Case Number: 2212310/2023

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant:	**Mr Jacob Meagher**
Respondents:	**Judicial Appointments Commission (1)** **Mr. Ian Thomson (2)** **Ms Sophie Austin (3).**
SITTING AT:	**London Central**
ON:	**14 June 2024**
BEFORE:	**Employment Judge G Smart** **Sitting alone in public.**

RESERVED JUDGMENT

On hearing for the Claimant (Counsel) in person and Mr Ashley Serr, (Counsel) for the Respondents:

1. The Claimant's claims for a failure to make reasonable adjustments are struck out as having no reasonable prospects of success.

2. The Claimant's claims of being subjected to indirect discrimination are struck out as having no reasonable prospect of success.

3. The Claimant's claim for victimisation by being subject to the detriments of a failure to discuss or make reasonable adjustments because of a protected act is struck out as having no reasonable prospect of success.

4. Consequently, the Claimant's claim does not proceed having been struck out in its entirety in accordance with rule 37 (1) (a) as against all the Respondents.

REASONS

THE APPLICATION AND ISSUES TO BE DECIDED

1. By letter dated 27 March 2024, the Respondents made a joint application to strike out the Claimant's claim.

2. The application letter said as follows:

   "The Tribunal also ordered the Respondents to confirm whether they wished to proceed with an application to strike out the matter. I confirm that the Respondents do wish to advance their strike out application on the following basis –

   1. The Claimant was not admitted as a Barrister in England & Wales until November 2018.

   2. In his Amended Particulars of Claim dated 8 December 2023 he says that he was deterred from applying for the selection exercise for Recorder in June 2023 because reasonable adjustments could not be agreed.

   3. In fact, the Claimant did not meet the statutory criteria for the Recorder post which requires a candidate to be a Barrister in England and Wales and to have seven years of "relevant experience" after that date.

   4. The Claimant also alleges victimisation in respect of the Recorder selection exercise. He alleges that because he had previously complained of discrimination, he was subjected to a detriment, the detriment being a refusal by the Respondents to agree reasonable adjustments.

   The Respondents submit that the above claims have no reasonable prospects of success and wish to advance their strike out application on this basis. In the alternative, the Respondents seek a deposit order."

3. The Claimant's case summary is as follows as per his particulars of claim ("POC"):

   3.1. He is a barrister called to the bar in the UK in November 2018 Paragraph 2 POC;

   3.2. He is disabled and notably the Respondent has conceded that the Claimant is disabled with all pleaded disabilities except for Autism Spectrum Disorder;

   3.3. He applied for the following public offices - paragraphs 9 – 40 POC:

      3.3.1. Deputy District Judge in 2020;

      3.3.2. Deputy District Judge in 2021;

      3.3.3. Deputy District Judge in 2022; and

3.4. There was an exercise to recruit Recorders in 2023. The Claimant failed to submit that application. He alleged that he was put off applying because of past failures of the First Respondent to make what he considered to be satisfactory reasonable adjustments about online qualifying tests - Paragraph 47 POC.

3.5. Despite pleading in his claim form that he was eligible to be recruited to posts that he applied for, at paragraph 10 POC, by the time of the preliminary hearing before me, the Claimant accepted he was not eligible to be recruited to any of the roles he had applied for. This was also made clear by his evidence at paragraphs 2, 4, 5, 6, 8 and 14. The relevant sections of those paragraphs are as follows:

"2. R's position appears to be that the direct answer to C's claim is that even if discrimination occurred C had no interest in the three applications because even if he passed the tests (for which C refused to make or genuinely1 consider making adjustments) statute precluded appointment at that particular time. In reality, for the first two exercises, DDJ 2021, and DDJ 2022, C engaged in extensive correspondence with R, ultimately via solicitors, and was passported through to the second stage of selection exercise by Mr Thompson in 2022. He was informed by R that he was eligible for appointment and C was very open as to his qualifications. R does not claim that C withheld or lied as to the dates of his qualifications. Given that R2, Mr Thompson, directly informed C that he met the five year eligibility criteria in 2021 and 2022 it was unsurprising that C believed he me[t] the seven year criteria in 2023/4."

"4. C's evidence is that both R1 (JAC) and Mr Thompson (R2) advised him that he met the statutory criteria, on the basis of his NZ admission and practice and his position as an academic – it appears Mr Thompson confused the citizenship criteria. C was in no way hiding his qualifications, he set them out thoroughly."

"5. C clearly had an interest in sitting the qualifying tests, he wished to become a DDJ and intended to accept appointment, he would at a date meet the statutory criteria (everyone believed he did – and has now done so), and has a right to seek adjustments for the tests even prior to meeting said criteria."

"6. … R's response is somewhat arbitrary in so far as that, should C have passed, the selection and character committee were to meet on a certain date - based on when the in-person exercise (the third test) was to take place. If this meeting was to be set back by one month, then C could have been appointed."

"8. R's submission at para 24 of their skeleton such that "It would render the provisions of the Act futile if Claimants were able to succeed in hypothetical claims as 'applicants' in respect of roles for which they were not eligible" is manifestly incorrect and a misleading statement of the

situation. As Judge Davidson sets out above, C is interested and will be (and is now) eligible – he is not going around applying for jobs that he can never (or is barred from) taking up – R too believed him to be eligible. C is not a hypothetical Claimant, firstly due to the fact that R1 and R2 advised him that he was eligible for the role at the time, and because it is not in the realm of hypothetical's as to his eligibility, he is now eligible, and has always been prospectively eligible. …"

"14. C's position is that this is clearly a continuing pattern of conduct on the part of the JAC/R, it seeks to exploit its own mistake in terms of its own error in not applying its regulations as to eligibility. …"

3.6. Consequently, the case the Claimant argued in his evidence, was essentially that everyone was mistaken about his eligibility (including the Claimant) when he applied for the judicial offices.

3.7. He argued the Second Respondent had misled him by allegedly telling the Claimant he was eligible for the offices. The Claimant avers he was interested in applying for the roles and was not a person who was simply applying for roles he was never going to take up should he be successful.

3.8. He also argued that because eligibility is determined from either the date he takes up the appointment or the date of the Selection and Character Committee meeting ("SCC"), if the appointment or SCC meeting was delayed for some reason, then hypothetically he was "prospectively eligible".

3.9. The Claimant's case is that regardless of whether he was eligible to apply or not, he did apply, he asked for adjustments, he did not get the adjustments he asked for and, he says, that is discrimination. Alternatively, PCPs were applied that put him and would put people with his combination of disabilities as a group at a substantial and unjustifiable disadvantage.

3.10. When considering his victimisation claim, the Claimant argues that he complained about the way he was being treated during the application processes on a number of occasions which he alleges were protected acts. He then says he was subjected to detriments as a result. These detriments are pleaded at paragraph 78 POC as follows:

"78. Because of the protected acts, the Claimant was subjected to the following detriments:

(1) His requests for adjustments to the Scenario Test were refused by the Second Respondent.

(2) The Second Respondent did not engage with the Claimant's request to discuss reasonable adjustments in respect of the 2023 Recorder selection exercise.

(3) The Third Respondent refused to agree to or engage with the Claimant's request for adjustments to the Critical Analysis and Situational Judgement tests for the 2023 Recorder selection exercise, so as to remove the multiple choice elements."

3.11. In summary the detriments are a failure to engage in considering making or actually make the adjustments the Claimant argues should reasonably have been made.

3.12. The Claimant also argued that the failures he identified amounted to a continuing course of discriminatory conduct by the Respondents even into his newly submitted claim, which has only recently been presented to the Tribunal with the Respondents still in their 28-day ET3 period on the date of this hearing.

4. Out of the issues listed for the preliminary hearing, we only had time to consider the strike out application, which was agreed by all the parties as being the first issue I needed to decide.

5. Given the Respondent's application and the Claimant's case above, I needed to decide the following:

5.1. Given that C and everyone else were mistaken about his eligibility to apply for the roles, was the Claimant a genuinely interested applicant for each of the judicial offices he applied for?

5.2. If he was, should the Tribunal strike out his claims anyway, because the Claimant was statute barred from becoming a Judge meaning there could be no detriment or disadvantage to him?

5.3. If the reasonable adjustments claims are struck out, should the victimisation claims also be struck out given the detriments relied upon would be the failures to make or discuss the reasonable adjustments the Claimant sought, which by this point would already have been deemed to have no reasonable prospect of success?

5.4. If the clams are not struck out on the above bases, should they nevertheless be struck out on policy grounds, namely, that it would undermine the meaning of "applicant" if that included a person who only had hypothetical claims because they were not eligible for the job they applied for?

6. The Claimant's claims relate to the 2021 and 2022 DDJ applications and the 2023 Recorder application. No issues are taken with the 2020 application. He claims indirect discrimination, a failure to make reasonable adjustments and victimisation.

7. As will be seen for the law section below, all parties and I are in agreement that there is no direct authority on the eligibility point when considering genuinely interested applicants. I've therefore been mindful of the potential of this case to set precedent. I therefore reserved my judgment to ensure that I had properly considered the issues, evidence and submissions provided by both Counsel.

8. I also know there is a second claim for a more recent application for judicial office that was presented a couple of weeks before the Preliminary Hearing and about which the Respondents were still within time to submit their ET3 responses on the date of the Preliminary Hearing. This is under claim number 2221529/2024 or 6002664/2024.

9. However, at the time of hearing this application, the claims had not been consolidated and therefore I was hearing an application about the Claimant's first claim only. I took into account any submissions the Claimant made about alleged acts that could potentially continue the timeline in both claims.

THE EVIDENCE

10. At the start of the hearing, I had two bundles of documents. A main bundle for the preliminary hearing of 328 pages and a correspondence bundle of 101 pages. I also had indexes for both. I also had two witness statements, two skeleton arguments from the Respondents and a number of authorities. The Claimant's witness statement was a combined witness statement and submission document.

11. Before we started hearing the case proper, I checked that all parties and had the correct documents.

12. Whilst the Claimant had (unusually) submitted a joint witness statement and submission, the Respondents declined to cross examine the Claimant. I therefore took the statement as it was.

13. I also heard evidence from the First Respondent's Head of Corporate Services, Miss Kimberley Barling. She did not have any of the bundles, but the Claimant agreed before Miss Barling was sworn in, that he would not be referring her to any bundle documents in any event, and he did not do so. This was therefore not an issue.

THE FACTS

14. Whilst the Claimant was indeed acting for himself, he is an experienced barrister with a long list of legal qualifications. Whilst he would like to be treated as a litigant in person (given some of his submissions), even though technically he is a litigant in person, he is of equal standing to the Respondents and was not at any particular disadvantage because of being unrepresented. We are not dealing with a litigant in person here who is unfamiliar with the courts, doesn't know the law and/or doesn't know legal procedure.

15. It was not in dispute that the Claimant had applied for the judicial offices mentioned earlier in this judgment.

16. It was not in dispute that the Claimant was not eligible for being appointed into those judicial roles, but now is. His statement makes that clear and essentially conceded this point. Consequently, it didn't really matter what might happen

hypothetically when all the applications before me had been decided and the Claimant not recommended for judicial office.

17. The statutory eligibility criteria I was taken to from the Tribunals, Courts and Enforcement Act 2007, the Courts Act 1971 and the County Courts Act 1984, do nothing more than list what the pre-requisites of the Office being advertised are for you to be able to apply for the position. It is like a statutory person specification in HR speak.

18. It was not in dispute that the Claimant had been rejected not only because of him being statute barred but also because the First Respondent considered the Claimant was not a fit and proper person to be recommended.

19. The Claimant disputed the First Respondent's reasons for deciding the Claimant was not a fit and proper person to be appointed, but I need not go into the detail of those reasons or the Claimant's views on it for the purposes of deciding this application. I make no findings about that point.

20. It was disputed by the Second Respondent that they informed the Claimant he was eligible for the appointments. I heard no evidence on those points from the Second Respondent and, given this was a strike out application, I make no findings on this point but proceed on the assumption that the Claimant was misled as he suggests thereby taking his case at its highest.

21. It was not in dispute that the Claimant did not need to undertake pupillage because of his overseas qualifications and experience. The eligibility criteria applicable therefore run from the date the Claimant was called to the bar in England and Wales namely November 2018. Before that he worked as a lawyer in New Zealand from 2016.

22. It was also not in dispute that the Claimant did not finish his application for the Recorder exercise. The Claimant says he was effectively put off by the lack of effective adjustments in other past exercises so didn't complete his application for that role.

23. The Claimant also fairly conceded that it was the burden of the applicant to ensure they met the statutory criteria to be eligible for applying for the role.

24. There were three possible dates in play for when the eligibility criteria crystallised. It could have been either on application, at the SCC or upon actual appointment.

25. Miss Barling's evidence, when questioned by the Claimant, was that the date for eligibility was determined at the Selection and Character Committee ("SCC") meeting date.

26. This is supported by the eligibility information from the First Respondent's website which stated *"the JAC will judge the PQE period to run from the start date of the relevant legal qualification (such as the pupillage date) up to the date of the Selection & Character Committee meeting at which the SCC will consider recommending candidates for appointment in that specific selection exercise."* At

page 190 in the bundle.

27. Equally at page 195 in the bundle the website information for the first Respondent states clearly *"eligibility requirements will be clearly stated on the information page for each role. You must be able to show that you meet all the eligibility requirements-those who do not meet the requirements will not be able to proceed further in the selection exercise."*

28. Having considered the evidence I find the date eligibility is decided, is the SCC meeting whenever that takes place.

29. I turn then to the stated eligibility criteria for all the applications relevant to the Claimant's Claim. Whilst the Claimant had accepted he was not eligible, I felt it helpful to analyse the factual backdrop of the situation about all three applications given this is what Miss Barling's evidence covered.

30. I was not told precisely when the Claimant was called to the bar. The Regulators entry at page 187 just states November 2018.

31. For the purposes of this application, I have therefore assumed he was called to the bar of England and Wales on 1 November 2018, the Claimant's best case, but make no factual finding about that.

32. For the 2021 DDJ application (066) the SCC meeting is stated as taking place on 13 January 2022 at page 256 in the bundle. However, Ms Baring said at paragraph 8 in her statement, that the SCC actually met on 14 July 2022. There was no reason to doubt her evidence.

33. On 14 July 2022, the Claimant was not eligible for the role applied for even on his best case. That would likely have crystallised on 1 November 2023 after 5 years PQE at the earliest.

34. For the 2022 DDJ application (120), Miss Barling said, again at paragraph 8 in her statement, the SCC meeting took place 14 September 2023. Again, there is no reason to doubt that evidence. Consequently, the Claimant was not eligible at that date, even on his best case.

35. For the 2023 recorder application (162), Ms Baring said at paragraph 9 in her statement, the SCC was due to meet on 24 June 2024. This means that because the criterion of post qualification experience is 7 years for that role, the Claimant would not satisfy that criterion until 1 November 2025 on his best case.

36. Consequently, the Claimant was not eligible to apply for any of the roles about which he claims discrimination took place during the application processes.

37. However, taking the Claimant's case at its highest and for the purposes of this hearing believing that the Claimant was either mistaken or misled about his eligibility to apply for the roles, I find that he did not appear to be a person trying to make money out of the JAC or other Respondents with hypothetical applications he would never have taken up if offered to him. He appeared to be

subjectively genuinely interested in applying for the DDJ roles and it appeared that he would have taken them up had he been recommended for them.

38. When considering his application for the Recorder role, the Claimant did not complete that application. He says he was put off from completing the application because he believed appropriate adjustments would not have been made for that application process. I have again taken the Claimant's argument here for the purposes of this hearing as being correct and decided this application as if what the Claimant says is true. However, in my view, this doesn't take things any further forward because he was not eligible to apply for that role anyway.

39. All three roles are therefore in the same position about eligibility and therefore in the same position about the arguments submitted by the Respondents supporting why they argue the claims should be struck out.

40. One last point to note is that there is an alleged irregularity in the application for the Recorder position in that the Claimant had listed his call to the bar as being 1 June 2016, which was common ground as being his New Zealand call date. This document is labelled as being a draft. I cannot see the questions the draft application answered, and I make no findings about that document for the purposes of this hearing. I have heard no evidence about it and it does not appear to be relevant to what I need to decide.

THE LAW

Genuine applicant

41. It is now well established that for an applicant to be deemed to have been put at a detriment or disadvantage, even if they apply for the job and are rejected in a discriminatory way, they must be genuinely interested in the job role and therefore be a genuinely interested applicant.

42. If an individual applies for a post with no intention of accepting it, even if it was offered to them (in particular if doing so for the purpose of bringing a legal claim when not offered it), in EU law they have no protection under the relevant directives because they are not 'seeking access to employment' or 'a victim' or 'suffering a detriment: **Kratzer v R + V Allgemeine Versicherung: C-423/15, [2016] IRLR 888 ECJ.** The headnote sums up the decision:

"Mr Kratzer's application for a trainee position with the company was not submitted with a view to obtaining that position but only with a view to obtaining the formal status of an applicant with the sole purpose of claiming compensation on the basis of Directives 2000/78 and 2006/54. A factual situation such as that is, in principle, outside the scope the Directives.

Those Directives apply to a person seeking employment, and also in regard to the selection criteria and recruitment conditions of that employment. However, a person making an application for a post in the circumstances above clearly is not seeking to obtain the post. That person cannot, therefore, rely on the protection offered by the Directives. Furthermore, such a person cannot, in those

circumstances, be regarded as a "victim" or a "person injured" having sustained "loss" or "damage".

Moreover, according to settled case law, EU law cannot be relied on for abusive or fraudulent ends. Accordingly, a situation in which a person who in making an application for a post does not seek to obtain that post but seeks only the formal status of applicant with the sole purpose of seeking compensation does not fall within the definition of "access to employment, to self employment or to occupation" and may, if the requisite conditions under EU law are met, be considered to be an abuse of rights."

43. Paragraphs 29, 35 and 36 of that judgment are also important:

"29 In that regard, it is apparent from that decision that the dispute in the main proceedings is characterised by the fact that Mr Kratzer's application for a trainee position with R+V was not submitted with a view to obtaining that position but only with a view to obtaining the formal status of an applicant with the sole purpose of claiming compensation on the basis of Directives 2000/78 and 2006/54."

"35 However, a person making an application for a post in circumstances such as those described at paragraph 29 of the present judgment clearly is not seeking to obtain the post for which he formally applies. That person cannot, therefore, rely on the protection offered by Directives 2000/78 and 2006/54. A contrary interpretation would be incompatible with the objective pursued by those Directives, which is to ensure equal treatment 'in employment and occupation' to all persons by offering them effective protection against certain forms of discrimination, in particular concerning 'access to employment'.

"36 Furthermore, such a person cannot, in those circumstances, be regarded as a 'victim' within the meaning of Article 17 of Directive 2000/78 and Article 25 of Directive 2006/54 or a 'person injured' having sustained 'loss' or 'damage', within the meaning of Article 18 of Directive 2006/54.

44. There are a number of cases that have also decided this in domestic courts: **Keane v Investigo UKEAT/0389/09 (11 December 2009, unreported), Berry v Recruitment Revolution UKEAT/0190/10 (6 October 2010, unreported), Garcia v The Leadership Factor Ltd [2022] EAT 19 (1 February 2022, unreported), AECOM Ltd v Mallon [2023] EAT 104 (10 August 2023, unreported) and Ramos (aka Garcia) v Nottinghamshire Women's Aid Ltd & Another [2024] EAT 67.**

45. **Keane** contains the crux of the reason why these cases have been decided this way, namely, if a person isn't really interested in the job and would not have taken it up, the applicant can't have been subjected to less favourable treatment, disadvantage or detriment as a result, as per Underhill J (as he then was) at paragraph 19. He says:

"19 … The basic point is that we do not see how an Applicant who is not considered for a job in which he or she is not in any event interested can in any

ordinary sense of the word be said to have suffered a detriment – or, to be more precise, to have been (comparatively) unfavourably "treated" or put at a "disadvantage". Nor can we see any reason why as a matter of policy it is necessary to give some extended meaning to the concept of detriment in this context – on the contrary."

46. This approach was endorsed in **Berry v Recruitment Revolution UKEAT/0190/10/LA.**

47. Those cases involved claims of indirect and direct discrimination. However, after **Aecom v Mallon (2023) EAT 104 unreported,** the Respondent submitted the genuinely interested applicant principle appears to apply just as much to reasonable adjustment claims as it would to the other heads of discrimination.

48. Upon reading that decision, I find that submission to be a bit of a stretch. **Aecom** discusses the principle of genuinely interested applicant, in the context of the originating Tribunal making a mistake of fact and thinking the Claimant had applied for a job in the same employer but a different team, (making him a genuine applicant), when in reality he was nothing of the sort because he had applied to the same employer and the same team despite being managed out of the employer for poor performance. The case was therefore remitted to the same Tribunal to reconsider whether the Claimant was a genuine applicant.

49. Whilst that claim was about reasonable adjustments, it is silent about whether the outcome would be that there can eventually be no claim for reasonable adjustments if the Claimant was not a genuine applicant. That point was not argued and no mention is made of any policy argument about that point.

50. Consequently, not only is there no authority about whether a lack of eligibility should be a policy bar for an applicant to bring complaints of indirect discrimination because they could never have been appointed to the role, I am also of the view that we are in novel territory when it comes to whether the same policy bar should apply to reasonable adjustment claims as it does to indirect and direct discrimination claims.

51. The Claimant brought my attention to a first instance ET decision of Judge Davidson in **Murnikaite-Afolabi v Atalian Servest Limited (2201419/2023),** where he argues that this case decided what the word "interested" actually means. That may well be the case. However, that case is not binding on me. I have considered it and, in my view, it does nothing more than state what **Berry** and **Keane** already do.

52. The concept of detrimental treatment has long been said to include and/or be interchangeable with being placed at a disadvantage after **Ministry of Defence v Jeremiah [1979] 3 All ER 833, Keane** and **Jesudason v Alder Hey Children's NHS Foundation Trust [2020] IRLR 374** albeit that whether something is a detriment, is to be taken from the subjective view of the alleged victim subject to the test of reasonableness.

53. Another case of relevance it seems to me, is **Roadburg v Lothian Regional**

Council [1976] IRLR 283. In that case, a female applicant applied for a voluntary Services officer job along with three other men. Her application was predetermined by the appointments committee and they would not have recruited her to the role anyway because it would have in their view upset the male/female balance within the teams of officers. They interviewed her anyway and she was appointed to a different role. In any event, the role she applied for was never filled because a recruitment freeze occurred later meaning no one was appointed. The Scottish Industrial Tribunal held that the predetermination of the selection process was an arrangement tainted with sex discrimination and therefore an injury to feelings award was made, but there was no loss because the Claimant wouldn't have gotten the role anyway because of the freeze.

54. This case is not binding on me either because it is both a Scottish case and a first instance case, but I have considered it for the reasons I discuss later.

Indirect discrimination

55. Indirect discrimination is contained within s19 Equality Act 2010 which says:

"**19 Indirect discrimination**

(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a)A applies, or would apply, it to persons with whom B does not share the characteristic,

(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c)it puts, or would put, B at that disadvantage, and

(d)A cannot show it to be a proportionate means of achieving a legitimate aim.

56. Disability is a relevant protected characteristic for indirect discrimination.

Reasonable adjustments

57. The Claimant relies on the First requirement namely PCP.

58. This claim is covered by sections 20 and 21 Equality Act 2010 which state where relevant:

"20 Duty to make adjustments

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4)…

(5)…

(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7)…

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9)…

(10)…

(11)…

21 Failure to comply with duty

"(1) A failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person

(3) …".

59. It is also important to note that there must be a real prospect the adjustment would have made a difference **First Group Plc v Paulley [2017] UKSC 4.**

Victimisation

60. This is covered by s27 of the Equality Act 2010, which states:

"27 Victimisation

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2)Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4)This section applies only where the person subjected to a detriment is an individual.

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

Strike out

61. This power is granted to me by virtue of rule 37 of the Employment Tribunal Rules of Procedure 2013 which states where relevant:

37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) …
(c) …
(d) …
(e) …

(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.

62. In Cox v Adecco UKEAT/0339/29 [2021] ICR 1307 at [28] HHJ Taylor held as follows:

"28 From these cases a number of general propositions emerge, some generally well understood, some not so much.

(1) No one gains by truly hopeless cases being pursued to a hearing.

(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.

(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.

(4) The claimant's case must ordinarily be taken at its highest.

(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.

(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.

(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.

(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

DISCUSSION AND CONCLUSIONS

Genuine applicant

63. Genuine applicant cases are about there being no detriment or disadvantage because the applicant wouldn't have taken the job anyway. It is essentially that the behaviour of the Respondent would have made no difference.

64. In my view, this is akin to whether there is effectively any actionable damage. In the case of applicants as a distinct category as compared to those already engaged in accordance with s83 Equality Act 2010, clearly a policy decision has been made that they have no claim for discrimination regardless of whether in all other circumstances the behaviour of the prospective employer would have amounted to discrimination if they aren't genuinely interested applicants.

65. The Claimant submitted he was prospectively eligible for the offices he applied for. I am not persuaded this makes any difference. Any applicant might be prospectively eligible to apply. A trainee solicitor who has not yet attained the qualification or PQE to apply could be argued as "prospectively eligible". Similarly, a person with only one year's PQE would eventually reach the required 5 or 7 years PQE making them prospectively eligible. Does that mean they can apply? Yes, technically, but their applications would be doomed to fail and they should not apply.

66. Of course, this is a matter of fact and a degree. Some applicants may only be a few days, weeks or a month short. However, if they are either ineligible to apply at all or by the date that eligibility is determined, even if that is a few days difference, they are still ineligible despite being "prospectively eligible".

67. The Claimant submitted that regardless of whether he could have been appointed, if the Respondent committed any prohibited conduct in the application and selection process, that is discrimination and would always be discrimination warranting a remedy. I reject that submission because the case law says the opposite, namely, there can be no claim *even if* prohibited conduct took place in rejecting an applicant not genuinely interested in the role.

68. Either way, in the case before me, it can be distinguished from the previous authorities which were focussed on spurious applications being made by applicants to abuse the Tribunal Process to make money from prospective employers when they had no interest in the role or in taking it up if it was offered to them.

69. This case is different. Rather than being based on what the Claimant *would* have done had he been offered the role, this was based on what the Claimant *could* have done had he been offered the role. Could he have taken up the role if it was mistakenly offered to him? The answer is no he could not. He was statute barred.

70. The whole purpose of the policy barring a discrimination claim if an applicant is not genuinely interested in the role, is to prevent actual or potential litigants submitting claims about applications for roles they did not really want and therefore could have no loss, damage or injury if they were unsuccessful in getting the role whether the selection process for the role was discriminatory or not.

Should the policy in Keane apply to reasonable adjustment claims?

71. Claims of indirect/direct discrimination are treated identically for the purpose of

applicants. There is no requirement on the Claimant to prove the prohibited conduct in accordance with sections 13, 19 and 21 of the Act, was also detrimental treatment.

72. **Kratzer** makes it clear that, in this regard, the end result of not getting the job and the way in which the successful candidates are selected for that job are not considered separately, but are considered together if the Claimant is not a genuinely interested applicant.

73. **Kratzer** (at paragraph 35) is also clear that if a person is not a genuinely interested applicant, they cannot be afforded the protection of the directives mentioned in that case as a whole. It appears to me to be all or nothing.

74. This is another reason why the Claimant's submission that even if he wasn't eligible, he should still be able to bring claims on the failure to make adjustments for the selection process regardless, is rejected. If I find he was not a genuinely interested applicant, then the loss of protection is, on my interpretation of **Kratzer**, absolute.

75. Additionally, given that the Equal Treatment Directive 2000/78 expressly covers disability and adjustments or "accommodation" in Article 5, it is quite straightforward to find that the genuinely interested applicant law also applies to all and any types of discrimination about any protected characteristics covered by that directive.

76. This includes reasonable adjustments and therefore the genuinely interested applicant test applies to reasonable adjustment claims as well as indirect and direct discrimination.

Should the policy in Keane apply to applicants who could not have taken up the role even if they were subjectively genuinely interested in applying for it?

77. Looking at this with the end in mind, and putting aside the issue of mistaken belief in being eligible for a moment, if a claim for discrimination could survive where an applicant could never have got the job through lack of essential qualification, they knew they could never have got the job for that reason, yet they argued the need for reasonable adjustments for the selection process that were refused by the prospective employer, would that cause the same strife as seen in **Keane** and **Garcia** above? In my view it would, particularly where it was known, as advertised here by the JAC, that eligibility was not considered until after the shortlisting selection process had been completed.

78. Admittedly, it would be a more unusual situation, such as the one before me, but I can see an unscrupulous Claimant "trying it on" in this way, then attempting to "sting" the prospective employer with a spurious discrimination claim for injury to feelings due to a lack of adjustments for selection tests, presentations, questions and answers or filling in application documents.

79. Therefore, in my judgment, if the applicant *knew* they were not able to take up the role because they don't have the requisite qualification/experience for the

role, even if they genuinely wanted it, they cannot have been a genuinely interested applicant for that role, in my judgment, in the same way they would never have taken the employer up on any offer of employment such as in **Keane etc.**

80. I say this because they cannot be said to be a victim as envisaged in **Kratzer.** In these circumstances they couldn't get the role, they knew it and therefore if they waste time, emotion and expense in applying for the role and getting into an argument with the prospective employer about adjustments or reasons why they were rejected, that would be "on them".

81. Therefore, if the applicant knew they could never get the role, I find they were not a genuinely interested applicant.

What if the applicant had a mistaken belief in being eligible for the role?

82. The Claimant argued that everyone had a mistaken belief in his eligibility to become a judge and not only that, the R2 allegedly told him his was eligible.

83. The difficulty I have with that submission, is the Claimant accepted the burden of checking eligibility was on him as the applicant. This was therefore common ground between the parties. On a summary view, this undermines his case about being mistaken. It doesn't matter what R2 told him in discussion even if it was misleading and the Claimant was therefore mistaken. The Claimant accepts he should have checked his eligibility for himself.

84. On that basis, as the Respondent submitted, the Claimant ought reasonably to have known that he was not eligible for the offices he applied for. The advertisement literature for all the roles was clear and the statutes were referred to in that literature for the Claimant to look up and check. He was very capable of doing that given his qualifications and experience.

85. For that reason, in my judgment, the policy decision in **Kratzer and Keane etc.** should include the Claimant as not genuinely interested in the role. He ought reasonably to have known that he wasn't eligible, and, to exclude the Claimant would make it far too easy for applicants to commence litigation on the basis of *"I didn't know"* about eligibility requirements even when, as is the case here, the requirements were spelled out to applicants in the advertisement literature.

86. Alternatively, should it really matter whether the Claimant ought reasonably to have known about the eligibility criteria? What if an applicant couldn't reasonably have known about the eligibility criteria and the fact of ineligibility wasn't found out until during the selection process or after the applicant had been rejected, in either case following some proven discriminatory treatment by the prospective employer. Should the same policy apply regardless?

87. In my judgment it should for the following reasons:

    87.1. First, it cannot be said that a person who could never be appointed to a role can be a victim or subjected to any detriment or disadvantage as a result

after the case law decisions I have referred to. Yes, they may have an innocent mind to the situation, but that in my view makes no difference to the actual result. The result is the same whether they wouldn't have taken up the role or couldn't have taken up the role.

87.2. Even if adjustments were put in place to assist the disabled applicant in passing an assessment, the ultimate result is, whether they passed the assessment or not, it would not matter because the job would still not be theirs. The Claimant could pass all the assessments, interviews and checks with the best result of all the applicants, but the job would still not be his.

87.3. Secondly, even if the applicant had taken reasonable steps to enquire about eligibility but they were confused, misled or got things wrong, the Directive is not worded to protect hypothetical applicants who cannot take up the role on offer. It is worded to protect real applicants who could really be appointed to a real job and really obtain access to employment.

87.4. When considering the tests for indirect discrimination and reasonable adjustments, when viewed through the all or nothing approach taken in **Kratzer,** when viewing the application process as a whole, the Claimant cannot be said to be put at both a group and individual disadvantage because of the selection process. I say this because non-disabled people would be in the same position both as a group or as individuals.

87.5. Similarly, it also cannot be said that any of the first, second or third requirements would put the Claimant at a disadvantage to trigger the duty to make reasonable adjustments because the disadvantage resulting from the PCP, physical feature or lack of an auxiliary aid would put him at a substantial disadvantage compared to non-disabled people, because they would be at the same disadvantage, and, that disadvantage would not bite harder with the Claimant either. You are either barred because of eligibility or you are not. For the purposes of this application, this case is not interested in value judgments, but simply the binary question of whether the prerequisite qualification and PQE were met.

88. Consequently, in my judgment, *"access to employment, self-employment or occupation"* deemed as a prerequisite for the directives to apply in **Kratzer,** for the offices the Claimant applied for, was never possible even if he was in fact misled by R2 about eligibility.

89. The Directive was therefore not engaged because the Claimant could not have been in employment or occupation as a Judge for the offices applied for had he been successful. Whether intentionally or not, he therefore simply had the status of applicant, and therefore any mistreatment of him could not have prevented access to employment or occupation with the result of taking the situation outside the scope of the Equal Treatment Directive.

90. I find the Claimant was therefore not a genuinely interested applicant, albeit in different circumstances than in previous authorities. He is not a genuinely interested applicant because he couldn't have taken up the job and therefore

should not reasonably be considered to be a genuinely interested applicant even if in his subjective view, he considered himself to be one.

The victimisation detriments

91. For the Claimant to succeed in his victimisation complaint, the burden of proof is initially with him to prove facts from which the Tribunal can infer that he was subjected to a detriment because of doing a protected act.

92. For the purposes of this application, I have assumed that a correctly proven and legally made out protected act occurred. I have assumed that there is a proven causal link between the protected act and the detriment alleged and that the Respondents do not have a non-discriminatory explanation for the behaviour alleged.

93. Article 11 of the 2000/78 Equal Treatment Directive covers victimisation.

94. The wording of the anti-victimisation provisions in the Equality Act 2010 s39 (3) are identical to wording for any other prohibited conduct for applicants.

95. Consequently, the same principles apply as for the indirect discrimination and reasonable adjustment claims above.

Are there any decisions that don't appear to fit with these conclusions?

96. I now consider the **Roadburg** decision. It could be argued that this case suggests the Claimant's circumstances could be treated as an issue that should be dealt with by a reduction in compensation.

97. In my view, the situation in **Roadburg** is entirely different to the case before me. I say this because **Roadburg** was about a job role the applicant was eligible to apply for and one which she could have been appointed to. It was not a case where the applicant could never have taken up the role at the point she applied or at the point eligibility was determined.

98. The fact that the role then became unavailable because of external factors is an entirely different set of circumstances to this case. In **Roadburg**, the Claimant had more than just the status of being an applicant. She could have had access to the employment and occupation of the job role she applied for and the discrimination in that case happened before the role became unavailable.

<u>Conclusion</u>

5.1 Given that C and everyone else were mistaken about his eligibility to apply for the roles, was the Claimant a genuinely interested applicant for each of the judicial offices he applied for?

99. In answer to the issue at paragraph 5.1 of this judgment, taking his case at its highest, the Claimant was subjectively genuinely interested in the roles he applied for. However, he ought reasonably to have known that he was ineligible

for the roles and therefore, in my judgment, was not a genuinely interested applicant. He applied for roles he could never take up and therefore does not benefit from the protection of the relevant directives.

100. I therefore strike out his claims because they have no reasonable prospects of success.

5.2 If he was, should the Tribunal strike out his claims anyway, because the Claimant was statute barred from becoming a Judge meaning there could be no detriment or disadvantage to him?

101. For the indirect discrimination claim under s19, assuming that there was a proven PCP applied as pleaded by the Claimant, for the purposes of this strike out application, there was no disadvantage to him either as an individual or any group disadvantage because he could never have got the job and neither could anyone within or outside of his protected group if they were also ineligible. His situation was hopeless from the start.

102. The same is true for the reasonable adjustments complaint under s20 and 21. Again, assuming the PCP alleged is proven, there is no disadvantage to Claimant. Additionally, applying **Paulley,** no adjustment could be made for the Claimant that could have improved his position. Again, his situation was hopeless.

103. For the victimisation complain under s27, I have assumed that the protected acts relied upon by the Claimant are proven and that the detrimental treatment he alleges was victimisation was because of one or both of those protected acts. However, the situation is the same. There can be no detriment to him if he could not have got the job regardless even if decisions made in the recruitment process or the decision to reject him were prohibited conduct.

104. Consequently, in the alternative, the Claimant's claims are struck out under this part of the application because they have no reasonable prospect of success.

5.3 If the reasonable adjustments claims are struck out, should the victimisation claims also be struck out given the detriments relied upon would be the failures to make or discuss the reasonable adjustments the Claimant sought, which by this point would already have been deemed to have no reasonable prospect of success?

105. If the reasonable adjustments claims fail, the victimisation claims fail. This is because the three victimisation detriments alleged are based on the failures to make the reasonable adjustments alleged. I have already decided the adjustments the Claimant argues should have been made, could not have been reasonable adjustments to make because they were never capable of improving the Claimant's situation.

106. In the alternative, I strike out the Claimant's victimisation claims under this part of the Respondent's application.

5.4 If the clams are not struck out on the above bases, should they nevertheless be struck out on policy grounds, namely, that it would undermine the meaning of "applicant" if that included a person who only had hypothetical claims because they were not eligible for the job they applied for?

107. I agree with the Respondent that, alternatively, if I am wring about the Claimant and he should be deemed to be a genuinely interested applicant subject only to the subjective test in the current authorities, in my view, the policy in **Keane etc.** should be extended to applicants who were not eligible to apply for the role, not eligible to be offered the role and/or not able to commence the role, because if it wasn't, that would defeat the purpose of the 2000/78 Equal Treatment Directive and the applicant provisions of the Equality Act 2010.

108. Consequently, the Claimant's claims should also be struck out on policy grounds because the Claimant ought reasonably to have known that he was ineligible for the roles he applied for. This meant that his claims were hypothetical ones and not only should an applicant be genuinely interested in the roles they are applying for, they should also only apply for roles they are able to take up if offered to them.

109. Therefore, I accept the Respondent's submission that to allow the Claimant's claims to continue, would undermine the intended meaning of applicant for the purpose of being protected, when seeking access to employment or occupation.

Strike out

110. In making these decisions, after **Cox** I have reminded myself that striking out a discrimination claim is rarely appropriate, especially when there are disputed facts.

111. However, in this case, the Claimant accepted that he was not eligible to accept the roles. The evidence heard was discreet and covered only eligibility to be appointed, and none of the evidence went to any of the facts about the actual prohibited conduct should they have survived the strike out application.

112. This application was made on legal and policy grounds rather than factual ones based upon common ground that the Claimant was not eligible to take up any of the offices he applied for. I was therefore content that this was one of the rare occasions where striking out the claim was appropriate.

113. I have also considered the fact that the Claimant wanted to make an amendment application to include a continuing course of discriminatory conduct argument projecting into his second claim.

114. Given my judgment that the claims in this case did not receive the benefit of the Equal Treatment Directive, they cannot be claims of discrimination and therefore could not form a continuing course of discriminatory conduct for the amendment application or if his second claim was consolidated with this one.

115. The Claimant has tried to emphasise that he is a litigant in person. However,

despite him not being legally represented, he is an experienced and highly qualified barrister with significant experience in court and Tribunal processes, procedures, rules of evidence and customary hearing conduct across jurisdictions abroad and in the UK. He was at no disadvantage and was fully able to properly plead his case, and indeed has.

116. The Claims are therefore struck out in their entirety under rule 37 (1) (a) and that concludes these proceedings.

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EMPLOYMENT JUDGE SMART
28 August 2024

Judgment sent to the parties on

28 August 2024
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For the Tribunal Office

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