Case No: EA-2019-001204-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16 November 2021

Before :

His Honour Judge James Tayler

- -

Between :

Miss K Niedzielska	**Appellant**
- and -	
Faccenda Foods Limited	**Respondent**

- -
- -

Mr M Jackson (instructed by Newport Citizens Advice) for the **Appellant**
Mr J Allsop (instructed by Make Business) for the **Respondent**

Hearing date: 26 August 2021

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The employment tribunal erred in law in striking out the claims of disability discrimination and unfair dismissal.

His Honour Judge James Tayler

Introduction

1. This is an appeal against the judgment of the employment tribunal sitting at Cardiff on 24 October 2019, Employment Judge C Sharp, striking out claims of disability discrimination and unfair dismissal as having no reasonable prospects of success.

2. The claimant worked for the respondent as a Production Operative from 2 April 2013. The claimant was absent from work due to ill health from 31 July 2018. The claimant did not return to work thereafter. The claimant was dismissed by reason of medical incapability on 9 April 2019. An occupational health nurse had written a report suggesting that the claimant would not be able to return to work in the next six months.

3. The Employment Judge explained her understanding of the reason the claimant was signed off:

> The Claimant was unfortunate enough to suffer from multiple issues, including conditions that affected her wrist and her spine, but the reason why she was signed off work was because her foot was swollen, she was in pain and she was unable to walk. Given that she worked in a cold environment where she needed to be on her feet, this caused her difficulties in attending work.

4. The claimant acted in person before the employment tribunal. At the preliminary hearing before Employment Judge Sharp, the claimant had a Polish language interpreter.

5. The claimant submitted a claim form that was received by the employment tribunal on 29 May 2019. At section 8.1 she ticked the boxes to claim unfair dismissal and disability discrimination. At box 8.2 she briefly set out her claim (I have quoted the text as written - it is obvious that this is a litigant in person for whom English is not her first language):

> I worked for this employer for 6 years since 2nd April 2013
>
> Employer dsmissal my on 9th April 2019 on medical reasons
>
> I went on sick note on 31 July 2018 I have pain and swelling on the foot cant walking.
>
> Occupational Health Department nurse have raport send to HR about me condition and perspective to return to work
>
> DISCRIMINATION
>
> when I get it sick note for such long period 9 months because of my condition Employer decide to dismiss my on medical ground as they say im blocking work place they can't kept my any longer
>
> I want to mention about another employee for similar process and similar issue for being on sick note since April 2018 she still employed and kept the job as back on return to work phrase for 2 days in 3 weeks time and again she back on sick note and still been employed where im bean

dismiss

6. The English may not be perfect, but it is good enough to be understood. Many of us would struggle to write a claim in a second language. The broad claims asserted are reasonably clear. The claimant contends that her dismissal was unfair and that she has been subject to disability discrimination by being dismissed because of her sickness absence, resulting from the pain and swelling of her foot, in circumstances in which she contends that another employee was retained, despite a longer period of ill health absence. Without knowing the correct legal labels or statutory provisions, the claimant was asserting claims that would be analysed by a lawyer as unfair dismissal, discrimination because of something arising in consequence of disability and, possibly, failure to make reasonable adjustments.

7. The fact that these claims are reasonably clear from the pleading is demonstrated by that fact that the respondent responded to them, including a claim of discrimination because of something arising in consequence of disability:

> 12. The Respondent does not accept that the Claimant has been discriminated against. The Claimant is required to provide further and better particulars of the specific heads of claim she is relying upon. However, even if the Claimant is found to be disabled it is the Respondent's position that there were no adjustments that could be made to alleviate her condition and the Respondent's actions in dismissing her were a proportionate means of achieving a legitimate aim.

8. The pleading that dismissal was a proportionate means of achieving a legitimate aim must have been a response to a claim of discrimination because of something arising in consequence of disability.

9. Mr Allsop, for the respondent, contended that this was a "belt and braces" pleading by a respondent that had little idea of what was being alleged against them. Mr Jackson, for the claimant, suggested that were that truly the case, the respondent would have covered off a much wider range of possible claims rather than happening to focus on these two specific claims. I agree with Mr Jackson's approach and consider it is clear that the respondent took it that a claim of discrimination because of something arising in consequence of disability was being asserted.

10. Expecting a litigant in person who has limited English to "provide further and better particulars of the specific heads of claim she is relying upon" is perhaps a little optimistic.

11. The matter was considered at a preliminary hearing for case management on 21 August 2019 before Employment Judge M R Havard. The Employment Judge gave a brief factual summary of the case but only gave a cursory analysis of the legal claims:

> On 29 May 2019, the claimant presented an ET1 claim form to the Tribunal, alleging unfair dismissal and that she had been discriminated against on the grounds of disability.

12. The employment judge did not consider what types of disability discrimination claim were being asserted. Getting to grips with the issues in a claim at a preliminary hearing for case management can be difficult, particularly if there is a lengthy pleading raising numerous factual allegations in an unstructured manner. The Tribunal does not have unlimited time and can only be expected to take reasonable steps to identify the core claim(s), even when dealing with a litigant in person. But here the facts were simple and the claims were reasonably clear. Instead of getting to grips with the claims, and the issues they gave rise to, the employment judge acceded to the respondent's request to order the claimant to provide additional information.

13. Despite not having analysed the claims and issues, and before the claimant had provided the additional information, the employment judge agreed to list the matter for a preliminary hearing to determine the respondent's application for strike out and whether the claimant was a disabled person, if necessary.

14. The further and better particulars did not clarify the claim. The claimant reiterated, in support of her claim of unfair dismissal, that a colleague had been assisted back to work after an absence of a year. In respect of reasonable adjustments, the claimant stated:

> a. Inappropriate footwear …
>
> c. I brought a doctor's certificate to change footwear from rubber boots to insulated boots. I received ankle leather boots without insulation, which during 8 hours of work in cold conditions contributed to current diseases

15. The claimant also referred to footwear in a disability impact statement:

> In August 2016, I brought to the workplace a doctor's certificate allowing me to do light work and change footwear from galoshes to insulated leather footwear.

16. The respondent asked a question aimed at eliciting the claim for discrimination because of something arising in consequence of disability. It is clear that the claimant did not understand the question so did not answer it, stating:

> When I get to the GP a previous diagnosis is mistake as the scan also confirmed earlier diagnosis I'm ask doctor to refer me to MRI scan to check what is going on, but doctor does not see the that is necessary. After I'm been referred to CMATS orthopaedic where right diagnosis is made, and all treatment received and continue. As my condition does not get any better over the time doctor referred me to see rheumatology doctor regarding my foot.

17. While the claimant did not answer the question asked, she did not explicitly state, or imply, that she was not bringing a claim of discrimination because of something arising in consequence of disability pursuant to section 15 **Equality Act 2010** (EqA 2010).

18. The respondent admitted that the claimant was a disabled person at the relevant times, so this was no longer an issue to be determined at the preliminary hearing.

The Tribunal's approach to the law

19. The employment judge gave herself a brief direction as to the approach to be applied in considering strike out. In the section of the judgment considering unfair dismissal the employment judge stated:

> I have had the benefit of being given written submissions about the law. I do not propose to go through them in detail other than say I do accept the summary of relevant law set out by the Respondent's solicitor as accurate. I have to decide whether or not the Claimant's case has no reasonable prospect of success and then if I reach a conclusion that she has no reasonable prospect, whether I should strike out the claim.

20. The employment judge stated of the appropriate approach to disability discrimination claims:

> I took the Claimant's case at its highest when considering the prospects of success and bore in mind the case law about how to approach my consideration, particularly when dealing with the discrimination claims.

21. Having regard to the fact that the claimant was a litigant in person, no doubt, the respondent had set out a clear statement of the core principles in its skeleton argument for the preliminary hearing:

> 12. A tribunal may strike out all or part of a claim on the grounds that it has no reasonable grounds of success rule 37(1)(a) *The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* ("the ET Rules"). When considering whether to strike out, a tribunal must:
>
> a. Consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established (first stage).
>
> b. Having identified any established ground(s), the tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the rule (second stage).
>
> 13. The requirement for this approach was confirmed by the EAT in *Hasan v Tesco Stores Ltd UKEA T/0098116.*
>
> 14. In *Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330,* the Court of Appeal held that a case could be struck out if the facts as alleged by the claimant disclosed no arguable case in law.
>
> 15. In *Balls v Downham Market High School & College UKEAT/0343/10,* the EAT held that it is a power that should be exercised where there are *no* reasonable prospects of success. *Balls* was specifically considered by the EAT in *Eastman v Tesco Stores Ltd UKEA T/0143/.12* when it upheld an employment judge's decision to strike out an unfair dismissal claim. Here, the EAT held that, in light of the judge's finding, the factual disputes had been determined and the judge had been entitled to conclude that the claim had no reasonable prospect of success.

16. The authorities on strike out of unfair dismissal claims were reviewed by the Inner House of the Court of Session in *Tayside Public Transport Company Ltd t/a Travel Dundee) v Reilly [2002] IRLR 755 (CS),* which found that:

> "There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*Mann Liquid Products v Patel; Ezsias v North Glamorgan NHS Trust*)."

17. Referring to the Court of Appeal's decision in Ezsias, the EAT (Langstaff P) in *Romanowska v Aspirations Care Ltd UKEAT/0015/14* the EAT observed that:

> "Sometimes it may be obvious that, taking the facts at their highest in favour of the claimant, as they would have to be if no evidence were to be heard, the claim simply could not succeed on the legal basis on which it has been put forward."

18. In *Anyanwu and another v South Bank Students' Union and South Bank University* [2001] IRLR 305, the House of Lords (as it then was) ruled that discrimination claims should not be struck out as an abuse of process for having no reasonable prospects of success, except in the plainest and most obvious cases.

19. The approach to be followed by a tribunal when faced with an application to strike out a discrimination claim was conveniently summarised by the EAT in *Mechkarov v Citibank NA [2016] ICR 1121* as follows:

> a. Only in the clearest case should a discrimination claim be struck out.
>
> b. Where there are core issues of fact that tum to any extent on oral evidence, they should not be decided without hearing oral evidence.
>
> c. The claimant's case must ordinarily be taken at its highest.
>
> d. If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out.
>
> e. A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

20. There will, however, be exceptional cases where it is appropriate for a tribunal to strike out a discrimination claim at a preliminary stage. For example in *Sivanandan v Independent Police Complaints Commission and another UKEAT/0436/14*, the EAT upheld an employment tribunal's decision to strike out part of Ms Sivanandan's indirect discrimination claims on the basis that even on the claim as pleaded at its highest, there was no reasonable prospect of establishing discrimination had occurred.

22. In his skeleton argument for this appeal Mr Allsop stated:

> 7. The first task for the Employment Judge was to take reasonable steps to identify the exact claims and issues that were being advanced by the Claimant. See further*: Cox v Adecco and others* (2021) UKEAT/0339/19/AT (Transcript) at paragraphs 28-30.

The Tribunal's analysis of the Claims

23. I agree with Mr Jackson's submission that it is helpful to start by considering the disability discrimination claim.

Disability discrimination

24. The employment judge stated:

> 18. I first needed to establish the exact claim being brought by the Claimant, before considering whether they had a reasonable prospect of success. I discussed at length with the Claimant her claim, in front of the Respondent's representative, as the Answer to Further and Better Particulars did not in my view make the point clear. I used as a starting point the Claim Form and the Answer to Further and Better Particulars and it became clear that the Claimant was only bringing a claim under Section 20 and 21 of the Equality Act 2010, namely an alleged failure to make reasonable adjustments.

25. I consider that on a fair reading of the ET1 the claimant was asserting a claim of discrimination because of something arising in consequence of disability. The claimant made her complaint about being dismissed because of ill health absence under a section headed "discrimination" in the ET1. In **Cox** I noted the problem of relying excessively on how a litigant in person explains the case at a preliminary hearing without also carefully considering the pleadings. This is even more the case when the litigant in person does not have English as a first language and requires an interpreter. The claim form was briefly pleaded. I consider it could only reasonably be read as including a claim of discrimination because of something arising in consequence of disability. I consider that the failure to identify an arguable claim of discrimination because of something arising in consequence of disability was an error of law.

26. In respect of the claim of failure to make reasonable adjustments in respect of not providing insulated and waterproof footwear the employment judge stated:

> However, she went on to tell me that many of the employees were suffering the same difficulties with the footwear, that lots of people had complained and that they had gone to the nurse and that they had been forced to cut the footwear in order to adjust it. The Claimant's difficulty is the law requires her to be put at a substantial disadvantage that is not faced by non-disabled people. If many employees had damp and moist feet due to the footwear supplied by the Respondent, then this cannot be an act of disability discrimination as the non-disabled comparators also suffered damp and moist feet, the substantial disadvantage of which the Claimant complains.

27. The employment judge had to consider whether, taking the case at its highest, it was arguable that the claimant was put to a substantial, i.e. more than minor or trivial, disadvantage in comparison to non- disabled persons. The fact that any employee would be uncomfortable if their feet were cold and wet did not mean that

the claimant, having arthritis that caused painful and swollen feet, was not caused a more than minor or trivial disadvantageous greater level of discomfort.

28. The employment judge also considered that there could be no duty to make reasonable adjustments because the claimant was not able to return to work at the time of her dismissal and had other medical problems with her wrist and back. However, the question of how long would be required for a return to work with appropriate adjustments was the type of question of fact that would generally need to be decided on the evidence at a hearing.

29. Furthermore, had the employment judge correctly identified a claim of discrimination because of something arising in consequence of disability, an important issue in considering the application for strike out would be whether the respondent was almost certain to establish that dismissal was a proportionate means of achieving a legitimate aim so that the claim had no reasonable prospect of success. The assessment of justification would involve consideration of whether it would be reasonable for the respondent to give the claimant some further time to recover (as the claimant asserted had been done in the case of a colleague – although this was not referred to in the judgment) and whether given some more time there were adjustments, such as insulated and waterproof footwear, that might permit a return to work. These are matters that would be likely to require assessment on the evidence at a hearing. The true medical situation was itself a matter of fact that would generally require determination on a consideration of all the evidence.

30. I consider it is clear, as asserted at Ground 1 of the Notice of Appeal, that this was not one of the exceptional discrimination cases in which strike out was appropriate. I consider the employment judge erred in law in striking the claim out.

Unfair Dismissal

31. The employment judge directed herself that she should take the claimant's case at its highest and that she should not conduct a mini-trial. I appreciate that I should be slow to assume that despite a correct self-direction the law was not properly applied: **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672. However, I cannot but conclude that the employment judge did not take the claimant's case at its highest. There are a number of stages at which the judge approached the matter as if it was for her to make the final determination, rather than to decide whether the claim of unfair dismissal had no reasonable prospect of success [with my emphasis added]:

> My role is to consider the reasonableness of the Respondent's actions, in particular whether it was reasonable to rely on occupational health reports about the Claimant when considering her capability to carry out her role. [11]
>
> The occupational health specialist sent a lengthy document in March 2019 about the Claimant's health, her ability to carry out her role and expressed the view that she would not be able to work for at least another 6 months. The Claimant had already been absent for at least 9 months. There is nothing within that document that leads me to think it was unreasonable for the employer to rely on it. [12]

32. There are also a number of stages when in considering the unfair dismissal claim the employment judge took into account material that was not considered by the respondent or made assumptions without any material that suggested those assumptions were also made by the respondent:

> I will not go so far as to say that it infers that the Claimant's employment with the Respondent was not suitable, but the overall picture I get from the evidence before me is that the medical evidence indicates the nature of the Claimant's role with the Respondent was problematic for her and her conditions. [5]
>
> I also note that the Claimant told me that she thought at least another 3 months' absence was likely from April 2019 [9]
>
> The Claimant herself says that her job was a responsible role, which I interpret to mean that it was an important role for the Respondent's business. The Claimant says that to undertake her role, you need significant training. Whether the job was being covered by an agency worker or someone else already employed within the business, it is a reasonable inference for me to draw that the Claimant's absence had to be covered and there is a cost to that. [13]
>
> In any event, if I am incorrect in concluding that it was reasonable for the Respondent To conclude that the Claimant was incapable of carrying out her role (or any reasonable alternative), I consider that applying the case of Polkey v AE Dayton Services Ltd (1987) UKHL 8, it made no difference to the final outcome.

33. In the last extract the employment judge took it upon herself to apply **Polkey**, apparently considering it would go to the issues of fairness, rather than remedy.

34. The employment judge notes that one of the assertions the claimant made as to the fairness of her dismissal was that "the Respondent should have waited longer". The employment judge did not have regard to the fact that, in circumstances in which the claimant had been absent from work for 9 months and asserted she should have been able to return to work in about 3 months (taking her case at the highest), in the claim form the claimant specifically asserted that there was another employee who after a lengthy absence had been allowed to return to work on a phased basis. That was an important potential issue of fact that the employment judge should have considered and decided whether it required determination at a full hearing. Mr Allsop stated that the issue of the "comparator" was not raised in the Notice of Appeal. I consider that it is a component of the general assertion that the employment judge failed to take the claimant's case at its highest and the specific

assertion that the judge appeared to accept as fact that it was "unreasonable to wait for a further 3 months" which raised the question of whether the employment judge took proper account of the claimant's contention in her pleading that another employee in broadly comparable circumstances had been retained. The issue of the comparison was raised in Mr Jackson's skeleton argument and Mr Allsop was prepared to respond to it. Had it been necessary, I would have permitted an amendment to the Notice of Appeal to raise this specific point.

35. In determining whether the respondent had acted reasonably, there were a number of matters about which the employment judge made assumptions that would be likely to require careful fact finding, and so were ill suited for consideration on a summary basis, such as whether the respondent acted reasonably: by investigating the possibility of adjustments (such as to footwear) that might permit and/or speed a return to work, considering alternative roles, reasonably assessing the true medical position, taking account of any cost or other inconvenience caused by the claimant's absence and assessing when the claimant might return to work.

36. I conclude that the employment judge failed to take the claimant's case at its highest. It could not realistically be said that "there were no disputes as to fact". The employment judge treated aspects of the claim as if conducting a mini-trial. The employment judge erred in law in striking out the unfair dismissal claim.

Disposal

37. The claim is remitted to be determined by a differently constituted employment tribunal because, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763: it is important to avoid further delay, it is not proportionate to await the availability of the same employment judge, the errors in dealing with the application for strike out were fundamental and the claimant might justifiably be concerned of the risk that there could be an unconscious tendency to take a second bite of the cherry in circumstances where the judge took so negative a view of the case on its merits, not just considering whether it had no reasonable prospects of success.

38. Case management is a matter for the employment tribunal on remission. However, it may well be thought appropriate to carefully identify the issues in the claim before determining the appropriate next stages of case management. Once the issues are clarified the respondent may wish to consider with care whether

seeking a strike out is proportionate in circumstances in which a full hearing is likely to be of a relatively short duration. It would be open to the respondent to limit any further application to seeking a deposit order.