EMPLOYMENT TRIBUNALS

Claimant: **Mr E Saleh**

Respondent: **Singletrack Systems Limited**

RECORD OF A PRELIMINARY HEARING

Heard at: **East London Hearing Centre (in public; by video)**

On: **25 April 2023**

Before: **Employment Judge Emery**

Representation

For the claimant: Mr Saleh (claimant's father)
For the respondent: Mr T Sheppard (counsel)

PRELIMINARY HEARING JUDGMENT

1. **The claims of victimisation and disability related harassment are struck-out as having no reasonable prospects of success.**

2. **The application for a deposit order for the claims of constructive unfair dismissal and wrongful dismissal fails.**

REASONS

Discussion

1. This hearing was listed to consider the respondent's applications to strike out or order a deposit for all remaining claims - of victimisation and disability-related harassment, constructive unfair dismissal, and wrongful dismissal.

2. The respondent's case is that there can be no reasonable prospect, alternatively little reasonable prospect of these claims succeeding. This is notwithstanding the Order of Acting REJ Russell dated 9 March 2023 which did not dismiss the

claims of harassment and victimisation, on the basis the claimant *"does not need to actually have been disabled"* for these claims to succeed (page 363).

3. The reason for the respondent's application stems from the Preliminary Hearing Judgment of EJ Brewer, that the claimant was not disabled at the material time by reason of AHD, and that the respondent did not have actual or constructive knowledge the claimant had AHD prior him disclosing this fact on 26 June 2020 (paragraph 100 Judgment on Disability, page 277).

4. The consequence of this, argued Mr Sheppard, was there could be no connection between this condition and any alleged detriment; there is no action of the respondent which can be related to a disability. Mr Sheppard argues the allegation within the claim is clear – that the clamant was subjected to a PIP and ostracised by colleagues because of his disability of Asperger's. The PIP process ran from July to 25 September 2020 when it was successfully completed. A claim about the PIP process is therefore out of time as the claimant resigned in June 2021 and his ET1 was submitted in September 2021.

5. Also, given the disability judgment, there is now no connection between the alleged treatment and his condition. The allegation of harassment alleged in the claim *"requires the claimant to be disabled".* Mr Shephard argued that the harassment claim *"must"* be struck-out.

6. Mr Sheppard accepted that in principle a claimant may allege harassment based on the employer's belief or perception they are disabled. By July 2020 the respondent had actual knowledge the claimant had AHD. But, Mr Sheppard argued, to bring a 'perception discrimination' claim the claimant must allege that the respondent perceived him to be disabled. Instead the claimant has alleged that he was disabled, and the respondent knew this.

7. On 'victimisation', Mr Sheppard argued that there is an issue of time which meant the claim could not succeed or had little reasonable prospects of succeeding – the PIP process ran from July to 25 September 2020 when it was "successfully completed" – this is 9 months prior to resignation and nearly 12 months to his ET1. This is a free-standing claim and cannot not be a course of continuing conduct as all other disability claims have fallen away following the PH Judgment that the claimant was not disabled during the period relevant to the claim. There is every chance that if the claim proceeds it will fail on the basis it was brought out of time and no just and equitable extension will be grated. This means that there can be no, or little, reasonable prospect of the victimisation claim succeeding.

8. The constructive dismissal claim: Mr. Sheppard accepted that in principle the allegation of ostracism could be a continuing claim and, while undefined could in theory be a repudiatory breach. He also accepted that 'at their highest' and as a matter of principle some of the allegations if proven may amount to a repudiatory breach, but the evidence also shows that the claimant acquiesced to the alleged breaches, he had remained in post and accepted or affirmed them. These include the respondent's actions during furlough – months before his resignation;

also, the decision to subject the claimant to a PIP. Mr. Sheppard argued that the claimant has *"elected to remain in employment"*.

9. On the claimant's argument that there was an accumulation of incidents, the claimant remained in post throughout all the incidents, and it's a *"huge uphill struggle"* for the claimant to argue there was a continuing breach of contract.

10. Mr. Saleh for his son argued that the respondent is *"salami slicing"* the issues within the resignation letter. The claimant did not acquiesce to any of the breaches of contract, in fact he challenged them throughout this period. He said only one employee out of 70 was furloughed, the claimant was put on a PIP but received no negative feedback, and there is then a note saying there is 'fat in the team'. Mr. Saleh considers that this was aimed at his son, who he said is overweight.

11. Mr. Saleh said he is *"convinced"* there is an element of truth in what the claimant is saying occurred in the office, as this is a statement between bosses. The failure to give a pay rise was in May 2021, not long before resignation. He was off sick from May; he was not paid company sick pay – which the respondent paid to other employees. Mr. Saleh said the events from furlough onwards are clearly linked*, "these are issues which could and should be heard";* he argued that the issue of salary, the decision to furlough and the event which occurred after are all linked.

12. Mr Saleh argued that it is clear that the claimant decided to resign on 30 June 2021 after an attempt to have dialogue with the respondent, he was hoping there would be some resolution and improvement, and when it did not *"enough was enough"*

13. The harassment and victimisation claims: Mr. Saleh referred to the grievance outcome (511) which discussed the claimant's *"disability"* and page 532, a June 2021 referral to Occupational Health which states the respondent seeks *"to understand"* his condition and how it affects him on a day-to-day basis. The respondent believed the claimant was disabled – for example page 461 which shows the respondent worked with the claimant to enable him to perform his role *"taking into account his disability".*

14. Mr. Salah argued that the harassment and victimisation claims had been allowed to proceed and could not understand why a strike-out was being considered. He argued that the harassment is not *"restricted or tied"* to disability, The respondent clearly perceived the claimant as disabled. It was arguable that the claim could encompass a claim of discrimination by perception *"this is not rigid, it is not tied to being disabled…".*

The Law

15. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

Striking out Rule 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) …

(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.

Strike-out – case law

16. Strike out is an exceptional course of action. It is only possible where a tribunal concludes a claim is scandalous or vexatious or has no reasonable prospect of success.

17. *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] IRLR 755: The power to strike out a claim under r 37(1) should only be exercised in rare circumstances.

18. *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126. As a general principle, cases should not be struck out be struck out under Rule 37 when the central facts are in dispute.

19. *Anyanwu v South Bank Students' Union* [2001] IRLR 305, HL. " … discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases…

20. *Mechkarov v Citibank NA* [2016] ICR 1121:

"(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."

21. *HM Prison Service v Dolby* [2003] IRLR 694, EAT - Even if one or more of the five grounds in r 37(1) is made out, the tribunal must also consider whether to exercise their discretion or make an alternative order. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim or response (or part thereof), order the claim or response (or relevant part) to be amended, or order a deposit to be paid.

Perceived disability

22. *Chief Constable of Norfolk v Coffey CA* [2020] 2 All ER 490: An act done because the employer believes that the employee is disabled, even in fact they are not, may be covered by s.13(1) Equality Act, where the employer acted on the basis that the employee was disabled, even when it was not. *"In a case of perception discrimination what was perceived had to, as a simple matter of logic, have all the features of the protected characteristic as defined in the statute".*

Paragraph 35:

> ***"****The starting-point for the issues raised by these grounds is that it was common ground before us that in a claim of perceived disability discrimination the putative discriminator must believe that all the elements in the statutory definition of disability are present – though it is not necessary that he or she should attach the label 'disability' to them. As Judge Richardson put it succinctly, at para [51] of his judgment:*
>
> *'The answer will not depend on whether the putative discriminator A perceives B to be disabled as a matter of law; in other words, it will not depend on A's knowledge of disability law. It will depend on whether A perceived B to have an impairment with the features which are set out in the legislation.'*

Conclusions

The claim of harassment

23. The Preliminary Hearing Judgement of EJ Brewer concludes that the respondent did not have knowledge of AHD prior to 26 June 2020. The acts of alleged victimisation and harassment are set out at paragraphs 66-67 particulars of claim: putting the claimant on a PIP for 8 weeks from 29 July 2020, during which he alleges he was harassed and encouraged to leave the business.

24. Given this timeline, a PIP process from end-July to 25 September 2020, and given the respondent's acknowledgement in documents that they considered the claimant to be disabled during his employment, taking the claimant's case at its highest it is possible that the respondent perceived the claimant as disabled when they commenced the PIP process.

25. The respondent's argument in summary is that the claimant has not brought a claim of perceived disability discrimination, that this must be alleged as a discrete factual issue for it to be considered; as it has not an allegation that has been made, the tribunal has no jurisdiction to hear it.

26. Briefly during the hearing and carefully thereafter I read the *Coffey* Court of Appeal and EAT judgments. The CoA sets out a short narrative at paragraph 26:

> "It was the Claimant's original case that she was disabled within the meaning of the 2010 Act, and she claimed on the basis not only of section 13 but also of sections 15 and 21. However, by the time of the hearing, following a medical report, she accepted that her condition did not amount to a disability and relied only on direct perception discrimination …".

27. I took from this phrase that Court of Appeal appears to have accepted that the claimant originally claimed direct disability discrimination but then applied to amend her claim to one of discrimination by perception – i.e. that the claimant was alleging she was *not* disabled but her employer perceived her to be.

28. The EAT judgment states *"Although the claimant's claim was originally much wider, by the time of the ET hearing it was put fairly and squarely on the basis of perceived disability. It was not alleged that she actually had a disability; her case was that her hearing loss did not have, and was not likely to have, a substantial adverse effect on her ability to carry out day-to-day activities …"* (paragraph 11). I took from this phrase that either the original claim had contained an allegation of perceived disability discrimination, or that an amendment to her claim to include perceived disability discrimination had been accepted at some stage by the Tribunal.

29. The Employment Tribunal judgment is not on the ET Judgments electronic database.

30. I concluded based on this limited information that in *Coffey* a claim of perceived disability discrimination may not have been alleged within the original claim, but that at some point an application to amend her claim was made by Ms Coffey, to that of a claim of perceived disability discrimination, and at some point this application had been accepted at a tribunal hearing.

31. In this claim, the allegation is the claimant was disabled, and the harassment was related to this "*relevant protected characteristic".* This is very different from an allegation that an employer suspects a claimant may be disabled, whether or not they were disabled, and harasses them as a result.

32. I concluded that the claimant has never alleged that the respondent discriminated against him on the basis of a perceived disability, his claim is and always has been he was at the material time disabled. Because a claim of perceived disability discrimination has not been brought, and there has been no application to amend his claim, the claim of harassment cannot succeed, because the allegation is that he was disabled when he was not. The allegation of disability-related harassment is struck out.

The claim of victimisation

33. The act of victimisation alleged is commencing the PIP process. I took this allegation to mean the operation of the PIP was an act of victimisation from end July 2020 which continued until the PIP process ended on 25 September 2020. The claim form was issued 15 September 2021. There is no suggestion within the claim form that this an allegation of a detriment continuing past 25 September 2020.

34. Had the other allegations of continuing disability discrimination not been struck-out at a previous Preliminary Hearing, I would have allowed this claim to proceed. As it stands, this is the sole remaining free-standing claim of discrimination about events which ended a year before the claim was issued. It is therefore out of time.

35. It is not my role to consider whether time should be extended on a just and equitable basis. It is my role to determine whether any such argument stands any reasonable prosects of success, such that the victimisation claim should not be struck out or a deposit order not made.

36. I determined that any argument that it would be just and equitable to extend time is very unlikely indeed to succeed. The reason - the only realistic argument which could be made on the facts of this case is as follows: the claimant was under a mistaken belief that he was disabled; he was under a mistaken belief that disability discrimination detriments were continuing; he therefore mistakenly believed his claims were in time.

37. I concluded that in circumstances where the claimant wrongly believes he is disabled and brings various continuing discrimination claims which turn out to be misconceived and are struck out because he is not disabled, it is highly unlikely that a tribunal would find that it would be just and equitable to allow a now historical 'rump' claim to proceed.

38. I considered that the claimant's likely 'time 'argument stands no reasonable prosects of success, and that the victimisation claim should be struck-out.

Unfair dismissal and wrongful dismissal

39. The respondent posits alternative arguments – there were no breaches, or the claimant affirmed them. The respondent also concedes that in principle some of the allegations if proven may be capable of amounting to breaches of contract. The claimant says he affirmed nothing and the cumulative effect of the breaches as set out in his dismissal letter must be considered.

40. Having read the dismissal letter, I accepted that taking each breach in isolation was the wrong approach, that just because the claimant may have accepted a state of affairs in 2019, it is arguable whether or not he continued to do so if further adverse incidents which he considered amounted to continuing breaches were accumulating. At its highest the claimant's case on constructive dismissal

is arguable if he is able to prove that all the events occurred and there was, for example, continuing ostracism.

41. I therefore did not make the orders sought by the respondent in respect of the claims of unfair dismissal and wrongful dismissal, which can proceed to the full merits hearing.

Employment Judge M Emery
Date: 14 July 2023