



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Dr M Wiseman**

**v**

**KIWA Ltd**

**Heard at:**

Watford

**On:** 24 April 2023

**Before:**

Employment Judge R Lewis

## **Appearances**

**For the Claimant:**

In person

**For the Respondent:**

Ms J Duane, counsel

## **JUDGMENT**

1. The claimant was at the material time a person to whom s.6 Equality Act 2010 applied, and the tribunal has jurisdiction to hear his claims of disability discrimination.

## **RESERVED JUDGMENT**

2. The claimant's claims of harassment under s.26 Equality Act 2010 are struck out in accordance with Rule 37 of the Employment Tribunal Rules (no reasonable prospect of success).
3. The respondent's applications to strike out part of the claim of a failure to make reasonable adjustments, alternatively for a deposit order in relation to the same, are refused.
4. The claimant's applications to strike out all or part of the response are refused.

## **REASONS**

1. These reasons, which follow from Judgment given in the public domain, and therefore will be placed online, are limited to the points on which judgment was given. A separate case management order, which is not a document in the public domain, and will therefore not be posted online, should be read in conjunction with this document.
2. This was the second preliminary hearing which I had directed at the first preliminary hearing in November 2022. I told the parties at the start of this hearing that it was a matter of the coincidence of random listing that this case had returned to me for hearing.
3. The parties had agreed a bundle of over 320 pages. The claimant adopted his impact statement on oath and was briefly cross examined.

4. I gave judgment on the s.6 issue at the start of the afternoon session. Neither party applied for written reasons.
5. I then dealt at some length with the list of issues. That matter is dealt with in the separate case management order.
6. I then heard from both sides applications to strike out, and from Ms Duane, an application for a deposit order in the alternative. As I reserved judgment on those applications, I now set out my reasoning.

The first harassment claim

7. The list of issues available to me contained two claims of harassment. The first was a complaint that on 25 November 2021.  
  
*“Ms Sophie Everard putting pressure on the claimant to return to work on 25.11.2021, when the claimant was self-certified as unfit to work with mental health disturbance, anxiety and distress, notified to Ms Everard on 24.11.2021.”*
8. I heard no evidence on oath on the point, and I had no contemporaneous documents. Ms Duane read to me the relevant portion of an email sent by Ms Everard to the claimant on 25 November 2021. The claimant confirmed that that was the document which he regarded as constituting the act of harassment.
9. I understood the position to be that the claimant had on Monday 22 November 2021 returned to work after a period of absence. On the afternoon of 24 November he had certificated himself sick with immediate effect and gone home.
10. Put neutrally, the specific issue at work at the time related to the supervision and line management system to which the claimant would return. The claimant did not wish to return to work with his existing line management. There was disagreement as to whether the line management structure could be reconfigured temporarily or on a longer-term basis. The claimant was, at the time, and remained at this hearing, convinced that a return to work within existing line management structures would cause significant damage to his mental health.
11. This complaint of harassment related in its entirety to Ms Everard’s email of 25 November. In it, she encouraged the claimant to return to work, and commented that a return was a necessary pre-condition to his reintegration into the workforce. Her language was polite, measured and professional. It did not express or imply any misuse of authority, or contain a threat of any sanction. It pointed out that a return would be in the best interests of both sides, notably that of the claimant.
12. The claimant submitted that in the state of his mental health at the time, he perceived an instruction to return to work as an undue, unreasonable and inappropriate form of pressure, which he feared would damage his health. Ms Duane’s point was that the email was not just a management matter, it was management which was proactive and supportive. She submitted, correctly, that the claimant’s perception was a factor, but that the tribunal was required to consider the claimant’s reaction to the email objectively.

13. This claim seems to me to have no reasonable prospect of success, because it is entirely predicated on the claimant's perception. The claimant's perception and interpretation of Ms Everard's email appeared to me objectively unreasonable. While the email was written at a time when the claimant was self-certificated, I also do not necessarily accept that it was "related to disability" for the purposes of s.26.
14. I add for the sake of completeness that the claimant's absence was medically certificated on 30 November, and that he remained on certificated sick leave until his dismissal on 15 December.
15. For those reasons, I find that this discrete claim has no reasonable prospect of success. It is not in the interests of justice for it to be heard. I strike it out in accordance with Rule 37.

The second harassment claim

16. The claimant's second and final claim of harassment was explained as follows: During the claimant's sick leave, and without his involvement, he was dismissed. The stated reason (the factual basis of which the claimant does not accept) was a breakdown in working relationships. It was common ground that the claimant was informed of his immediate summary dismissal by email on 15 December, and common ground that the email instructed the claimant to return the respondent's property (notably a laptop and phone) by 17 December. The claimant asked for more time to comply with this instruction, and in the event returned the equipment, by consent, by early January.
17. The claimant clarified that the claim of harassment relates exclusively to the instruction to return equipment within 48 hours. He takes no issue in principle with the instruction to return property; his issue is with the timescale he was given, in light of a number of factors: his mental health at the time; the fact that he and his wife were recovering from covid and that he wished to de-sanitise the equipment before returning it; a possible wish to check the contents of the laptop before returning it; and pressures on postal and delivery services at that time of year.
18. An instruction to a dismissed employee to return company equipment is an everyday routine management matter. I can see no prospect of the claimant showing that it was related to disability, and no prospect of the claimant showing that his response to the instruction was objectively reasonable. The claimant has, in this claim, as elsewhere, based his claim exclusively on his perception and interpretation of events, which I do not agree were reasonable or is the correct legal test. The claim has no reasonable prospect of success and is struck out.

The reasonable adjustment claim

19. Ms Duane applied for strike out of the claim for reasonable adjustments which was based on the PCP of "requiring employees to report to their line manager and supervisor".
20. She submitted that the claimant had a long working career of reporting to line managers, and could not demonstrate that that requirement placed him at substantial disadvantage. It is, furthermore, the most everyday and banal

requirement in any working system to work within the respondent's systems and structures.

21. The reasonable adjustment claim related to the claimant's perception of the working relationship between himself and the line manager: I use that form of words because the claimant, as I told him at this hearing, repeatedly used the word "bullying" to describe the manager's conduct. I pointed out to the claimant first that that is not a term of law; secondly that it is subjective, imprecise and undefined; and thirdly and most importantly, that he repeatedly used the word as if it were a proven fact, which it is not. It remains to be proved if relevant.
22. It seemed to me that the factual matrix which related to the claimant's interaction with line management lay at the heart of this claim and was fact sensitive. It did not seem to me appropriate for a strike out or deposit order, although a number of Ms Duane's points sounded well made. The claimant should not interpret my decision as stating or implying that this part of the claim has merits.

### The response

23. The claimant applied for strike out of parts of the response.
24. He applied first for strikeout of the response to the claims of harassment. I do not need to deal with that, as the claims for harassment have themselves been struck out.
25. The claimant applied secondly for strike out of the response to the claim of automatic unfair dismissal on the grounds, as he said forcefully, that the defences are demonstrably untrue as can be shown by evidence.
26. I remind the claimant of what I wrote at paragraph 12 of my order of last November:

“...the tribunal will not strike out a response simply by a paper assessment without hearing evidence unless the case which has been put is so poor as to be fanciful.”
27. The reason for the claimant's dismissal, and whether it has been accurately set out in writing by the respondent, is part of a primary factual matrix to be decided on full evidence by a full tribunal. It is not appropriate for strike out on the basis of the claimant's interpretation of the evidence, and the application is refused. I add, for the sake of completeness, that the claimant's application to strike out the defence to harassment was based on the same reasoning, and that if the harassment claim had not been struck out, the application to strike out the response would have been refused for the same reason.
28. Finally, the claimant applied for strike out of the amended grounds of resistance on the grounds that they appear to go further than his interpretation of my order of November. I do not agree that that is the case, and I do not agree that strike out would be the appropriate sanction in that event. The appropriate sanction would be to refuse leave to amend. However, as I granted leave to amend in November, I deal with the matter in the separate case management order.

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Employment Judge R Lewis

Date: 10 May 2023

Sent to the parties on: 12 May 2023

For the Tribunal Office