THE EMPLOYMENT TRIBUNALS

Between

Claimant: **Mrs M Itulu**

Respondent: **London Fire and Emergency Planning Authority**

Hearing at London South on 9 June 2017 before Employment Judge Baron

Appearances

For Claimant: **The Claimant was present in person**

For Respondent: **Rebecca Thomas - Counsel**

JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal that the claims made under the Equality Act 2010 based upon the protected characteristic of disability be struck out.

REASONS

1 Judgment was given at the conclusion of this hearing. The Claimant requested that written reasons be provided.

2 The Claimant presented a claim form ET1 to the Tribunal on 1 February 2015. In that claim form she had ticked the boxes in section 8.1 to indicate that she was making claims of discrimination based upon the protected characteristics of race, disability and sex. In the particulars of claim attached to the claim form the Claimant made reference to claims under sections 13, 21, 26 and 27 of the Equality Act 2010. She also referred to a breach of the equal pay legislation.[1] The Respondent presented a response on 4 March 2015 in which the allegations were denied.

3 Of particular importance to this hearing is the denial by the Respondent in the response that the Claimant was a disabled person within the 2010 Act. At a preliminary hearing on 30 March 2015 EJ Emerton recorded that the Claimant relied upon two impairments, being (1) work related stress and (2) musculoskeletal pain in her back, shoulder, arm and wrist.

[1] It was later confirmed that the reference to sex discrimination was a reference to the equal pay claim.

4 This hearing was held to consider the Respondent's application for an order striking out the claims under sections 13, 21 and 26 of the 2010 Act based upon the protected characteristic of disability, but not the claim of victimisation under section 27. That application was made in a letter dated 28 November 2016, to which further reference is made below.

5 It is important to look at the chronology of what has occurred. The chronology relates only to the issue as to whether the Claimant was a disabled person, and does not deal with other procedural difficulties which have arisen and the very substantial correspondence generated. It does not cover every document on the subject of disability, but only the main events. Further, I do not deal with the postponements of hearings as to the merits of the claims which have resulted from the procedural difficulties.

5.1 30.03.15. At the preliminary hearing mentioned above the Claimant was ordered to provide such medical evidence as was under her control relevant to the issue as to whether she was a disabled person to the Respondent by 26 May 2015, and then for the Respondent to state whether it was accepted that the Claimant was a disabled person in either or both respects.

5.2 30.06.15. The Respondent stated that the fact of disability was not conceded.

5.3 14.08.15. There was a preliminary hearing held by me by telephone. Paragraph 2 and 3 of the Orders made on that occasion are as follows:

> 2 **The position of the parties**. The Respondent wished to have experts appointed at its own cost to advise the Tribunal as to whether the Claimant was a disabled person for either or both reason. Miss McEntee [Solicitor for the Respondent] acknowledged that the Respondent had received occupational health reports prepared for the purposes of management but had not had sight of the background medical information. The Claimant did not see the need for any experts to be appointed and stated that the 2010 Act did not include any requirement for expert's reports. She said that the Respondent had had all necessary information.
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> 3 **My decision**. As the fact of disability for either reason has not been conceded the Tribunal will have to make a decision on the point. While the burden is on the Claimant to prove that she was a disabled person, it is simply not fair for her to decide what evidence is to be provided to the Tribunal. Justice requires that the Respondent be able to have the Claimant examined so that it may too provide evidence to the Tribunal. On this occasion the Respondent is not seeking permission to appoint its own experts, but is asking the Tribunal to order that there be joint experts appointed, and further it is willing to pay the whole of the costs. That seems to me to be more than fair to the Claimant, and also that such procedure will assist the Tribunal in coming to a just conclusion on the point.

I then made orders for the Respondent to provide the names of three consultants in each specialty, and for the Claimant to select one from each of the lists provided. I also made orders for the provision of draft letters of instruction to be prepared by the

Respondent, and for agreement to be attempted as to the terms of those letters.

5.4 24.09.15. The Respondent applied to the Tribunal to settle the letters on instruction to the experts as it had not been possible to reach agreement. It is not necessary to set out all the details of the points upon which agreement could not be reached.

5.5 26.11.15. I held a further preliminary hearing. I made amendments to the drafts and asked for the Respondent to provide a revised copy to the Claimant for final approval.[2] I strongly urged the Claimant to object only to any point which was of great importance. The Claimant also objected to the disclosure to the experts of her medical records citing the Access to Medical Reports Act 1988 and maintaining that the Respondent was in breach of the Act. The Respondent contended that that statute was not relevant. I informed her that experts must be in possession of all material information, and I urged her to provide the necessary consents so that the experts could have access to the records.

5.6 14.12.15. The Respondent sent consent forms to the Claimant in relation to the two consultants selected by the Claimant. Dr Cutting and Professor Povslen having access to the Claimant's medical records.

5.7 24.12.15. The Tribunal was notified by the Respondent that an issue had arisen concerning Dr Cutting. The Tribunal was provided with an email from the Claimant to the Respondent of 6 December 2016 in which the Claimant stated that she had received two letters from Dr Cutting concerning an appointment and consent to the release to him of the Claimant's medical records. The objection by the Claimant was that apparently the Respondent had contacted Dr Cutting before the joint letter of instruction had been agreed. The Respondent did not accept that the Claimant's objection had any validity.

5.8 19.01.16. The Respondent applied for a further preliminary hearing to settle the wording of the instruction letter to the experts, whether it was appropriate to instruct Dr Cutting, and to settle the list of issues to be decided by the Tribunal. That hearing was due to be held on 13 May 2016 before me but had to be postponed as I had lost my voice.

5.9 07.07.16. There was the further preliminary hearing on 7 July 2016. Paragraphs 5-7 of the notes of that hearing are as follows:

> 5 **Medical records.** This subject generated considerable unnecessary heat. The position is simple. The Claimant alleges that she was a disabled person. That is disputed by the Respondent. Two experts are to be appointed to examine the Claimant. They need to have a copy of the Claimant's existing medical records. The Claimant wanted to have prior access to the records before they were

[2] As becomes apparent below it was still not possible for agreement to be reached.

supplied to the experts. The Claimant insisted that the production of those existing records falls within the Access to Medical Reports Act 1988. I disagree. The clue lies in the name of the statute. It does not refer to medical records. It is not necessary to refer in detail to the provisions of the statute, although they were discussed at the hearing. The Tribunal cannot require a claimant to give consent to records being supplied, but it can stay claims until they are supplied. In the end I decided that the Respondent should amend the draft forms in the bundle specifically to request that a copy of the records be supplied to the Claimant at the same time as they were supplied to the experts. The Claimant will than have time to consider them and seek to have corrected any entries which she considers to be erroneous. The revised consent forms are to be supplied to the Claimant by the Respondent as soon as possible. Those consent forms are then to be supplied to the experts along with the relevant letters of instruction, to which I turn next.

6 **Letters of instruction.** Again it had not been possible for the parties to reach agreement. I settled the form of the letters. The Tribunal **orders** that the Respondent instructs the experts on behalf of both parties within seven days of having received the letters of consent from the Claimant. The experts are to be instructed to prepare their reports within eight weeks of having been instructed. The Tribunal is to be informed when the experts have been instructed.

7 **Dr Cutting.** The Claimant objected to Dr Cutting being instructed. He is one of the experts chosen by the Claimant. It appears that before being formally instructed Dr Cutting jumped the gun, and contacted the Claimant with details of an appointment for an examination. The Claimant objected to the fact that the Respondent appeared to have contacted Dr Cutting. What appears to have happened is that enquiries were made of several individuals as to availability, one of whom was Dr Cutting. The Claimant selected him. The Respondent told Dr Cutting that he had been selected, and he then wrote to the Claimant. That was unfortunate, but I fail to see how it affects the suitability of Dr Cutting to provide advice to the Tribunal as an expert.

5.10 14.07.16. The Claimant sent an email to the Tribunal asking that the Tribunal order be varied to substitute a Dr Bashir for Dr Cutting. She also asked that her date of birth, hospital number and NHS number be redacted from the letters of instruction for the experts and from any documents in the bundle.

5.11 05.09.16. I issued 'Notes and Decisions' to the parties. Paragraphs 1 & 3-5 are as follows:

1 **Introduction.** I held a preliminary hearing in this matter on 7 July 2016 and the Notes and Orders resulting from that hearing were issued on the following day.[3] Since then there has been further correspondence principally emanating from the Claimant. This document sets out my decisions on the various issues raised.

2 **. . . .**

3 **Letter of instruction**. The parities had not been able to agree upon the terms of the letter of instruction to the independent expert. The terms were settled by me at the hearing and I ordered that the Respondent effect the instruction. The Claimant objects to the Respondent instructing the expert without submitting the final draft to her. There is no need for that to be done as the wording was settled

[3] I see that inadvertently the document did not state that the preliminary hearing was on 7 July 2016.

at the hearing. However, I order that the Respondent do send a copy of the letter to the Claimant as sent to the expert. I had assumed that the Respondent would do that in any event as a matter of courtesy.

4 **Dr Cutting.** The Claimant has again objected to my order that Dr Cutting be appointed and now seeks to appointment of another expert. The Respondent objects. That matter was fully ventilated at the hearing. I see no reason to vary my order.

5 **Personal data.** The Claimant is again objecting to her date of birth, NHS number and hospital number being disclosed, but it is not clear as to the extent of her current objection. If the Claimant objects to such information being supplied to Dr Cutting then the Claimant's application is refused. If the objection is solely to the information being in the bundle, so that members of the public might possibly see it, then the Respondent has confirmed that those details will be redacted when the bundle is prepared.

5.12 28.11.16. The Respondent applied for an order striking out the disability discrimination claims on the ground that her conduct in regard to the instruction of medical experts has been unreasonable and/or vexatious. It is apparent that the Claimant was still refusing to see Dr Cutting and the letter had stated that 'if the Respondent goes ahead to instruct Dr Cutting it will be incurring such costs of its own choice.'

5.13 14.03.17. I issued a note to the parties setting out what I understood to be the matters which needed to be considered at this hearing, including the consideration of the striking out application.

6 Miss Thomas made the application to strike out the disability discrimination claim relying on paragraphs (b) and (e) of rule 37. That rule is as follows:

> **37.**—(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 is scandalous or vexatious or has no reasonable prospect of success;
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
> (d) that it has not been actively pursued;
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

7 The Claimant objected to reliance being placed upon paragraph (e) as that had not been mentioned in the application of 28 November 2016. Miss Thomas agreed to limit her application to paragraph (b). However, in my view that is largely academic. It is well established that even when considering the making an order which does not specifically rely upon paragraph (e) the question as to whether a fair trial is possible is a matter

which must ordinarily be considered by a judge when deciding whether to strike out a claim.

8 My attention was drawn to correspondence with Professor Povlsen. Following receipt of an appointment letter from him, the Claimant wrote to Professor Povlsen on 25 November 2016, and the relevant part of her letter is as follows:

> I am unsure what happens during an examination / assessment you propose to carry out. So that I can understand clearly what can happen during an examination / assessment you propose to carry out for the report, please clarify whether or not you need to examine me physically. Please also clarify the dates / periods any such examination or assessment will cover.

9 Professor Povlsen replied on 28 November 2016 as follows:

> I can confirm that I will examine both your upper limbs to assess the strength and range of movement of your fingers, elbows and shoulders to provide a report on condition and prognosis. The examination covers your ability at the present time. I will ask you some questions about your past and present health etc.
>
> In the joint letter of instruction, I have been asked to provide a report on your physical impairment including any relevant pre-existing conditions and treatment received for the period 19 December 2013 to 25 February 2015.

10 The Claimant then replied on 6 December 2016 as follows:

> Please note that the Order of the Employment Tribunal made was for a medical report covering the relevant period from 19 December 2013 to 25 February 2015, and does not cover any '*examination'* or '*my ability at the present time'* as you have confirmed in paragraph 2 of your letter dated 28 November 2016.
>
> I am, therefore, unwilling to contact your secretary to arrange a medical examination now, because you do not appear to have the legal authorisation to carry out the physical examination of my body you are intending to carry out.
>
> Additionally, as your intention to examine my body is not in accordance with the law (Order of the Employment Tribunal) it is a breach of the Data Protection Act 1998, and a potential violation of my rights under the Human Rights Act. I am exercising my rights to refuse to give my consent to carry out physically examination of my body.

11 This correspondence was discussed at this hearing. After clear questioning from me the Claimant specifically stated that she refused to allow any physical examination to take place by Professor Povslen, and that all she was prepared to do was to answer questions about her abilities during the relevant period. The Claimant was absolutely adamant on the point.

12 The Claimant then made a different objection to being examined by Dr Cutting from that made previously. She produced an internet print. This appeared to show an extract from the Data Protection Register showing that Dr Cutting was registered for the period from February 2016 to February 2017. The Claimant also produced a screen print of what she said was an internet chat evidencing that it was only in February 2016 that Dr Cutting registered himself under the data protection legislation.

13 The application to strike out the relevant claims was made on 28 November 2016. As far as Dr Cutting is concerned the application was made at the time on the basis that the Claimant had selected him

originally, that that appointment had been confirmed by the Tribunal, and that the failure of the Claimant to attend the appointment on 23 November 2016 was unreasonable. The Claimant's conduct had caused a delay of over a year, and no progress had been made towards obtaining the relevant report. The application did not refer to any issues concerning Professor Povslen.

14 Miss Thomas made submissions on behalf of the Respondent in support of the application. She submitted that taking an overview of what had occurred since the proceedings were issued the Claimant had consistently sought to find ways to avoid or delay being examined. The claim had been issued back in February 2015 and very little progress had been made concerning an essential element of the claim, being the issue of disability. The Respondent was being prejudiced as three witnesses had now retired.

15 Miss Thomas submitted that the objections by the Claimant concerning Dr Cutting were of no validity. The fact that he had contacted the Claimant before having received formal instructions did not affect his independence. Further, the Claimant was still refusing to be examined by him despite my order of 5 September 2016 and she was now citing another reason relating to registration under the data protection legislation.

16 Miss Thomas referred to the above correspondence concerning Professor Povlsen, and the statement by the Claimant that she would now not allow herself to be the subject of a physical examination. No valid reason had been given for that objection, said Miss Thomas. Miss Thomas accepted that the Claimant had a right to refuse to be examined, but if that was her decision then she should not be allowed to pursue her claim based upon the physical impairment in question.

17 I now give my reasons for my conclusion. In giving judgment I summarised the material elements of the chronology as set out above. The Tribunal has the power to strike out a claim as set out in rule 37 which I have reproduced above. The power is discretionary, and must be exercised in accordance the overriding objective of the Tribunal which is to deal with cases fairly and justly.

18 My clear conclusion is that the Claimant is doing all she can to prevent being examined by either Dr Cutting or Professor Povslen. That is unreasonable behaviour in the context of claims based upon the protected characteristic of disability.

19 Her original objection to Dr Cutting was his contacting the Claimant after the Respondent had made initial enquiries as to whether he would be able to examine the Claimant and provide a report within the timescale initially envisaged. I do not consider that that has any relevance to his independence, nor his ability to examine the Claimant and provide a report for the benefit of the Tribunal. Further, the Claimant has now sought to dig up a further reason for not instructing him. I have noted that the Claimant did suggest substituting a Dr Bashir for Dr Cutting, but in the

light of what has happened I have no confidence that the Claimant would not also find reasons to object to him.

20 As far as Professor Povslen is concerned the Claimant was simply refusing to allow herself to be physically examined, despite the fact that she is relying on a physical impairment. She did this being well aware that a striking out of at least part of her disability claim was possible. I entirely fail to see how an expert could properly produce a report giving an opinion as to the Claimant's capabilities during the relevant period without conducting a physical examination.

21 I am satisfied that a fair trial cannot be held without the Tribunal having the benefit of the experts' reports, and without the ability of the Respondent to cross-examine the Claimant and address the Tribunal on them. The Respondents is entitled to insist upon such independent evidence.

22 The issue now is not whether I have the jurisdiction to strike out the disability claims, but whether I should exercise my discretion to do so. It is well recognised that such power should be sparingly exercised as a striking out has the effect of preventing a claimant from pursuing a claim which may have validity. In my judgement the circumstances of this case justify such an order being made. By reason of the past conduct of the Claimant I have no confidence whatsoever that if different experts were now to be sought then the claims could proceed without further delay. I have also noted the prejudice to the Respondent already suffered as a consequence of the retirement of witnesses, who are now therefore not under the Respondents' control.

23 I therefore order that the claims based upon the fact of disability be struck out. For the avoidance of doubt this order does not affect the subsisting claim of victimisation because that does not depend upon the Claimant being found to have been a disabled person at the relevant time.

Employment Judge Baron

31 July 2017