EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr K Hirani Institute and Faculty of Actuaries and others

PRELIMINARY HEARING

HELD AT: London Central **ON:** 20 February 2017

EMPLOYMENT JUDGE: Dr S J Auerbach

Appearances

For the Claimant: in person

For the Respondent: Mr S Miller, solicitor-advocate

JUDGMENT

1 The Respondents' strike out application on the basis of the application of res judicata succeeds in respect of those complaints (but only those complaints) identified as struck out in paragraphs 26 – 31 of the reasons below. Otherwise it fails.

2 The Respondents' strike out application arising from the Claimant's email of 19 September 2016, and subsequent events relating to it, fails.

REASONS

Introduction

1 This litigation began in 2013. There have been a number of preliminary hearings (PHs). The background can be gleaned from the minutes and decisions emerging from them and I will not repeat it here. I refer, however, in particular, to the minute of the PH that took place on 30 June 2016, at which the matter was listed for a full merits hearing in May 2017; and to the Judgment, orders and reasons emerging from the further three-day PH which I conducted on 15 -17 November 2016.

2 On 1 December 2016 the Respondent's solicitors wrote to the Tribunal and the Claimant. Their letter included two strike-out applications. The subsequent correspondence is voluminous, but I can summarise the main points as follows.

3 During the course of December 2016 and January 2017 the Claimant emailed at regular intervals indicating that he needed more time to complete his responses, and either the Respondent agreed and/or I in any event allowed him more time. This was taking account of the fact that he is a litigant in person, his disabilities, and of a bereavement. On 30 January, in my absence, a further and final extension was given to the Claimant by REJ Potter, to 1 February 2017.

4 During the period the Claimant tabled (a) on 21 December 2016 his response to the first strike-out application; (b) on 24 January 2017 an additional submission in response to the first application, and a submission in response to the second application, but indicating that he also wished to add further to it; and (c) on 1 February 2017, further material in response to the second strike out application.

5 The Respondents' solicitors were permitted to put in a written response to the Claimant's documents, which they did on 10 February 2017.

6 A party facing a strike out application has the right to request a hearing. The Claimant indicated that he wished to have one and the present hearing was listed. Both the Claimant and the Respondent brought bundles to the hearing, and Mr Miller a bundle of authorities. At the same hearing I dealt also with certain other matters. The Tribunal has written separately to the parties about that. My decision in relation to the strike-out applications was reserved, and is now provided.

7 The written material presented to the Tribunal, and oral arguments, in relation to these two applications, has been very extensive. I have considered it all. I do not attempt to reproduce, and address separately, every last strand of the arguments. It would be neither necessary nor proportionate to do so. I focus on what seemed to me to be the key points, and which have been decisive of the outcomes.

First Strike-Out Application

8 Arising from a PH held on 21 and 22 January 2014, EJ Clark gave a reserved decision, promulgated on 4 February 2014, including that "[t]he Claimant's complaint about the allocated time to take the examination CA2 and the Respondent's failure to split it over two days is about the application of competence standards to him."

9 The significance of EJ Clark's ruling arises from section 53(7) Equality Act 2010. This provides that the application by a qualifications body of a competence standard to a disabled person is not disability discrimination unless it is discrimination by virtue of section 19. So, in respect of a competence standard, the only type of discrimination that can be alleged is indirect discrimination.

10 At the PH in November 2016 the Claimant applied to be permitted to reopen Judge Clark's decision. That application was refused. Written reasons were promulgated on 8 December 2016. I also directed the Respondents to provide the Claimant with a list of those claims which they say fall away as a result of the judgment of EJ Clark, and the Claimant to reply stating whether he agreed that list, or identifying the claims in respect of which he disagreed. The Respondents' solicitors duly tabled their list, and the Claimant replied to the effect that he disagreed in all cases. The Respondents' solicitors then made their first strike-out application, being for the claims which they had identified to be dismissed, relying on the res judicata principle.

Decision on First Strike-Out Application

11 By reference to the paragraph numbers of the October 2016 edition of the list of issues, the claims which the Respondents say should be struck out, in view of EJ Clark's decision, are as follows: 4.5, 4.6, 4.17.4, 5.3, 5.14.6, 5.15, 6.11.1, 6.11.3, 7.7, 7.23 and 11.1.13.

12 Breaking it down, the following claims are all of direct discrimination (section 13 of the 2010 Act).

13 Claim 4.5 is of discrimination by the First Respondent reducing or restricting the Claimant's extra time allowance for the CA2 exam from 40% to 25%.

14 Claim 4.6 is that, in order to reconsider its decision, the First Respondent required the Claimant to arrange for an external health professional to review past CA2 exam papers and provide the First Respondent with a report explaining his case that he needed additional time.

15 Claim 4.17.4 asserts that the Third Respondent is liable in respect of a letter of 17 September 2013 suggesting that the Claimant take the CA2 exam over 11 hours and 12 minutes in one day and in its references to the CA1 exam.

16 The following claims are all of discrimination arising from disability (section 15 of the 2010 Act).

17 Claim 5.3 is, factually, of the same treatment as claim 4.5. Claim 5.14.6 relates to the same letter as claim 4.17.4. Claim 5.15 relates to the same factual allegation as claim 4.6.

18 The following claims are of indirect discrimination (section 19).

19 Claim 6.11.1 relates to the same matter as claim 4.5. Claim 6.11.3 relates to requiring the CA2 exam to be completed in 9 hours split over two days.

20 The following claims are of failure to comply with the duty of reasonable adjustment.

21 Claim 7.7 relates to exams generally since 2009 and to a claimed policy of not allowing sufficient reading time and failing to provide the Claimant with sufficient reading time in exams. Claim 7.23 relates to the CA2 exam and the same matter as claim 4.5. Finally, claim 11.1.13 relates to an alleged discriminatory rule (section 145(2)) by way of ring-fencing the CA2 exam with a maximum of 25% extra time.

22 In principle, the effect of EJ Clark's decision is that any discrimination claim, other than one of indirect discrimination, which relates to the amount of time allowed to sit the CA2 exam (whether in one or more sessions) should be struck out: the issue of jurisdiction has been adjudicated, in this litigation, between these parties. The Claimant argues that EJ Clark's decision only applies to one "complaint", in the singular. But its effect, in substance, applies to all complaints (other than of indirect discrimination) which relate to the time allowed to sit that particular exam, and/or the failure to split it over two days. I consider this to be fairly described as an application of the res judicata principle; but, in any event, all such complaints would fall to be struck out as having no reasonable prospect of success.

23 The Claimant argues that the impact of EJ Clark's decision is confined to the CA2 exam as it stood prior to 31 July 2013, and does not bite in relation to his complaints related to that exam post that date. He asserts that the Respondents proposed or contemplated changes to it, in the autumn of 2013. He accepts that he did not apply to sit that exam after 2013, but says that he still has locus to challenge a discriminatory rule. He says that his complaints in relation to CA2 after July 2013 are not about the time allowed to take CA2, nor about not splitting it over two days.

24 It is not suggested that there has been any change in the CA2 exam, whether mooted or implemented, other than in relation to the time allowed to sit it, and

whether to spread it over more than one day. There is therefore no other kind of change which might make EJ Clark's reasoning no longer applicable to it, in respect of complaints relating to the period after June 2013. However, I do agree with the Claimant that, for the purposes of res judicata, the writ of EJ Clark's decision only runs *insofar as* the given complaint *is*, in fact, one about the time allocated to the CA2 exam or a failure to split it over two days (other than a section 19 complaint).

25 Applying the foregoing considerations, I turn, then, to consider each of the above complaints in turn.

26 Claims 4.5 and 5.3 and 7.23 relate to the amount of time required to sit the CA2 exam, and are therefore struck out.

27 Claim 4.6 are 5.15 are connected to the CA2 exam, but the alleged treatment complained of is not, itself, a matter of time allocation. They are therefore not struck out.

28 Claim 4.17.4 and 5.14.6 are, in relation to the CA2 exam, about time allocation. In so far as they relate to that exam, they are therefore struck out. In so far as they relate to the CA1 exam, Mr Miller accepted at the hearing that they should not be struck out, and I decline to do so.

29 EJ Clark's decision does not bite on claim 6.11.1 nor claim 6.11.3, as they are both of indirect discrimination. In their reply to the Claimant's objections to this application, the Respondents' solicitors conceded that they should not be struck out, and I decline to do so.

30 Claim 7.7, on its face, applies to all exams. In so far as it applies to exams other than CA2, Mr Miller accepted at the hearing that I should not strike it out, and I decline to do so. Insofar as it is about the CA2 exam, it is about the time allocated to it, and it is struck out.

31 Claim 11.1.13 relates to time allocation for the CA2 exam. The section relied upon makes a rule unenforceable insofar as it relates to treatment prohibited by the 2010 Act. In so far as such treatment is said to amount to indirect discrimination, this claim is not struck out. Otherwise, it is struck out.

Second Strike Out Application

32 The basis of the second application is an email that the Claimant sent to the Respondents' solicitors on 19 September 2016. At that time the parties were working on the list of issues. In a marked-up version attached to that email, the Claimant struck through a number of matters, with annotations to the effect that they were withdrawn.

33 In section 11 of their skeleton argument for the November 2016 PH the Respondents' solicitors listed those claims which they understood had been withdrawn. However, the Claimant had not actually communicated any such withdrawal to the Tribunal, and, although he confirmed at that PH that *certain* matters were indeed withdrawn, in relation to others he wished to consider his position further.

34 I accordingly directed that the Claimant set out in writing which of the claims identified in the Respondents' solicitors' skeleton argument, which had yet to be withdrawn, he now also withdrew. The Claimant complied with that order by an email of 28 November 2016. There he made certain further withdrawals but identified the following claims as *not* withdrawn. Using the numbering in the Respondents' skeleton, they are: 11.1.2.2, 11.1.2.3, 11.1.3.1, 11.1.4.1-3, and 11.1.5.1 – 9.

35 Drawing on the Respondents' skeleton these can be summarised as:

(a) Alleged indirect discrimination and failure to comply with the duty of reasonable adjustment by failure to provide disability awareness training;
(b) Failure to comply with the duty of reasonable adjustment by supplementing the written exam with a verbal assessment;
(c) Failure to comply with that duty by requiring students to suggest amendments; and
(d) Nine distinct claims of victimisation.

36 The Respondents' solicitors then indicated that they were likely to apply for those claims to be struck out, but sought, first, an explanation from the Claimant as to his change of stance. The Claimant's response was to ask who was the regulator of the lawyers concerned.

37 The Respondents' solicitors say that the Claimant has unexpectedly and without reason departed from his stance in the 19 September 2016 email, and that this prejudiced them because they were not able to raise these matters as part of their res judicata and section 53-scope challenges at the November 2016 PH. They submit that the Claimant's conduct in this regard is unreasonable or vexatious and/or the claims in question have not been actively pursued.

38 The Claimant says that he accidentally sent the wrong version of the list of issues to the Respondents' solicitors on 19 September 2016; and notes that he never communicated a withdrawal to the Tribunal. He says that he did not realise his error until he read the Respondents' skeleton argument for the November hearing.

39 The Claimant says that it is irrelevant whether he was in receipt of legal advice, as this cannot affect whether the claims were withdrawn. He says it was unrealistic and unreasonable of the Respondents to expect him not to change his

position, as the Tribunal gave him time to consider his position after the November PH. Also, he has maintained claims under sections 110 – 112, parasitic upon the claims in question, so the Respondents cannot have expected these related claims to be withdrawn.

40 The Claimant complains that the Respondents have bullied him and used delaying tactics. He says that his email raising who regulates them was a proportionate response to feeling bullied. It is not part of the conduct of the litigation. It is not vexatious and has not made a fair trial impossible.

41 The Claimant says the Respondents are not prejudiced as the Tribunal would likely have deferred the issue to the main hearing in any event; and they would not be facing the claims had they not discriminated against him in the first place.

42 The Claimant says it is not vexatious to pursue claims described in communications between the parties as withdrawn when there was no communication of a withdrawal to the Tribunal. He relies on the well-known authorities cautioning the Tribunal in relation to the power to strike out where the claims are of discrimination.

43 The Claimant says that the claims *have* been actively pursued. He referred to them in his skeleton argument for the November PH; and has since confirmed that they are maintained.

Decision on Second Strike Out Application

44 I consider that there are two key aspects which are decisive of the outcome of this application. The first is that it is a well-established principle that a withdrawal is not effective unless or until it is communicated to the Tribunal. Mr Miller accepted at the hearing that his firm was familiar with this at the time. The Respondents' principal case, in short, however, is that, by tabling this document, the Claimant created a legitimate expectation that he would withdraw the complaints in question, on which they relied.

45 However, the Respondents' solicitors were cognisant of the fact that the 19 September 2016 email had not been copied to the Tribunal, nor did they believe that any separate communication of withdrawal had (yet) been sent by the Claimant to the Tribunal. Mr Miller therefore accepted that they could not be sure that the Claimant had, as it were, passed a point of no return in this respect, unless or until they had confirmation that he had indeed communicated a withdrawal to the Tribunal.

46 The second aspect concerns *why* the Claimant referred to withdrawal but did not then do so. He says that Ms Platt was only able to assist him to a limited extent, that he had various versions of the draft list on his desktop, and that he accidentally sent the wrong one. He did not notice his mistake when he got the next iteration of

the list of issues (on which the amendments removing these claims had been electronically accepted) because of its sheer size, his disability and being a litigant in person. He raised it as soon as he realised it. Mr Miller challenged these assertions.

47 Even if I were to conclude that the Claimant had, when he sent the 19 September 2016 email, not made a mistake, but simply later changed his mind, I would not have regarded that as amounting to sufficient reason to treat his conduct as unreasonable or vexatious, justifying a strike out of these claims, given what I have said about the first aspect. But in any event I do not find sufficient basis to conclude that this was *not* a mistake on his part.

48 Bearing in mind his disabled status and status as a litigant in person, I do not regard the Claimant's raising of the issue of the regulator as vexatious conduct warranting a strike out. I do not, therefore, need to adjudicate the Claimant's counter-allegations of bad conduct on the part of the Respondents' solicitors. Always at the hearings before me, and mostly in the correspondence, the exchanges on both sides in this long-running, difficult and hard-fought litigation have been courteous; and I encouraged both parties to maintain that approach, as we enter the last stages of preparation for trial.

49 Finally, the separate argument that there has been a failure actively to pursue the claims in question, such as would justify a strike out, was not pursued with much vigour; and in light of all the foregoing, I do not consider that it provides any sufficient independent support for this application.

50 The second strike out application is therefore refused.

Employment Judge Auerbach
21 February 2017