



EMPLOYMENT TRIBUNALS

Claimant: Mr Muhammad Nazieb

Respondent: Moores Furniture Limited

Heard at: Leeds **On:** 16 January 2024

Before: Employment Judge Jaleel

Representation

Claimant: In person

Respondent: Jonathan Cook (Counsel)

PRELIMINARY HEARING IN PUBLIC RESERVED JUDGMENT

1. The claimant's claim of direct disability discrimination is struck out as having no reasonable prospect of success.
2. The respondent's application to strike out the claimant's claims of discrimination arising from disability, failure to make reasonable adjustments and victimisation, on the basis that they have no reasonable prospect of success is refused.

REASONS

Introduction

1. The claimant represented himself and the respondent was represented by Mr Jonathan Cook, Counsel.

2. I was provided with a bundle of documents running to 94 pages which had been prepared by the respondent. The claimant confirmed that he had been provided with a copy of the bundle of documents in advance of the hearing.
3. This was a remote hearing which was not objected to by the parties, being conducted entirely by CVP video platform.

Background

4. I have set out the background to this matter in the preliminary hearing case management order of the same date. For avoidance of doubt, I did not make any findings of fact during the hearing. I simply set out respective circumstances as they are asserted to be.

Submissions

5. The following contains a very basic summary of the submissions that were made.
6. I was provided with a helpful written skeleton argument which Mr Cook supplemented with brief oral submission. It was accepted that there was a high threshold to pass for the Tribunal to strike out such a claim. For the purposes of its application only and requirement to consider the claimant's claim at its highest, the skeleton argument and oral submission was prepared on the basis that the claimant will establish that he is disabled and the alleged detriment amounted to less favourable/unfavourable treatment. Mr Cook commented on each head of claim, and summarised the respondent's position as to why the claims have no reasonable prospects of success. In his oral submission he also referred me to documents within the bundle and authorities relied upon for my consideration. Mr Cook emphasised that the claims be struck out, and if not, a Deposit Order be made. I do not intend to repeat the submission in this Judgment.
7. The claimant did not provide any legal basis in support of his submission that his claims should not be struck out and/or subject to a Deposit Order. He remained aggrieved that his previous employment tribunal claims were dismissed and remained resolute that he had a disability and had been treated unfairly. The claimant stated that whilst he was unfit to return to work he should have been afforded additional time to recover. He emphasised that he wanted to return to work.
8. The claimant also stated that he was utilising the statement of a former colleague Ms Ahmed as part of his evidence at a final hearing but she would not be attending herself. Mr Cook referred me to paragraphs 31 – 33 of Employment Shephard's Judgment (page 52) and highlighted that it was found that the statement was undated, unsigned and claimant had confirmed that he had not met this individual.

9. During the course of the preliminary hearing I took note of the claimant's means. He is not working, but in receipt of benefits. He also has some property in his name.

The Law

10. A Tribunal is required when addressing such applications as the present to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of 15 Procedure) Regulations 2013 which states as follows:

"2 Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

- a) ensuring that the parties are on an equal footing;*
- b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. 30 The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

Strike out

11. Rule 37 of the ET Rules provides:-

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;*

12. In *Mechkarov v Citibank NA* [2016] ICR 1121 the EAT summarised the principles that emerge from the authorities in dealing with applications for strike out of discrimination claims:

"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with

undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

13. The guidance in *Mechkarov* followed from a line of authorities including *Anyanwu v South Bank Students' Union* [2001] IRLR 305 and *Eszias v North Glamorgan NHS Trust* [2007] IRLR 603. *Chandok v Tirkey* [2015] ICR 527 shows that there is not a "blanket ban on strikeout application succeeding in discrimination claims". They may be struck out in appropriate circumstances, such as a time-barred jurisdiction where no evidence is advanced that it would be just and equitable to extend time, or where the claim is no more than an assertion of the difference in treatment and a differencing protected characteristic. *Eszias* also made clear that a dispute of fact also covers disputes over reasons why events occurred, including why a decision-maker acted as they did, even when there is no dispute as to what the decision maker did.
14. In *Ahir v British Airways plc* [2017] EWCA 1392 the Court of Appeal held that tribunals should "not be deterred from striking out claims, discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger in reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context".

Conclusion

15. My starting point is that in discrimination cases I should be slow to strike out a claim on the basis it has no reasonable prospect of success. It is normally necessary to hear all the evidence to be able to consider the merits of a discrimination claim.
16. I have considered the prospects of success and whether in the circumstances it would be appropriate to strike out the claim. I deal with each claim in turn:

Direct Disability Discrimination

17. The Respondent operates a formal capability process. Long term sickness is defined under the policy as an absence of four weeks or longer. It is managed on an individual case basis depending on the circumstances. If following an absence of at least 3 months, an employee is unable to return to their contracted role, or there is no reasonable prospect of the employee doing so in the foreseeable short-term future, a meeting is held to review the situation and dismissal may be an outcome.
18. The claimant was invited to and attended welfare meetings at which he confirmed that he was unable to return to work. This was supported by medical evidence.

19. A first stage capability meeting took place on 21 February 2023. Further capability meetings were convened on 27 April 2023 and 7 June 2023. Throughout this period, the claimant declined referral to occupational health. He also maintained that he was unable to return to work due to his health and was unable to provide a timeframe within which he contemplated being able to return. He was supported by medical evidence obtained from his GP.
20. Mr Cook, in his submissions referred to 3 employees of the respondent who were dismissed for capability following long term absences. The absence duration in these cases ranged from 7 months to just under 14 months. I accepted that whilst this evidence is not determinative, it does illustrate that the respondent took a more lenient approach managing the claimant's absence than other colleagues.
21. For the most part, the claimant simply asserts that he was subjected to less favourable treatment i.e. his dismissal and his alleged disability is the reason it was. He does not give any evidence or explanation at all and he does not identify any person without the particular protected characteristic in a comparable situation who was or would have been treated better.
22. The claimant will therefore be relying upon a hypothetical comparator i.e. the comparator in this case is someone who doesn't share the same disability as the claimant but otherwise shares identical circumstances including the period of absence and unavailability to return to work.
23. Having considered the information I agree with Mr Cook that there is no reasonable prospects of the claimant proving that a hypothetical comparator who had been absent for over 16 months and had no timeframe for returning to work would have been treated any differently. Accordingly, the claim for direct discrimination is struck out. At its highest there is no reasonable prospect of finding that the claimant was treated less favourably due to his disability. The claim is therefore struck out.

Discrimination arising from disability

24. The threshold to strike out a claim is a high one and in my view without hearing oral evidence of the surrounding events prior to, on and after 7 June 2023 that threshold is not met. I cannot say that there are no reasonable prospects of this claim. I remind myself that discrimination cases are fact sensitive and that in this case there will be oral evidence addressing the discussions and correspondence that took place and was exchanged during the entire duration of his absence including the informal meetings and capability proceedings. The claim should not be struck out at this stage on the basis that it has no reasonable prospect of success as there may be factual issues of dispute which the Tribunal ought to consider.
25. I do however find that this claim has little reasonable prospect of success. I refer to my Deposit Order of the same date in this regard.

Failure to make reasonable adjustments

26. I did not consider this claim should be struck out at this stage on the basis that it has no reasonable prospect of success as there may be factual issues of dispute which the Tribunal ought to consider. This largely mirrors the conclusion I reached in respect of the claim for discrimination arising from disability above.

27. I do however find that this claim has little reasonable prospect of success. I refer to my Deposit Order of the same date in this regard.

Victimisation

28. Whilst I note the respondent's assertion that Mr Joliffe, the manager who handled the sickness absence and dismissed the claimant and Mr Lomax the Appeal manager had no involvement in the 2022 Tribunal proceedings it remains that relevant findings of fact will need to be determined. The dismissal took place shortly after the conclusion of the 2022 Tribunal proceedings and the claimant has asserted in the meeting of 21 February 2022 that the respondent's offer of support was influenced by those proceedings and upcoming hearing at the time. In my view and taking the claim at its highest, without hearing oral evidence of the surrounding events prior to, on and after 7 June 2023 the threshold is not met. I cannot say that there are no reasonable prospects of this claim. I remind myself that such cases are fact sensitive and that in this case there will be oral evidence addressing the events that took place between parties. I did not consider the claim should be struck out at this stage on the basis that it has no reasonable prospect of success and/or subject to a deposit order on the basis that it has little reasonable prospects of success.

Employment Judge Jaleel

Date 15 February 2024