EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr N Ollard	v	Boston Ltd

Heard at: Watford On: 31 October 2022
Before: Employment Judge George

Appearances
For the Claimant: Mr M Ollard, father
For the Respondent: Mr J Hitchens, counsel

JUDGMENT

The claims have no reasonable prospects of success. They are struck out under rule 37(1)(a) of the Employment Tribunal Rules of Procedure Rules 2013.

REASONS

1. At this preliminary hearing in public I made orders that the claimant had not failed to comply with the unless order sent to the parties on 30 August 2022 and as to the scope of the issues as set out in the claim form. I refused the claimant's application to amend his claim for reasons set out in the separate record of a preliminary hearing to which I refer but which I do not repeat. At the hearing I had the benefit of an electronic file of documents of 81 pages. Page numbers in these reasons refer to that electronic file.

2. I then needed to consider the respondent's application for an Order under Rule 37 of the Employment Tribunals Rules of Procedure 2013 to strike out the disability discrimination claim on the basis that it has no reasonable prospects of success. This was dispose of the claim in its entirety because the claimant withdrew his unfair dismissal claim at the preliminary hearing on 10 August 2022 because he did not have sufficient qualifying service (para.29 on page 39).

3. The Employment Tribunals (Rules of Procedure) Regulations 2013 Sch.1 include the following:
"37.— Striking out
(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."

4. The power to strike out a claim under that Rule is one that should be exercised sparingly, particularly in a case such as the present where there are allegations of discrimination. That has been emphasised in a number of authorities, notably in the well-known case of Anyanwu v South Bank University [2001] IRLR 305 HL where it was emphasised that the power should only be used in the plainest and most obvious of cases.

> "Discrimination cases are generally fact sensitive and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on its merits or de-merits of its particular factors is a matter of high public interest." (per Lord Steyn para.24)

5. Having said that, where it is plain that a discrimination claim has no reasonable prospects of success applying that high threshold appropriately the Tribunal has the power and may use the power to strike out a claim. I also quote from paragraph 39 of Anyanwu where Lord Hope said:

> "I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospects of succeeding at trial, the time and resources of the Employment Tribunal ought not to be taken up by having to hear evidence in cases that are bound to fail."

6. That is the legal background to the decision that I have to make at this point. I have to take the case at its highest and for that reason I do not give weight to the arguments of Mr Hitchens about the merits generally but focus on key elements of the complaint that the claimant will have to establish.

7. The question I need to consider is whether there are no reasonable prospects of the existing direct discrimination claim succeeding. That claim is the allegation that the claimant was dismissed because of his wrist injury and that that was disability discrimination contrary to s.13 EQA.

8. I do not think it is right to find that there has been a formal concession by the claimant that his arm injury was not a disability. I have re-checked my notes and at the last hearing, although the claimant on occasion said that he was relying on his mental health he did also say he was relying on both that an his wrist injury. Given that his comments were equivocal, it would be wrong to hold a litigant in person bound by a statement that he relied on a mental health condition as being a concession that he was not relying upon a condition set out in the claim form. However a direct disability discrimination

claim under s.13 EQA depends upon the claimant being able to show that he had the disability; that is the way this particular claim is argued.

9. I therefore need to consider whether there are no reasonable prospects of him proving that the wrist injury caused substantial adverse effects and that those were long term in the sense that they were likely to last for at least 12 months or were likely to last for the rest of his life. They clearly had not lasted at 12 months as at 12 November when he was dismissed.

10. The claimant provided some information about this alleged disability in July 2022 in response to an Order and also provided an X-ray. I can see that a metal plate has been inserted into his wrist. It may be that he is able to establish that at the date of dismissal he had more than trivial adverse effects of the wrist injury because it seems that, as at that date, he was unable to lift or had been advised not to lift or to bear weights when his arm was in a sling. That is evidenced by the risk assessment that I have been referred to (page 75).

11. The Court of Appeal's provided a summary of the relevant law on the definition of disability in All Answers Ltd v W [2021] EWCA Civ 606, paras 24 to 26:

> "24. A person has a disability within the meaning of section 6 of the 2010 Act if he or she (1) has a physical or mental impairment which has (2) a substantial and (3) long term adverse effect on that person's ability to carry out day to day activities….
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> 25. Paragraph 2(1)(b) of Schedule 1 to the 2010 Act defines long term, so far as material to this case, as "likely to last at least 12 months". "Likely" in this context means "could well happen": see Boyle v SCA Packaging Ltd. [2009] UKHL 37, [2009] ICR 1056, per Lord Hope at paragraph 4, and Lord Rodger at paragraph 42, Baroness Hale at paragraphs 70 to 72 (with whom Lord Neuberger agreed at paragraph 81), Lord Brown at paragraph 77.
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> 26. The question, therefore, is whether, as at the time of the alleged discriminatory acts, the effect of an impairment is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. A tribunal is making an assessment, or prediction, as at the date of the alleged discrimination, as to whether the effect of an impairment was likely to last at least 12 months from that date. The tribunal is not entitled to have regard to events occurring after the date of the alleged discrimination to determine whether the effect did (or did not) last for 12 months. That is what the Court of Appeal decided in McDougall v Richmond Adult Community College: see per Pill LJ (with whom Sedley LJ agreed) at paragraphs 22 to 25 and Rimer LJ at paragraphs 30-35. That case involved the question of whether the effect of an impairment was likely to recur within the meaning of the predecessor to paragraph 2(2) of Schedule 1 to the 2010 Act. The same analysis must, however, apply to the interpretation of the phrase "likely to last at least 12 months" in paragraph 2(1)(b) of the Schedule. I note that that interpretation is consistent with paragraph C4 of the guidance issued by the Secretary of State under section 6(5) of the 2010 Act which states that in assessing the likelihood of an effect lasting for 12 months, "account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood".

12. A Tribunal or Judge tasked with a final decision on whether the claimant was disabled at the date of dismissal would thus be precluded from looking at evidence that postdated the period concerned. They would be precluded from looking at what actually happened and would be looking at the evidence as at the point of dismissal to see whether it was likely that the effects would continue. That is why the fit-note that Mr Hitchens referred to is relevant. I accept that as a matter of fact the claimant was referred regularly to the GP but the fit-note at page 79 does provide some evidence that the GP thought that he might be sufficiently improved by four weeks to be fit for work.

13. That is not the same as saying there were no substantial adverse effects. It may well have been reviewed but it is some evidence that, as at the relevant point in time, a medical qualified professional anticipated that relatively short reviews of a month were sensible rather than it being clear that it was likely to last longer than that. That reinforces the view that I have formed that, taking this at its height, it is extremely unlikely that the claimant would be able to show that any adverse effects of the wrist injury could well have lasted for a further eleven months from the date of his dismissal. It is even more extremely unlikely, that he would be able to show that the respondent knew enough about it that they would have had knowledge of disability. That also would be necessary before he could show matters which tended to show that the reason for dismissal was the wrist injury itself.

14. Those factors cause me unusually to reach the conclusion, and it is not a conclusion I reach easily in a discrimination case, that there are no reasonable prospects of success. The prospects of showing that the wrist injury amounted to a disability as at that point in time seem to me to be fanciful.

15. That being the case I go on to consider whether I should strike the claim out. It does seem to me that it is not in accordance with the interests of justice that a claim that has no reasonable prospects of success should continue. This claim should not take up further Tribunal time and costs both of the public and of the respondent. Bearing in mind Lord Hope's comments that I have cited above, I have decided to strike out the claim on the basis that it has no reasonable prospects of success.

16. I do not need to go onto consider the alternative application for the claimant to pay a deposit as a condition of being permitted to pursue his claim.

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Employment Judge George

Date: …5 February 2023 ……..

Sent to the parties on: 7th February 2023

GDJ
For the Tribunal Office

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