EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: S/4100176/17 & S/4100276/17 Held at Aberdeen on 3 May 2017

Employment Judge: Mr N M Hosie (sitting alone)

Miss Tegwen A Northam	Claimant Represented by: Mr M Gachuba
Atkins Limited	1st Respondent Represented by: Mr C Graham - Solicitor
Nicola Gregor c/o Atkins Ltd	2nd Respondent Represented by: Mr C Graham – Solicitor
Mario Profeta c/o Atkins Ltd	3rd Respondent Represented by: Mr C Graham – Solicitor
Jodina Rigg c/o Atkins Ltd	4th Respondent Represented by: Mr C Graham – Solicitor
Kealie Ahmad c/o Atkins Ltd	5th Respondent Represented by: Mr C Graham – Solicitor

ETZ4 (WR)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that both claims are struck out in terms of Regulations 37(1)(a) and (b) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

Introduction

1. These two claims came before me by way of a Preliminary Hearing to consider an application by the respondents' solicitor for a "Strike-Out" of both claims in terms of Regulation 37 in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure") and, in particular, 37(1)(a) and (b) which are in the following terms: -

> "***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.*"

2. In the alternative, the respondents' solicitor sought a "Deposit Order" in terms of Regulation 39, on the grounds that the claims had "*little reasonable prospect of success*".

3. The application was opposed by the claimant's representative.

4. Both parties' representatives spoke to written submissions. These are referred to for their terms.

5. The two claims with which I was concerned were related to two other claims which had been submitted by the claimant's representative on behalf of Miss Northam, namely Case Number 4112628/15 which was submitted on 29 September 2015 ("the First Claim") and Case Number 4100680/17 ("the Fourth Claim") which was submitted on 20 April 2017.

6. Two Bundles of documentary productions were lodged for the Preliminary Hearing by the respondents' solicitor. One contained the pleadings in all four cases, Judgments, correspondence and associated documents ("R1"). The other contained letters, emails, medical reports and associated documents ("R2") The claimant's representative also referred to a Bundle of documents which he had lodged for the First Claim ("C") and "Case Law" documents (C2").

Respondents' submissions

7. Helpfully, the respondents' solicitor set out in his written submissions (his "Skeleton Argument") the background and history of these four related claims, which I was satisfied was reasonably accurate: -

> "*The First Respondent is a multi-disciplinary Design Engineering Consultancy. The respondent employed the claimant on 12 March 2007 as an Engineer within the Oil & Gas business. The Second to Fifth Respondents are employees of the First Respondent.*
>
> *The Claimant's duties include producing computer models of engineering projects to be delivered by the First Respondent and producing reports regarding the design and its ability to withstand any natural or inherent stress factors.*
>
> *From October 2015, onwards the Claimant has been certified unfit for work. She suffers from repetitive strain injury in her right arm, migraines and chronic pain syndromes. The Claimant is and remains unable to return to work. Her most recent sick note of 14 April 2017 signs her off for a further 28 days* (R2/52)*.*
>
> *On 29 September 2015, the Claimant submitted a claim against the First Respondent in the Aberdeen Employment Tribunal (Case Number 4112628/2015) ("the First Claim").*
>
> *The Claim presented on 29 September 2015 was 77 pages long and did not particularise the Claimant's factual or legal complaints clearly (R1/1). The First Claim provided an extended factual account with no (or no discernable) connection to a series of specific, legal claims.*
>
> *The Respondent made an application under Rule 37 of the Tribunal Rules of Procedure and identified 18 Claims which had no reasonable prospect of success. The Respondent's application was heard at a Preliminary Hearing held at Aberdeen on 5 & 6 April, 1 August and 10 October 2016.*
>
> *The Employment Tribunal:*

Struck out 7 of the Claimant's complaints; and Ordered a Deposit be paid in respect of 6 of the Claimant's complaints, which were subsequently struck out due to the Claimant's non-payment.

A Judgment was entered in the Register on 22 December 2016 (R1/8). On 3 January 2017, the Claimant applied for a reconsideration of the Employment Judge Hendry's Judgment. The First Respondent resisted that application in its letter of 6 January 2016 (R1/9).

The Employment Tribunal subsequently dismissed the Claimant's application for reconsideration in its Judgment entered on 1 March 2017 (R1/10, page 310).

What remains of the First Claim are 5 complaints under Section 21 of the Equality Act 2010 complaining of a failure to make reasonable adjustments and specific, clearly understood complaints of direct and indirect discrimination, discrimination arising from disability and victimisation.

The Claimant subsequently brought complaints on 26 January 2017 under Case Number 4100176/2017 (R1/3) ("the Second Claim"); and 27 February 2017 under Case Number 4100276/2017 R1/5) ("the Third Claim") to which this application relates. In summary:

the Claimant relies on a medical report produced by Dr. Khan of Health Management dated 7 December 2016 (R2/11) which recommended adjustments which, the Respondent failed to implement and presumably that such adjustments would facilitate her return to the workplace;

the Claimant objects to the Respondent engaging with Health Management Ltd concerning both the original report and the wider circumstances of her case;

the Claimant also objects to the report of Dr. O'Donnell, the Chief Medical Officer of Health Management Ltd dated 11 January 2017 (R2/13), which confirmed that, having considered the requirements of her job role, the adjustment recommended by Dr, Khan were in fact unlikely to be effective in facilitating the Claimant's return to work.

On 25 April 2017 the Claimant brought a further claim under Case Number 4100680/2017 (R1/7) ("the Fourth Claim"). For the current purposes, the Respondent invites the Employment Tribunal to stay the Fourth Claim pending the outcome of the present application.

Based upon the same factual position advanced (in each case) the Claimant complains of:

Failure to make reasonable adjustments (section 21 Equality Act 2010);
Direct discrimination (section 13 Equality Act 2010);
Indirect discrimination (section 19 Equality Act 2010);
Victimisation (section 27 Equality Act 2010);
Harassment (section 26 Equality Act 2010);

Discrimination arising from disability (section 15 Equality Act 2010);
Inducing contraventions (section 111 Equality Act 2010);
Aiding contraventions (section 112 Equality Act 2010);
Perverting the course of justice."

8. The respondents' solicitor invited me to have regard to all four claims which had been submitted on behalf of the claimant and submitted that they followed the same pattern: the claimant's representative had taken a set of facts and attempted to pursue every possible complaint imaginable.

9. He referred me to the Judgment of EJ Hendry in the First Claim and the "History" which he set out in his reasons (R1/8, page 235): -

"*On the 29 September 2015, the Claimant presented a Claim for disability discrimination. The Claim was 77 pages long and did not particularise the Claimant's factual or legal complaints clearly. It gave an extended factual account of her employment and the difficulty she alleged she had encountered. A Schedule of Loss was submitted totalling £716,609.00. The Claimant was assisted by a friend, Mr Gachuba, who was not a practicing solicitor but who had academic legal qualifications. He had drafted the documents on her behalf.*"

10. The respondents' solicitor submitted that the subsequent three claim forms which had been submitted were in similar terms but the scope had been broadened by including employees of the respondent as additional respondents. He submitted that "*every contravention imaginable is pleaded*".

11. Given the similarities in the pleadings, the respondents' solicitor advised that he was able to rely on the same case law and submissions which he had advanced in relation to the First Claim which were set out in EJ Hendry's Judgment (R1/8, pages 233-268).

12. While acknowledging, with reference to **Balls v. Downham Market High School College [2011] IRLR 217**, that the Tribunal's power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, he submitted that that power should be exercised in relation to the two claims which were the subject-matter of the Preliminary Hearing.

13. He explained that the essence of his submissions was expressed in Para. 2.5 of his Skeleton Argument: -

> "*(Assuming the Claimant is disabled) the Respondent avers that none of the complaints in the second and third claims have any reasonable prospect of success. The complaints advanced are misconceived and have no legal basis. They involve a bare assertion and no more. They are repetitive and rely upon the same essential circumstances.*"

14. He submitted that it was clear that the claims in the two cases with which I was concerned at the Preliminary Hearing, had no reasonable prospect of success.

Failure to Make Reasonable Adjustments - s.20

15. The respondents' solicitor submitted, with reference to s.20 of the Equality Act 2010 ("the 2010 Act"), that the claimant had failed to identify a "provision, criterion or practice" ("a PCP") which applies to the claimant which places her at a substantial disadvantage with persons who are not disabled.

16. However, his principal submission in this regard was that the duty to make reasonable adjustments had not been *"triggered".* That was because the claimant had not been certified as fit to return to work. On 11 January 2017, an independent medical expert, Dr O'Donnell, certified that she was unable to fulfil her contractual working duties (R2/13) and her own G.P. had certified her as unfit to work since October 2015 and continues to do so (R2/46-52).

17. In support of his submission he referred to:

> **The Home Office v. Collins [2005] EWCA Civ 598;**
> **London Underground Ltd v. Vuoto UK EAT 0123/09;**
> **Doran v. Department for Work & Pensions UKEATS/0017/14/SM**

18. He submitted that unless the adjustments would themselves render the employee fit for work, the duty to make reasonable adjustments will not be triggered.

19. The respondents' solicitor also drew to my attention the reference by the claimant's representative in his written submissions to **NCH Scotland v. McHugh UKEATS/0010/06/MT**. However, in that case, the EAT opined that imposing a duty to make reasonable adjustments when the employee concerned is unable to return to work would be "*futile*". The respondents' solicitor submitted, therefore, that that particular case actually supported his position.

Direct Discrimination - s.13

20. It was submitted that this particular complaint also "*failed*" as the claimant had not identified an appropriate comparator, either actual or hypothetical.

21. Further, the *"detriment or unfavourable treatment"* had not been particularised in the claim forms.

Victimisation – s.27

22. The respondents' solicitor submitted that the issue here was one of "*causation*".

23. It is alleged that by challenging the original medical report with reference to a "*working duties document"* (R2/12), the respondent subjected the claimant to a detriment because she had done a protected act, namely the submission of her First Claim.

24. However, so far as causation was concerned, it was submitted that the respondent had no alternative other than to revert to Health Management for more detailed advice and opinion or face the risk of civil proceedings.

25. In support of his submission that the victimisation complaint had no reasonable prospect of success the respondents' solicitor referred to the test to establish causation in **Nagarajan v. London Regional Transport [1999] 1HLR**.

26. He submitted that there was a "*different reason*" why the respondent referred back to Health Management and that was to: *"manage legal risk and ensure compliance with its legal obligations towards the claimant".*

27. Further, and in any event, the detriment or unfavourable treatment was not particularised and not allowing the claimant to return to the workplace cannot amount to either detriment or unfavourable treatment, particularly having regard to the respondent's duty of care at common law.

Harassment – s.26

28. Although unclear as to what exactly was being alleged, it was submitted that:

> "*Neither requesting clarification from Health Management in the context of the Claimant's working duties; nor providing Health Management with information about her contractual working duties; nor communicating the outcome of those enquiries are capable of constituting harassment in the proper factual context.*"

29. The respondents' solicitor also referred me in this regard to the Judgments of 21 December 2016 (R1/8, page 262, Para 87) and 17 February 2017 (R1/10, page 306) in the First Claim in which EJ Hendry explained to the claimant the need to meet the statutory test when making allegations of harassment. Respectively, the Judgments state:

> "*In relation to harassment there is simply no basis for the suggestion that the events complained of violated the Claimant's dignity or created a hostile or intimidating atmosphere. For example, the invoking of the capability process is the exercise of management prerogative. It is not harassment unless there is alleged to be no basis for doing so or bad faith of some sort…...*
>
> *Although the comment might be insensitive that does not meet the statutory test of harassment. The conclusion the Tribunal reached was based on its assessment of what the Claimant says happened and requirements of the law for a successful claim under this head.*"

30. It was submitted, therefore, in light of this that: -

> "*The Claimant cannot now misunderstand the legal position. It is submitted that this claim has no reasonable prospect of success and should be struck out in accordance with Rule 37. Alternatively, the Employment Tribunal is invited to consider whether the Claims have little prospect of success and should be subject to Deposit Orders in accordance with Rule 39.*"

Indirect Discrimination – s.19

31. The respondents' solicitor submitted that this complaint, which related to a "*denial of intranet website, electronic files access and denial IT*", had already been advanced in the First Claim.

32. In any event, it was submitted that the claimant had failed to particularise the PCP relied upon; how that PCP put those who share the claimant's alleged protected characteristic at a particular disadvantage (when compared with others who do not share such characteristic); or demonstrate the existence of disadvantage suffered in the three months proceeding the issue of the second claim when she has not been at work since October 2015.

33. It was also submitted that: -

> "*The Claimant cannot have suffered disadvantage in circumstances where she is not required to access anything because she can neither return to the workplace, nor perform her contractual working duties.*"

Instructing, or causing & Inducing Discrimination – s.111

34. The respondents' solicitor referred to the "statutory exclusion" at s.111(7) and submitted that: -

"*The complaint under s.111 is misconceived in that a relationship between the Respondent(s) and Health Management does not fall into any of the categories listed at Part 5. Discrimination cannot exist in a vacuum and requires the proper statutory context. No. such context exists in the relationship between the respondent(s) and Health Management.*

No requisite authority

S. 111 replicates early provisions replaced by the Equality Act 2010 whereby it is unlawful for one person who has actual or customary authority over another to instruct that person to do any act that is unlawful under the specified parts of anti-discrimination legislation. As a matter of both law and fact, the Respondent has no authority whatsoever over Health Management, which is an independent provider of professional service, regulated by the General Medical Council.

In any event, neither the working duties document provided to Health Management nor the request for clarification following the first medical report can be construed as an instruction, cause or inducement to discriminate."

35. For all these reasons, the respondents' solicitor submitted that the indirect discrimination complaint should be struck out as it had no reasonable prospect of success, or alternatively that the claimant be required to pay a deposit in accordance with Rule 39 on the grounds that the complaint has little prospect of success.

Aiding Discrimination - s.112

36. The respondents' solicitor made the following submissions with regard to this particular complaint:

"*Notwithstanding that the Claimant's complaint is not particularised, it is a complaint against each of the individual Respondents in respect of their respective parts in 'furnishing HM false contractual working duties in an unethical pursuit of a second medical opinion'. The Claimant alleges that in providing Health Management the Respondent(s) a '…knowingly aided a contravention'.*

(As a matter of law and evidence) the Claimant is unable to demonstrate either a contravention or that in providing Health Management with a description of the Claimant's working duties, any one of them 'knowingly' aided a contravention.

> *The Claimant is and will be unable to demonstrate that any of the Respondent(s) knew at the time that discrimination is a probable outcome of their actions (Paragraph 9.28 ECHR Code) or that Health Management was discriminating, about to discriminate or was contemplating discriminating (**Hallam v. Avery [2000] WLR966CA**. Notwithstanding that such discrimination is denied, it would have been impossible for any of the Respondent(s) to possess such knowledge which effectively involves predicting the outcome of an independent medical report. Such an outcome cannot be said to have been within the scope of their knowledge (**Allaway v. Reilley & Another UKEAT [2007]**, both generally and because aiding cannot be unconscious (**Sinclair Roche & Temperley v. Heard [2004] IRLR 763.***
>
> *For the same reasons as related to in paragraph 3.28 to 3.34 above, (as a matter of law and evidence) the Claimant is and will be unable to demonstrate either:*
>
> > *a contravention; or*
> > *that in providing Health Management with a description of the Claimant's working duties, any one of the individual Respondent(s) 'knowingly' aided a contravention."*

Discrimination arising from Disability- s.15

37. It was submitted, once again, that this particular complaint had not been particularised. However, the respondents' solicitor proceeded on the basis of an assumption that the 'something' arising in consequence of the claimant's alleged disability was her absence from the workplace.

38. That being so, it was submitted that the only way in which the first respondent could have avoided the alleged "unfavourable treatment" would have been to disregard the recommendations made in the medical report of 11 January 2017 (R2/13). That would have involved ignoring advice from Dr O'Donnell, the Chief Medical Officer of Health Management, which would have placed the respondent in breach of its duty of care to the claimant and exposed it to the risk of prosecution and/or of civil proceedings.

39. Further, and in any event, it was submitted that advising the claimant that she could not return to work was: "a *proportionate means of achieving a legitimate*

aim" namely, ensuring the claimant's health and safety in the workplace and acting in accordance with independent medical advice is *"proportionate"*.

40. It was submitted, therefore, that this particular complaint had no reasonable prospect of success and should be struck out or alternatively that it had "little reasonable prospect of success" and should be subject to a Deposit Order in accordance with Rule 39.

"Common Law Offence of Perverting the Course of Justice"

41. In the course of the Preliminary Hearing the claimant's representative advised that he wished to withdraw this "complaint".

"Re-Litigated Complaints"

42. The respondents' solicitor referred me to the Employment Tribunal Judgment in the First Claim, which was registered on 22 December (R1/8) and made the following submissions: -

> "*The Claimant's complaints at paragraphs 5 and 6, complaints (iii) to (vi) inclusive, complaint (xi) and complaint (xii) of the Second Claim (and repeated at paragraphs 5 and 6 of the Third Claim) have already been decided in the earlier proceedings where the parties and the issues in both cases are identical, and as such the doctrines of res judicata and issue estoppel apply. It is submitted that:*
>
> > *These complaints be struck out for abuse of process for the reasons set out in paragraphs 10 to 13 of the Response to the Second Claim and paragraph 20 of the Response to the Third Claim; and/or in the alternative; and*
> >
> > *These complaints be struck out as vexatious, on the basis that there had been an earlier decision based on exactly the same facts against the same employer (**Ashmore v. British Coal Corporation [1990] ICR 485***."

"Privileged Material"

43. This related to paragraph 40 of the Third Claim (R1/5) and paragraphs 18 and 90 of the Response (R1/6).

44. However, while this was included in the respondents' Skeleton Argument, the respondents' solicitor advised that he wished to reserve his position in this regard with a view to the issue being addressed at a Case Management Preliminary Hearing once I had issued my Judgment in the present case.

Claimant's Submissions

45. The claimant's representative also lodged written submissions. These are also referred to for their terms. They ran to some 22 pages of very close print and referenced more than 25 cases.

46. Despite my best efforts and even with oral submissions by the claimant's representative, I found it well-nigh impossible to elucidate the points that were being made and understand his position.

47. Accordingly, and having regard to the "overriding objective" in the Rules of Procedure, in the course of the Preliminary Hearing I directed the claimant's representative to respond to each of the numbered paragraphs in "Part 2 – Strike-Out" of the respondents' Skeleton Argument, as this was the only way I felt I could make sense of the claimant's position and deal with matters *"fairly and justly"*.

48. I adjourned the Preliminary Hearing, therefore, to allow the claimant's representative sufficient time to consider an appropriate response and I was even prepared to continue the Hearing to another date to enable him to do so. However, in the course of the day the claimant's representative advised that he had had sufficient time to respond, as I had directed, and I reconvened the Hearing.

Para.2.1 (the numbered paragraphs are those in the respondent's solicitor's "Skeleton Argument")

49. It was submitted that: *"it is because of the respondent's conduct that various cases have been filed".*

50. The claimant's representative also denied that the claims were "repetitive". He submitted that the subsequent claims after the First Claim arose *"because of the Report of 7 December"* (R2/11*).*

Para.2.4

51. The claimant's representative submitted that the purpose of the Second Claim was "*to force the respondent to implement the adjustments in the Report of 7 December*" (sic).

Failure to make Reasonable Adjustments

Para.3.1

52. The claimant's representative referred me to a number of medical reports which had been included with his documentary productions. He referred in particular to the report of 1 December 2016 from Health Management (R2/11) which he submitted recommended a return to work. He explained that this was: *"the basis for all of these claims".*

53. He also submitted, with reference to the "internal communication", from Dr Asatiani to Health Management dated 21 November 2016 from IMM (C123-128), that it was clear that the claimant was fit to return to work. However, he accepted that the respondent had not seen this Report.

54. It is the respondent's position that this report was superseded by the report of 11 January 2017 from Health Management (R2/13). However, it was submitted that the Doctor O'Donnell: *"had no power to give this second opinion".*

55. So far as the second submission by the respondents' solicitor that there was "no substantial disadvantage", was concerned, it was submitted that the disadvantage was that the claimant went on extended sick leave and was unable to return to work.

56. So far as the duty to make reasonable adjustments was concerned, it was submitted that this was triggered by the report of 1 December 2016 (R2/11).

Para 3.5

57. The claimant's representative submitted, with reference to a "TUC Sickness Absence & Disability Discrimination Guide" which he had lodged, that there was never any "objective assessment" of the adjustment which had been recommended (C2/243/244, Para 9.4).

58. The claimant's representative also referred me to the following passage from the Judgment of the Supreme Court in **Collins** at para.37 (C2/258): -

> "*But for whatever reason the focus from there on was on what the Applicant was unable to do, and not on how the situation could be created whereby he could continue to work".*

59. He also referred me to the following passage from the Judgment of the EAT in **Southampton City College v. Randall UKEAT/0372/05/BM** at Para.27 (C2/27): -

> "*A proper assessment of what is required to eliminate a disabled person's disadvantage is therefore a necessary part of the duty imposed by s.6(1) (the Disability Discrimination Act 1995) and that duty cannot be complied with unless the employer makes a proper assessment of what needs to be done.*"

60. It was submitted that a "*proper assessment*" was never done.

Para 3.6

61. In response to the submission by the respondents' solicitor that "*unless the adjustments would themselves render the employee fit for work the duty to make reasonable adjustments will not be triggered*". He submitted that: "*It is not the purpose of adjustments to make an employee fit for work*".

Para 3.7

62. The claimant's representative submitted that Dr. O'Donnell who had prepared the report of 11 January 2017 on which the respondent relied (R2/13), was "*not independent*".

63. He further submitted that the duty to implement a phased return and the remaining adjustments which included: "*an increase in supervision, support or other investment of financial or other resources, both arose on 7 December 2016*".

Para 3.8

64. The claimant's representative confirmed his position that he challenged the assertion by the respondents' solicitor that "*unless the adjustments themselves would render the employee fit for work, the duty to make reasonable adjustments will not be triggered*". He submitted that this was "*not legally correct*".

Para 3.9

65. So far as the contention by the respondents' solicitor that the claimant "*has been certified as unable to fulfil her contractual working duties by an independent medical expert*" was concerned, the claimant's representative referred me to: **Smith v. Churchills Stairlifts Plc [2005] EWCA Civ 1220** and the following passage at Para. 33 (C2/191):

> "*An employers' arrangements for dividing up the work he needs to have done into different jobs are just as capable of being 'arrangements' as are an employer's arrangements for deciding who gets what job and how much each is paid…. the job descriptions for all their posts are*

> *'arrangements' which they make in relation to the terms, conditions and arrangements and which they offer employment. Also included in those arrangements is the liability of anyone who becomes incapable of fulfilling the job description to be dismissed.*"

66. The claimant's representative submitted that the claimant has not been "*unfit for work since October 2015*". In support of his submission he referred me to the Health Management report dated 1 December 2015 from Dr Allison (C6-9) and, in particular, the following passages: -

> "*You have indicated in your referral that a workplace stress-risk assessment had already been completed. However after reading the report Ms Northam has indicated to me that although she has completed the forms that were provided to her by HR she does not believe that HR have completed the relevant parts of the documents and no actions have been undertaken to discuss the findings with her or resolve any issues. Therefore, her perspective is that a stress-risk assessment has not been completed….*
>
> *I understand that for the last two years she has been reviewing the electronic reports, collating the information and analysing and assimilating the data regarding the structures. She is unhappy with the restriction that she cannot travel out to platforms. When she saw our doctor, Ms Northam was absent from work. There have been frequent sickness absences in the last year. She describes a range of symptoms including psychological symptoms, which she attributes to being "victimised", "bullied" and "misunderstood" within the organisation. Our doctor reported that she complains of concomitant issues due to perceived stress of the capability process that she is undergoing and the fear of losing her job. She states that she is demotivated…...*
>
> *Due to her forearm problems, Ms Northam has difficulty using a keyboard or and clicking her mouse. As a result, she has been provided with voice-activated software, Dragon Naturally Speaking Professional Addition version 13. In addition she has Speech Start plus on which she has had from her perception, a limited amount of training. She has found this to be of benefit, but feels that she needs to be completely hands-free, and has highlighted that to do so she requires further training on the Professional Edition of Dragon Naturally Speaking Professional Edition version 13. The funding for this, she indicates, has been rejected by management. On this basis she continues to use her arm to type, and therefore I believe she has run into issues relating to her performance standards. She also contends that because she was not appropriately trained she had to continue using her mouse on occasions to point and click rather than facilitate voice recognition software to do this. She believes that this aggravated her injury and made her arm pain worse…...*

> *There are two issues here: obviously there is the psychological issue and also her discontentment in the workplace, and I think these organisational issues will need to be resolved before a sustained return to work can be achieved. I do not feel that there is any contra-indication to her participating in meetings, or with management. However Ms Northam has stated that 'participating in meetings with my line manager is detrimental to my mental health'".*

67. It was submitted, in light of this, that: "*the problem was workplace, not medical, as such*".

68. It was further submitted that Para. 3.9 of the submissions by the respondents' solicitor was "not medically supported" as the medical report of 1 December 2015 referred to the need for adjustments (R2/11).

Para 3.10

69. In response to the submission by the respondents' solicitor that the requirement to make adjustments did not arise, the claimant's representative submitted that "*Dr. O'Donnell was biased*" and that he had "*made up his mind on 5 September*".

Para 3.11

70. In response to the submission by the respondents' solicitor that the respondent had a legal obligation to observe its common law duty of care, the claimant's representative referred again to **Smith** (C2/191) and submitted that the problem lay with the first respondent's organisation and not the claimant's health.

Para 3.12

71. The claimant's representative submitted that both claims had a reasonable prospect of success.

Direct Discrimination

Para 3.15

72. The claimant's representative submitted that there was no need for a comparator. He asserted that "*because of her disability they (the respondent) decided to lobby Dr. O'Donnell to write a medical report that she should not get back to work.*"

73. So far as the contention that the claimant had not suffered any detriment was concerned (Para. 3.17), the claimant's representative submitted that: "*Lobbying Dr. O'Donnell and undisclosed conversations were detrimental to the claimant as she had no way of putting forward her side of the story";* and Dr. O'Donnell did not consult with her.

Victimisation

74. It was submitted that the "protected act" was the claimant bringing Employment Tribunal proceedings (the First Claim).

75. It was further submitted that from July 2016 to 11 January 2017 there were:

> "*Numerous phone calls which were never disclosed and no proper records…..all these phone calls were designed to lobby Dr. O'Donnell to issue a report that the claimant was not fit to return.*"

Para 3.20.1

76. So far as the contention by the respondents' solicitor that: "*the respondent had no alternative in the circumstances but to either revert to Health Management for more detailed advice and opinion or place its own organisation at risk of prosecution or civil proceedings*" was concerned, the claimant's representative submitted that there was an "alternative": the final paragraph of the Health Management Report of 1 December 2016 (R2/11): -

> "*Our doctor has recommended that follow-up occupational health consultation is undertaken once adjustments have been put in place and Ms Northam has undertaken a return to work in the first month of her role.*

> *This will allow any additional support for the employer and employees. Of course, this can be arranged should you have any concern.*"

77. He also referred again to the report from Dr. Asatiani, an Occupation Health Physician with IMM, dated 21 November 2016, which was sent to Health Management (C123/128) and the following passage: -

> "*I would suggest a follow-up occupational health consultation with Ms Northam in 3-4 weeks after her return to work for further advice on the PRTWP and recommended restriction/adjustment. Please book this appointment through the usual channels.*"

78. The claimant's representative accepted, however, that the respondent did not see a copy of this report.

79. The claimant's representative submitted that: *"being able to work hands-free was the major issue",* but Dr. O'Donnell was not prepared to comment on this (R2/13). The claimant's representative submitted that the claimant would have gone back to work if that adjustment had been put in place. However, it was submitted that Dr. O' Donnell "*had already made his mind up and prepared a false report*".

80. It was submitted that Dr. O'Donnell: "*was already biased against the claimant and his report could not be relied upon.*"

Para 3.2.2

81. It was submitted that the detriment was "*going back to Dr. O'Donnell*".

Harrassment

Para 3.23

82. It was submitted that the harassment comprised: "*Lobbying for a change in medical opinion without her knowledge*". It was submitted that this was "the unwanted conduct".

Indirect Discrimination

Para 3.26

83. The claimant's representative explained that this related to:" the *denial of access to websites and electronic files.*" (R1/3, page 129)

84. It was submitted that this comprised both indirect discrimination and a failure to make reasonable adjustments.

Para 3.27

85. In response to the assertion by the claimant's solicitor that the claimant would not have suffered any disadvantage as she was not able to return to work or perform her contractual working duties, the claimant's representative submitted that the claimant **was** able to return to work.

Instructing, Causing & Inducing Discrimination

86. The claimant's representative submitted that the respondent "*induced its employees to discriminate*". In this regard, he referred me to Paras. 42 and 43 of the particulars of the Third Claim (R1/5, page 161): -

> "*42*
> *The decision by R to secretly provide to HM a false contractual working duties document in its unethical lobbying for a second medical opinion without the Cs knowledge/consent/input so as to deny a return to work and adjustments amounts to victimisation contrary to s.27/39/109 Eq Act because she lodged Claim 4112628/2015.*

> *43*
> *The secret submission of a false working contractual duties document to the HM in support of the secret lobbying for a second medical opinion without the Cs knowledge/consent/input by Jodina, Kaele Ahmed, Nicola and Mario so as to deny a return to work and adjustments amounts to instructing, causing or inducing contraventions by the R (s.111 Eq Act, 2010).*

87. He further submitted: "*I'm not saying Atkins induced Health Management, but rather its employees*".

Aiding Discrimination

88. In this regard the claimant's representative referred me to the e-mail of 5 September 2016 from Dr. O'Donnell in which he disclosed "*what his plans were*" (C287): -

> "*I called Kealie Ahmad at around 3.34pm today. I expressed the view that Ms Northam had probably had all the adjustments that were reasonably feasible for Atkins as an employer to put in place. I went on to say that I felt her physical problems were a major barrier to her managing to provide reliable service in future and that I had no doubt that her medical conditions of upper limb pain and fatigue were entirely genuine but unfortunately it is not realistic to expect a return in the foreseeable future. This is based on my reading of the file prior to the recent assessment and I feel that any further consultation should revolve around what the prospects for recovery are and not around attempting to get her back to work.*"

89. It was further submitted that there were previous medical reports to the effect that there were organisational difficulties and the claimant's representative questioned where Dr. O'Donnell had got that information from and how he could have arrived at that opinion. He submitted that: "*That will all be before the Court*".

90. He submitted that the claimant was not aware that Dr. O'Donnell had discussed the case with Kealie Ahmad on 8 December (C318); or of subsequent telephone discussions (C322); (C347); (C1/327); and it was only after these telephone conversations that Dr. O'Donnell was sent the e-mail of 11 January 2017 (C349). It was submitted that: "*the claimant was kept in the dark*"; she should have been aware of this correspondence.

91. In a letter, which was received on 9 January 2017, Kealie Ahmad, the respondent's HR Operations Manager asked Dr. O'Donnell for his comments on "PCbyVoice" (R2/12). It was submitted that: "*this was because they had already seen the first judgment (issued on 24 December 2016),* (R1/8) *but Dr. O'Donnell was not an expert on these matters as he advised and he was not the right person to ask*".

Discrimination Arising from Disability

Para 3.40

92. It was submitted that the less favourable treatment was not allowing the claimant to return to work and obtaining a second medical opinion without her consent, involvement or input.

Para 3.42

93. The claimant's representative disagreed with the assertion that advising the claimant that she could not return to work was: "*a proportionate means of achieving a legitimate aim*". He submitted that the respondent should have informed the claimant that she could have put her views to Dr. O'Donnell; denying her return was not for health and safety reasons; and there was "*no objective risk assessment*".

Para 3.42.2

94. It was submitted: "*Dr O'Donnell's opinion was false.*"

"Re-Litigated Complaints"

Para 4.1.1

95. It was submitted that these were not the same claims, but rather were the adjustments, detailed in Dr. Asatiani's report (C123-128).

96. Finally, the claimant's representative referred me to Para.6.24 of the Code of Practice on Employment and reminded me that there is no onus on a disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask).

97. He also referred me to Para. 6.32 which is in the following terms: -

> "*It is a good starting point for an employer to conduct a proper assessment in consultation with the disabled person concerned of what reasonable adjustments may be required. Any necessary adjustments should be implemented in a timely fashion, and it may also be necessary for an employer to make more than one adjustment. It is advisable to agree any proposed adjustments with the disabled worker in question before they are made.*"

Response by the Respondents' Solicitor

98. The respondents' solicitor submitted there has to be a connection between the PCP and the disadvantage; the PCP relates to "*being in the workplace and the fact that the claimant could not return to work cannot be a disadvantage.*"

99. He submitted that the duty to make reasonable adjustments was not triggered. As a matter of law there was no duty.

100. He submitted that the respondent was able to rely on Dr O'Donnell's report of 11 January (R2/13) and that: *"other than the claimant's desire to return to work, there was no other evidence that she was fit to do so".*

101. The respondents' solicitor also reminded me of the first respondent's duty of care towards its employees and the "reason why" the first respondent would not allow the claimant to return to work in light of the medical evidence was: "*the risk of*

prosecution or of a civil claim". The claimant could not return to work without the respondent being placed at risk.

Harassment

102. It was further submitted that the pleadings did not meet the statutory test. Such an environment was not created.

Indirect Discrimination

103. It was submitted that this was different from the First Claim as the claimant was not at work.

Aiding Discrimination

104. It was submitted by the claimant's representative that the respondent: "*knew they were discriminating when they instructed Health Management"*.

105. However, this was denied by the respondents' solicitor who submitted that the respondent relied on Dr. O'Donnell's reports. The so-called "organisational issues" in previous reports related to the sick notes.

106. Further, it was submitted that "Aiding discrimination" could not be done "*unconsciously; it's just a conspiracy theory; it doesn't fit within the statutory framework*".

Discrimination Arising from Disability

107. It was submitted by the claimant's representative that the respondent should have disregarded Dr. O'Donnell's report. But, the reason why the respondent relied on Dr. O'Donnell's report was to "**manage legal risk**".

Re-litigated Complaints

108. The respondents' solicitor re-stated his previous submissions. He maintained that these complaints had been struck out at the previous Hearing and by way of reconsideration. There was no appeal and the Code was irrelevant as "*either it's been litigated or it has not*".

109. The claimant maintained she was forced to use "GeniEYE", but that complaint was struck out.

110. Finally, the respondents' solicitor submitted that the fourth claim should be sisted and that in due course he should be afforded 28 days in which to respond.

Discussion & Conclusion

Relevant Rules of Procedure

111. The applications by the respondents' solicitor were in terms of Rules 37 and 39 in the Rules of Procedure and, in particular, the following provisions: -

> "***37 Striking Out***
>
> *(1) At any stage of the proceedings, either on its own initiative or on the application of a party, the 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.*";

and, in the alternative:

> "***39 Deposit Orders***
>
> **(1)** *Where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument…..*"

Relevant Law

Burden of Proof

112. The burden of proof provisions are to be found in s.136 of the 2010 Act. In short, once the claimant has proved facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof shifts to the respondent to prove a non-discriminatory explanation.

113. These provisions have the greatest impact in respect of complaints of direct discrimination, where it is necessary to establish that the claimant has been treated less favourably than another because of a protected characteristic (disability in the present case).

114. However, they also apply to complaints of failure to make reasonable adjustments under s.20; victimisation under s.27; harassment under s.26 and indirect discrimination under s.29. However, although similar principles apply, what needs to be proved depends to a certain extent on the nature of the legal test set out in the respective statutory provisions and it was necessary, therefore, for me to consider each of the complaints separately.

115. Guidance on the application of the burden of proof provisions was given by the EAT in **Barton v. Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205**. These guidelines have now been explicitly endorsed by the Court of Appeal in **Igen Ltd v. Wong [2005] IRLR 258** and other cases. Although these cases concern the application of s.63A of the Sex Discrimination Act 1976, the guidelines are equally applicable to complaints of disability discrimination.

116. When giving the Judgment in the Court of Appeal in **Igen** LJ Peter Gibson said this at para. 76: -

> "***(1)*** *Pursuant to s.63A of the SDA, it is for the claimant who* complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of

discrimination against the claimant which is unlawful….these are referred to below as "such facts".

(2) *If the claimant does not prove such facts he or she will fail.*

(3) *It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases, the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*

(4) *In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage is the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.*

(5) *It is important to note the word 'could' in s.63A (2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary facts could be drawn from them.*

(6) *In considering what inferences or conclusions that can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.*

(7) *These inferences can include in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.*

(8) *Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account determining such facts pursuant to s.56A (10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*

(9) *Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.*

(10) *It is then for the respondent to prove that he did not commit, or as the case may be, it not to be treated has having committed, that act.*

(11) *To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.*

> **(12)** *That requires the Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which on such inferences can be drawn, and further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.*
>
> **(13)** *Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to discharge the burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.*"

117. In the first instance, therefore, the claimant is required to establish a "*prima facie case*", but these guidelines clearly require the claimant to establish more than simply the possibility of discrimination having occurred before the burden will shift to the employer. In **Bahl v. The Law Society & Others [2004] IRLR 799** the Court of Appeal upheld the reasoning of EAT and emphasised that unreasonable treatment of a claimant cannot of itself lead to an inference of discrimination, even if there is nothing else to explain it. Although that case proceeded under the legislation prior to the changes made to the burden of proof, the principle is still valid. In other words, unreasonable treatment is not sufficient in itself to raise a *prima facie* case requiring an answer. It is necessary to create a presumption of discrimination that someone who was not disabled would have been treated more favourably.

118. As the EAT said in **Bahl [2003] IRLR 640** at para. 89: -

> "*……merely to identify detrimental conduct tells us nothing at all about whether it has resulted from discriminatory conduct.*"

119. The point was further emphasised by LJ Mummery giving the Judgment of the Court of Appeal in **Madarassy v. Nomura International Plc [2007] IRLR 246**: -

> "*For a prima facie case to be established it will not be enough for a claimant simply to prove facts from which the Tribunal could conclude that the respondent could have committed an act of discrimination. Such facts would only indicate a possibility of discrimination, nothing more. So, the*

> *bare facts of a difference in a status and a difference in treatment – for example, in a direct discrimination claim the evidence that a female claimant had been treated less favourably than a male comparator – would not be sufficient material from which a Tribunal could conclude that, on the balance of probabilities, discrimination had occurred. In order to get to that stage, the claimant would also have to adduce evidence of the reason for the treatment complained of.*"

The Present Case

120. For the purposes of the Preliminary Hearing, I took the claimant's averments *pro veritate*. In other words, for the purposes of the exercise with which I was concerned, I proceeded on the basis that the claimant would be able to prove all the facts averred in the two claim forms. However, she is required to: *"set out with the utmost clarity the primary facts from which an inference of discrimination is drawn.*"; and "*it is the act complained of and no other that the Tribunal must consider and rule upon.*" (**Bahl**)

Observations on the Pleadings and the Submissions on behalf of the Parties

121. The two claim forms with which I was concerned contained at Para. 8.2 details of the claims. They were unnecessarily lengthy and detailed and difficult to understand. They did not set out the facts relied on by the claimant to establish a *prima facie* case with *"utmost clarity".*

122. Further, at the Preliminary Hearing the claimant's representative presented me with 22 pages of close type by way of written submissions; some 340 pages of 'case law'; and over 900 pages of documents (thankfully, only a few of which, transpired to be relevant to the issues with which I was concerned.)

123. When taken with the piecemeal presentation of the four claims I found the picture to be utterly confusing.

124. For the most part, the written submissions on behalf of the claimant when taken with the pleadings seemed designed to conceal rather than elucidate points that were being sought to be made. Consequently, there was a danger that any good

points were not highlighted and although my conclusions may be relatively brief, in comparison, I had to devote a considerable amount of time reading all the relevant paperwork and ensuring that no point of substance was overlooked. Further, while I understand that the claimant's representative is not a qualified solicitor and some leeway must therefore be afforded to him, he has academic legal qualifications, he has brought a number of Employment Tribunal claims on behalf of claimants and it was clear from the reasoning in the Judgments in the First Claim (R1/8 and R1/10) that the Tribunal and my colleague, EJ Hendry, was faced with exactly the same difficulties.

125. Further, it appears that the claimant's representative was made aware of such concerns not only when conducting the First Claim, but also in the course of case management hearings and of the need: "*to try and focus on the essential elements of her case and not to get caught up in the minutiae of office behaviour as it does over some years*" as EJ Hendry put it.

126. I was, and remain, very concerned that those advices seem to have been completely ignored by the claimant's representative; by his attempt, to advance, with considerable factual detail, relevant or not to the statutory test, every conceivable disability complaint, whether with merit or not; to re-litigate claims already decided; and his absurd attempt to bring a claim of "perverting the course of justice" which is patently a matter for the criminal courts and not an Employment Tribunal, and appeared to be little more than a blatant attempt to put some sort of additional pressure on the respondents. It seemed to me that in all the circumstances and with his experience in other cases and the advice he has been given, that the conduct of the claimant's representative in the present cases bordered on an abuse of the Employment Tribunal process.

127. Fortunately, the respondents' solicitor clearly had spent a considerable amount of time considering the pleadings in the two claim forms with which we were concerned at the Preliminary Hearing and endeavouring to extract from them the multitude of complaints which appeared to be advanced and the factual bases for them which he was then able to detail and address in his written "Skeleton Argument". I am greatly indebted to him for this.

128. However, as I recorded above, after I had heard submissions from the respondents' solicitor at the Preliminary Hearing, when I invited the claimant's representative to make his submissions by way of response he started by referring to his own written submissions. However, I found it quite impossible to follow the points he was making and as time went on I became even more confused.

129. I advised the claimant's representative of this, therefore, and suggested that an alternative way of proceeding would be for him to respond, point by point, paragraph by paragraph, to the respondents' Skeleton Argument. He agreed to do so, and I so directed him. I advised that in the circumstances I would allow him as much time as he needed to consider his position and his submissions. To his credit, he was able to do so in the course of the day allocated for the Preliminary Hearing and this assisted me, at least to some extent, in clarifying his position.

Conclusion

130. In short, I was satisfied that the submissions by the respondents' solicitor were well-founded and, in particular, the following summary of his general position: -

> "*(Assuming the claimant is disabled) the respondent avers that none of the complaints in the second and third claims have any reasonable prospect of success. The complaints advanced are misconceived and have no legal basis. They evolve a bare assertion and no more. They are repetitive and rely upon the same essential circumstances.*"

131. However, as I recorded above, when setting out the burden of proof provisions, it was necessary for me to consider what needed to be proved for each of the complaints which appeared to be advanced on behalf of the claimant, with reference to the respective statutory sections in the 2010 Act.

Failure to Make Reasonable Adjustments

132. With reference to the authorities referred to by the respondents' solicitor namely **Collins,** **Vuoto** & **Dorran** and having regard to the particular circumstances of this case, I was not persuaded that the duty to make reasonable adjustments was "triggered".

133. While these cases made it clear that each case turns very much on its own facts and there is no general proposition of law that the employer's duty to make reasonable adjustments does not arise until the disabled employee indicates when he or she will be able to return to work, it was clear from Dr. O'Donnell's report of 11 January 2017 which the respondent obtained (R2/13) which was prepared once he had access to the claimant's "*complete occupational health file*" from July 2013 onwards, that the claimant was not fit to return. Dr. O'Donnell made reference to "*insurmountable obstacles to return to work*". He also said this in his report: -

> "*As mentioned above, I have no doubt of Ms Northam's desire to achieve a full return to work and I have no doubt that she would value the opportunity to make a further attempt, but for all the reasons above, I believe that the possibility of work based interventions being successful, is remote at least in the short and medium term*."

134. The claimant was also certified as unfit to return to work by her own G.P. (R2/46-52).

135. I was also mindful in this regard of the first respondent's duty of care towards its employees which was referred to by the respondents' solicitor. In short, had they ignored the medical opinion and arranged for the claimant to return at that time on a phased basis they have placed themselves at risk of a civil action for damages.

136. For all these reasons, therefore, I was satisfied that this complaint had no reasonable prospect of success and it is struck out, therefore, in terms of Rule 37(1)(a).

Direct Discrimination

137. A complaint of direct discrimination requires the claimant to identify a comparator as s.13 focuses on whether an individual has been treated "*less favourably*" because of a protected characteristic.

138. No such comparator, either actual or hypothetical, has been identified by the claimant. This complaint therefore, has no reasonable prospect of success and it is struck out in terms of Rule 37(1)(a).

139. Further, and in any event, no detriment has been identified by the claimant and the contention by the respondent's solicitor that "*allowing the employee to return to the workplace in these circumstances cannot properly amount to either detriment or less favourable treatment*" was well-founded.

Victimisation

140. As I understand it, this complaint relates to the respondent questioning the Health Management report of 1 December 2016 (R2/11) and asking Dr O'Donnell to review it. It is alleged that the report was challenged and Dr O'Donnell was prevailed upon to produce a *"false report"* based on information about the claimant's duties at work provided by the first respondent, which were deliberately misleading, because the claimant had done a protected act namely, submitting the First Claim.

141. However, there were no averments to support the contention that that was why the respondent questioned the report of 1 December and further, and in any event, it was the respondent's position that clarification of the report was required and one of the reasons was to address a concern as to the risk of civil proceedings in the event that the claimant returned.

142. That was why the matter was referred to Dr. O'Donnell who is the Chief Medical Officer at Health Management. It was not disputed that he had some 30 years' experience in occupational medicine and as I recorded above, he had access to the claimant's complete occupational health file from July 2013.

143. Further, and in any event, there were no averments relating to any alleged detriment or unfavourable treatment and not allowing the claimant to return to the workplace in such circumstances cannot amount to either detriment or unfavourable treatment in all the circumstances, particularly having regard to the respondent's duty of care.

144. For all these reasons, therefore, the victimisation complaint has no reasonable prospect of success and it is also struck out in terms of Rule 37(1)(a).

Harassment

145. The definition of harassment is set out in s.26(1) of the 2010 Act.

146. As the respondent's solicitor drew to my attention in his written submissions EJ Hendry had explained to the claimant's representative the need to satisfy the statutory test.

147. I searched in vain for averments in the claimant's pleadings which would go anywhere near to satisfying the statutory test. There were none.

148. This complaint has no reasonable prospect of success and it is struck out in terms of Rule 37(1)(a).

Indirect Discrimination

149. I was concerned that such a complaint appeared to have already been pled in the First Claim.

150. I was satisfied, once again, that the submissions by the respondents' Solicitor in this regard were well-founded. The pleadings do not disclose a proper PCP; the pleadings do not demonstrate how any PCP puts, or would put, persons with whom the claim shares the protected characteristic of disability at a particular disadvantage, when compared with persons who do not share such a characteristic; the pleadings do not demonstrate any disadvantage.

151. This complaint has no reasonable prospect of success and it is struck out in terms of Rule 37(1)(a).

Instructing, Causing and Inducing Discrimination

152. s.111 of the 2010 Act makes it unlawful for a person to instruct, cause or induce someone to discriminate, harass or victimise another person on any of the grounds covered by the Act, regardless of whether the person so instructed, actually does so.

153. I was also satisfied that the submissions by the respondents' solicitor in this regard were well-founded.

154. As I understand the claimant's position, she relies on the relationship between the respondents and Health Management.

155. However, the relationship between the respondents and Health Management does not fall into any of the categories listed at Part 5, Chapter 1. Further, as the respondents' solicitor submitted: -

> "*As a matter of both law and fact, the respondent has had no authority whatsoever over Health Management, which is an independent provider of professional services, regulated by the General Medical Council.*
>
> *In any event neither the working duties document provided to Health Management nor the request for clarification following the first medical report can be construed as an instruction, cause or inducement to discriminate.*"

156. This complaint, therefore, has no reasonable prospect of success and it is struck out in terms of Rule 37(1)(a).

Aiding Discrimination

157. In addition to prohibiting a person from instructing, causing or inducing discrimination, the 2010 Act also includes a provision making it unlawful to aid acts of discrimination (s.112(1)).

158. The EHRC Employment Code states that "help" should be given its ordinary meaning, and that help given to someone to discriminate, harass or victimise will be unlawful '*even if it is not substantial or productive so long as it is not negligible.*"

159. However, the first respondent in the present case was required to 'know' that discrimination, harassment or victimisation was a likely outcome and it was impossible for the first respondent to predict the outcome of an independent medical report. They could not have "known" what the outcome was likely to be.

160. This complaint is without merit, based on the pleadings. It has no reasonable prospect of success and it is therefore struck out under Rule 37(1)(a).

Discrimination Arising from Disability

161. It was difficult to discern the factual basis for this complaint. However, having read the pleadings it would appear that the respondent's solicitor was correct in assuming: "*that the unfavourable treatment that she refers to is the decision not to allow her to return to work on medical advice"* and the '*something arising in consequence of her alleged disability is her absence from the workplace.*'

162. Once again, the respondent's common law duty of care and the need to avoid risk of civil action was relevant to this complaint.

163. In any event, not allowing the claimant to return to work based on an independent medical report from a very experienced Occupational Health Adviser who had access to the claimant's complete health file, thereby ensuring the claimant's health and safety in the workplace was a "*proportionate means of achieving a legitimate aim.*"

164. This complaint has no reasonable prospect of success and it is therefore struck out in terms of Rule 37(1)(a).

"Re-litigated Complaints"

165. I was satisfied that the submissions by the respondent's solicitor in this regard which related to "complaints at paragraphs 5 and 6, complaints (iii) to (vi) inclusive, complaint (xi) and complaint (xii) of the Second Claim (R1/3) (and repeated at paragraphs 5 and 6 of the Third Claim (R1/5)) have already been decided in earlier proceedings in the First Claim.

166. The reasons in the Responses to the Second Claim (R1/4, Paras 10-13) and to the Third Claim (R1/6, Para 20) are well-founded.

167. As I recorded above, this caused me considerable concern as the claimant's representative, was or, at least, should have been aware of this.

168. These complaints are vexatious. They are struck out, therefore, in terms of Rule 37(1)(a).

169. For all these reasons, therefore, these two claims are struck out.

Employment Judge: Nicol M Hosie
Date of Judgment: 07 August 2017
Entered in Register: 08 August 2017
and Copied to Parties