 May 2023. Its creation, amendment and accuracy have not been tested in evidence. That the dismissal letter records the true reasons for the dismissal is also disputed. I am to take the claimant's case at its highest, including his case that the second respondent did not identify any areas of underperformance in the Zoom call on 16 May 2023 and was vague about how exactly it was said that the claimant was alleged to be underperforming.
28. Mr Pourghazi argued that the only primary fact to link the dismissal to disability is the timing of the dismissal. But taking the claimant's case at its highest i.e. that no performance concerns were raised after his appraisal, that no specific performance concerns were identified in the dismissal meeting, and that his dismissal came after his wife's diagnosis and shortly after her surgery, a Tribunal could infer that the real reason was not the one given and, in those circumstances, could infer from the timing that the real reason related to his wife's disability.
29. For the reasons given, I do not consider that the complaint of direct disability discrimination in relation to the dismissal has no reasonable prospect of success. The claimant's case regarding his dismissal is not conclusively disproved by or totally and inexplicably inconsistent with undisputed contemporaneous documents. There are core issues of fact that will turn on oral evidence, and should not be decided without hearing oral evidence. The reason for the dismissal is the central dispute between the parties, and that dispute can only be resolved by hearing from the parties who actually made the decision. The application to strike out the complaint of direct disability discrimination in relation to the dismissal is refused.
30. For the reasons given, I do not consider that the complaint of direct disability discrimination in relation to the dismissal has little reasonable prospect of success. Further, the question of whether this complaint has reasonable grounds of success turns on factual issues that are disputed. The application to make a deposit order in respect of the complaint of direct disability discrimination in relation to the dismissal is refused.

Grievance Complaint

31. I turn now to the complaint of direct disability discrimination in respect of the refusal to commence a grievance procedure.
32. The respondents' strike out application dated 17 October 2024 argues (hearing bundle, pp. 107-108) that the claimant has no reasonable prospect of establishing a valid detriment in law or that the reason that the

first respondent did not commence its grievance process was that the claimant's wife had a disability.

33. The claimant's employment ended on 31 August 2023. On 4 December 2023, the claimant's solicitors wrote to the first respondent, and requested the first respondent commence formal grievance processes. The relevant part of this letter simply says "Please treat this letter as a formal written grievance and commence [your] formal grievance processes. Please liaise with our client regarding such" (hearing bundle, p. 226).
34. The first respondent's solicitors replied on 15 December 2023, stating that: the first respondent would not commence its formal grievance process; the first respondent's employee handbook stated that it applies to employees; the claimant was no longer an employee and the first respondent was not obliged to treat his complaint as a grievance; and the claimant's solicitors had provided no reason why the first respondent should treat his complaint as a grievance (hearing bundle, p. 231-232).
35. The respondent's grievance procedure states that "A grievance is a complaint that an employee might have ..." and that "This procedure applies to all employees ..." (hearing bundle, p. 128). The claimant had not been an employee of the first respondent for three months when he made his request for the grievance procedure to be instigated.
36. The claimant says that he has suffered injury to feelings (Particulars of Claim, para 45(2)). Taking his case at its highest, he has suffered injury to feelings as a result of the refusal to instigate the grievance procedure. But mental distress is not enough to establish detriment. His distress would also have to be objectively reasonable in the circumstances. In the circumstances, just outlined, the claimant has no reasonable prospect of succeeding in establishing that his distress was reasonable.
37. Mr Murphy's arguments on this issue were brief (paragraph 33 of his skeleton). He referred to *Omooba v Michael Garrett Associates Ltd (t/a Global Artists)* [2024] IRLR 440, paragraphs 148-150. The EAT held that it was open to the ET, *assessing the question as at the time of the alleged discrimination*, to conclude on the facts of that case that an actress had suffered detriment when she was denied a role which she wanted at the time, although by the time of the hearing she did not want to play the role. I do not consider that that case assists him: at the time of the alleged discriminatory refusal to initiate the grievance procedure, clear and objectively understandable reasons were given. The claimant has no reasonable prospect of succeeding in establishing that his distress was reasonable in the circumstances.
38. Mr Pourghazi also submitted that this is the type of case described in *Ahir*, where there is on the face of it a straightforward and well-documented innocent explanation for what occurred. I agree with that. While an employer might dismiss an employee with a disabled partner on the basis of concerns about the impact of their partner's disability on their performance, there is no intelligible connection between having a partner who is disabled and refusing to instigate grievance procedures. My assessment is that even assuming that the dismissal complaint succeeds,

the claimant has no reasonable prospect of succeeding in showing that the reason for refusing to instigate the grievance procedure was that his wife was a disabled person.

- 39. These two reasons are individually (and jointly) sufficient to show that the grievance complaint has no reasonable prospect of success. Having reached that conclusion I must consider whether or not to exercise the discretion to strike out. I cannot see any reason not to strike out this complaint. The claimant is legally represented and has had every opportunity to respond to the application set out in detail in the respondents' strike out application dated 17 October 2024. Dealing with a case fairly and justly involves saving unnecessary expense.
- 40. The complaint of direct disability discrimination in respect of the first respondent's rejection of the claimant's request to commence grievance proceedings is therefore struck out.

Employment Judge Andrew Jack

Date 2 January 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
3 January 2025

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FOR EMPLOYMENT TRIBUNALS