



EMPLOYMENT TRIBUNALS

Claimant: Ms J Griffiths-Baker

Respondents: (1) Cardiff Metropolitan University
(2) Ms C Aitchison
(3) Ms I Finlay
(4) Ms C Fraser
(5) Minerva (Shepherd Tucker) LLP
(6) Mr B Tucker

Heard: by video **On:** 4 & 5 February 2021

Before: Employment Judge S Jenkins

Representation

Claimant: Mr J Mitchell (Counsel)
Respondents: (1 – 4) Mr S Keen (Counsel)
(5 – 6) Mr C Ludlow (Counsel)

JUDGMENT

1. The Claimant's claims of discrimination arising from disability (section 15 Equality Act 2010 ("EqA")) and of failure to make reasonable adjustments (sections 20/21 EqA), against all Respondents, are dismissed on withdrawal.
2. The Claimant's claim of breach of the obligation not to ask questions about the health of an applicant for work before offering work (section 60 EqA), against the Fifth and Sixth Respondents, is struck out as having no reasonable prospect of success.

REASONS

Background

1. The hearing was arranged to deal with a number of interlocutory matters, most involving case management issues which have been addressed in a separate document. There were however two matters on which judgment was required. The first involved the withdrawal of two of the Claimant's claims, whilst the second involved an application by the Fifth and Sixth Respondents to strike out one of the Claimant's claims, or in the alternative

for the Claimant to be ordered to pay a deposit as a condition of continuing with it.

2. I delivered judgment orally on the latter issue, but there was a request for written reasons. I therefore set out my reasons in relation to both issues below.

Withdrawal

3. Prior to the hearing, the Claimant's representative had indicated in correspondence that she proposed to withdraw her claims of discrimination arising from disability and failure to make reasonable adjustments against all Respondents. There was a suggestion that that proposed withdrawal was subject to a condition but, during the hearing, Mr Mitchell, on behalf of the Claimant, confirmed that those claims were to be withdrawn unconditionally. I therefore ordered that they be dismissed on withdrawal.

Strike out/deposit order

4. The Fifth and Sixth Respondents had made an application for the Claimant's claim against them of a breach of section 60 of the Equality Act 2010 ("EqA") to be struck out pursuant to Rule 37 of the Employment Tribunals Rules of Procedure ("Rules") as having no reasonable prospect of success, or, in the alternative, that a deposit should be ordered, pursuant to Rule 39, to be paid by the Claimant as a condition of continuing that claim on the basis that it had little reasonable prospect of success. I noted that although the same claim is brought against the First to Fourth Respondents, and is resisted by them, a similar application has not been made on their behalf.
5. I considered the written submissions of Mr Ludlow on behalf of the Fifth and Sixth Respondents, and of Mr Mitchell on behalf of the Claimant, together with their supplementary oral submissions.

Law

6. Looking at matters first from the perspective of the strike out application, I was referred to the House of Lords decision of Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391, the Court of Appeal decision of Ahir v British Airways plc [2017] EWCA Civ 1392, and the Employment Appeal Tribunal decision of Abertawe Bro Morgannwg University Health Board v Ferguson [2013] ICR 1108. I also took into consideration the Employment Appeal Tribunal decision of Balls v Downham Market High School and College [2011] IRLR 217. All those authorities make clear that a strike out order should not be made in discrimination cases, except in the most obvious of cases, as they are generally fact sensitive and require a full examination of the evidence in order to make a proper determination.
7. However, I noted the comment of Underhill LJ in *Ahir* that, "*Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has*

not been heard and explored, perhaps particularly in a discrimination context".

8. In relation to deposit orders, the Employment Appeal Tribunal in Van Rensburg v The Royal Borough of Kingston upon Thames (UKEAT/0096/07), noted that the "little reasonable prospect" test is not as rigorous as the "no reasonable prospect" test, noting that a Tribunal has a greater leeway when considering whether or not to order a deposit. Also, the Court of Appeal in Ezsias v North Glamorgan NHS Trust [2007] ICR 1126, noted that it was not wrong for a Tribunal to make a provisional assessment of the credibility of a party's case when deciding whether to make a deposit order.
9. In terms of the claim sought to be struck out or, alternatively, sought to be made subject to a deposit order, section 60 EqA, which has the sub-title "*Enquiries about disability and health*", provides as follows:
 - "(1) *A person (A) to whom an application for work is made must not ask about the health of the applicant (B) –*
 - (a) *before offering work to B*"

Background circumstances

10. I made no findings in respect of any factual matters as no evidence was put before me. However, the background to the applications is that the Claimant's case is that she was offered a job by the First Respondent in December 2019, with the Fifth Respondent, corporately; and the Sixth Respondent, individually; being involved in that, as recruitment search consultants. It appears that a contract was concluded between the Claimant and the First Respondent in January 2020 for the Claimant to commence work for the First Respondent on 1 February 2020. However, shortly before that, concerns arose about the information the Claimant had provided and/or failed to provide during the recruitment process. Ultimately, after enquiries made of the Claimant's former employer by the Sixth Respondent, a meeting between the Second Respondent and the Claimant, and an internal discussion involving the Second, Third, Fourth and Sixth Respondents, the proposed employment was withdrawn on 31 January 2020.
11. The Claimant has bought a variety of claims against six Respondents, including one of discrimination arising from the asking of health questions that is the subject matter of the Fifth and Sixth Respondents' application. Relevant to the Fifth and Sixth Respondents, the Claimant contends that the Sixth Respondent, and consequently vicariously the Fifth Respondent, in light of the concerns which had arisen, contacted a person he knew at the Claimant's previous employer and made enquiries about her. The Claimant contends that these involved enquiries about her health, although that is denied by the Fifth and Sixth Respondents.

Submissions

12. On the Fifth and Sixth Respondents' side, in addition to raising a concern that the Claimant's clarification of her section 60 claim in further and better

particulars she had provided amounted to an amendment (which I did not consider was the case), the essence of Mr Ludlow's case was that section 60(1) EqA provides that a person to whom an application for work is made must not ask about the health of the applicant *before* (my emphasis) offering work to that applicant. He submitted that, even taking the Claimant's case at its highest, the earliest date that the Claimant says the Fifth and Sixth Respondents were involved in any possible breach of section 60 was 28 January 2020. He noted that the Claimant was offered work by the First Respondent on 18 December 2019, and that a contract was entered into between the Claimant and the First Respondent on 10 January 2020. He therefore contended that any enquiries about the Claimant's health alleged to have been made by the Sixth Respondent cannot have been before she was offered work, and therefore that her claim cannot succeed.

13. Mr Mitchell's written submissions on behalf of the Claimant primarily responded to the Fifth and Sixth Respondents' contentions regarding what they contended was an expansion of her claim within her further and better particulars, which, as I have already noted, I did not consider had been the case. In his oral submissions, Mr Mitchell referred to being surprised by Mr Ludlow's argument about the timings of the alleged enquiries about the Claimant's health, suggesting that the point had not been raised in Mr Ludlow's written submissions, and in fact referring to having been ambushed. I did not, however, consider that there should be any surprise about the contentions advanced by Mr Ludlow, as, at paragraph 28 of his submissions, he referred to the dates on which the Claimant was offered work and appointed as preceding any alleged involvement of the Fifth and Sixth Respondent in any questions about the Claimant's health.
14. Mr Mitchell noted that the First to Fourth Respondents were not making a similar application, to which Mr Keen on their behalf responded that, whilst they were not pursuing a strike out or deposit order application, the First to Fourth Respondents also did not consider that section 60 applied in fact, as any questions relied upon by the Claimant were posed after the work had been offered.
15. Mr Mitchell also noted that the Fifth and Sixth Respondents had engaged with the Claimant's claim by factually denying that questions were asked, and by raising a request for further and better particulars of the Claimant's section 60 claim. He concluded by contending that the question of whether and when health questions had been asked remained to be determined, and that that should happen at the substantive hearing.

Conclusions

16. In relation to the strike out application. I was very mindful of the guidance provided by Anyanwu and Ahir, and indeed the other cases referred to above, that a strike out order should not be made in discrimination claims except in the most obvious of cases. I therefore approached matters from the perspective of taking the Claimant's claims at their highest in her claim form and further particulars.
17. In that regard, the Claimant raised no concern about any questions being asked by any Respondent about her health prior to the job offer, or indeed

prior to entering into a contract to commence work. Her claims, for the purposes of this application by the Fifth and Sixth Respondents, purely relate to questions alleged to have been asked by the Sixth Respondent of her former employer, on 28 January 2020.

18. Section 60(1) EqA refers to a prohibition on the asking of questions about the health of an applicant before offering work to the applicant. It seemed to me that there was no question of the Claimant's claim in this regard succeeding, as the alleged questions, even if established as having been asked, occurred after the offer of work. I therefore concluded that the Claimant's claim under section 60(1) EqA against the Fifth and Sixth Respondents had no reasonable prospect of success and should therefore be struck out.

Supplemental observations

19. I made two supplemental observations.
20. The first was that section 60(2) EqA provides that the enforcement of a contravention of section 60(1) is to be undertaken only by the Equality and Human Rights Commission. It seemed to me therefore, that there would be no ability, in any event, for an Employment Tribunal to grant any direct remedy to a claimant in respect of a breach of section 60(1) EqA.
21. The second was that my decision regarding the section 60 claim does not mean that the factual points cannot be pursued as part of the Claimant's other discrimination claims. I noted that the Equality and Human Rights Commission's Code of Practice on Employment, at paragraph 10.39, indicates that although job offers can be made conditional on satisfactory responses to, amongst other things, health enquiries, employers must ensure they do not discriminate against a disabled job applicant on the basis of any such response. The Code goes on to provide an example indicating that rejecting an applicant on the grounds that a health check reveals that they have a disability would amount to direct disability discrimination. It seemed to me therefore, that the Claimant's assertions about questions being asked about her health, whilst obviously needing to be substantiated, could still potentially have relevance for her other discrimination claims.

Employment Judge S Jenkins

Date: 11 February 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON 12 February 2021

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FOR THE TRIBUNAL OFFICE