EMPLOYMENT TRIBUNALS

Claimant: Mr A Eadie

Respondent: Ebury Partners UK Limited

Heard at: London Central
On: 27 May 2022

Before: Employment Judge Heath

Representation
Claimant: Ms L Bone (Counsel)
Respondent: Mr M Greaves (Counsel)

RESERVED JUDGMENT

1. The claimant's claims under section 13 Equality Act 2010 are not struck out, and are not subject to a deposit order.

2. The claimant's claims under section 15 Equality Act are not struck out, and are not subject to a deposit order.

REASONS

Introduction

1. This open preliminary hearing was initially listed by EJ Burns at a closed preliminary hearing she conducted on 15 February 2022. The stated purpose of this hearing was:

    a. To determine if the claimant is a disabled person for the purposes of the Equality Act 2010;

    b. To consider any application(s) the respondent may make for strike out/deposit orders in respect of the claimant's claims and determine these, subject to the discretion of the judge allocated to the preliminary hearing; and

    c. Case management as appropriate.

2. By letter dated 1 March 2022 the respondent applied for strike out or a deposit order in respect of:

    a. The claimant's perceived disability claim under section 13 Equality Act 2010 ("EA"); and

    b. The claimant's perceived disability claim under section 15 EA.

3. Various applications were made by both parties, which I have dealt with in a separate case management order summary.

Procedure

4. I was provided with a 140 page bundle (I will refer to pages in this bundle as follows [**77**]) and and additional bundle (I will refer to pages in this bundle as follows [**A77**]). Both counsel provided skeleton arguments and copies of a number of authorities, though these had not reached me before the hearing. I took just under an hour to read the skeleton arguments and other material the start of the hearing.

The claims

5. The respondent is a fast-growing *Fintech* company that provides cross-border financial services to corporates and SMEs, including trade finance lending, foreign exchange services, cash management and risk management solutions. It is authorised and regulated by the Financial Conduct Authority.

6. Prior to joining the respondent, the claimant was employed by Greensill Capital ("Greensill") for around six years as its Group Finance Director. In March 2021 Greensill was running into severe financial difficulties.

7. In early 2021 the respondent engaged a recruitment company, La Fosse, to approach candidates for various roles at the respondent. The respondent asked La Fosse to look at potential candidates from Greensill, and the claimant was approached.

8. The claimant attended seven interviews with the respondent over the course of a week in March 2021. On 23 March 2021 the claimant was verbally offered the role of Group Finance Director with the respondent, and he signed a contract of employment of the 26 March 2021. The claimant negotiated a shorter notice period with Greensill, and he attended some of the respondent's internal meetings prior to taking up employment with them.

9. The claimant's first day of employment was 10 May 2021. On this day the claimant collapsed and was admitted to hospital. He was discharged the following day with a confirmed diagnosis of a transient ischaemic attack (or TIA) [**134-5**].

10. On 17 May 2021, the respondent's head of HR telephoned the claimant to let him know his employment was being terminated. Further written reasons followed on 27 May 2021.

11. On 10 June 2021 the claimant appealed against his dismissal, pointing out that his dismissal was "*likely to have Equality Act implications*". He says this was a protected act, and that similar assertions made in correspondence by his solicitors on 23 June 2021 were similarly protected acts.

12. On 23 July 2021 the claimant submitted a Subject Access Request to the respondent seeking personal data. He says the respondent failed to respond promptly or adequately to this request.

13. On 16 September 2021 the respondent wrote to the claimant's solicitors to say that the claimant's appeal would not be progressed as any appeal would be futile.

14. The claimant says there has been an ongoing failure to allocate him Growth Shares due under his contract of employment.

15. It is the claimant's case (following his concession that he was and is not a disabled person) that:

    a. The respondent directly discriminated against him by dismissing him because it perceived him to be disabled. He also relies on other acts of discrimination consequent on his dismissal, such as failing to deal with his appeal and overturn his dismissal, the failure to allocate Growth Shares, and the failure to respond promptly and adequately to his Subject Access Request.

    b. The respondent treated him unfavourably by dismissing him, failing to deal with his appeal and overturn his dismissal, failing to allocate him Growth Shares and failing to respond promptly and adequately to his Subject Access Request. The claimant says that the respondent treated him this way because it wished to avoid matters arising in consequence of the claimant's perceived disability, in particular its wish to avoid becoming under a duty to make reasonable adjustments.

    c. His appeal against dismissal submitted on 10 June 2021, which referred to the "*Equality Act implications"* of his dismissal, and the letter to the respondent from his solicitors dated 23 June 2021, were protected acts, and that the way the respondent failed to deal with his appeal, the failure to allocate Growth Shares and failure to deal adequately or promptly with his Subject Access Request were detriments because of those protected acts.

16. The respondent's case is that the claimant's state of health was not the reason for any of the above treatment. The respondent asserts that on 11 May 2021, the day after the claimant started employment with them, first, the Financial Conduct Authority ("FCA") announced it would be commencing an investigation into Greensill, and second, a Parliamentary Enquiry would commence. It further asserts that on 14 May 2021, the Serious Fraud Office ("SFO") announced an investigation into GFG Alliance which would include an investigation into that business groups links and financing arrangements with Greensill.

17. The respondent informed the claimant on 17 May 2021 that his employment was to be terminated on notice, and provided him with reasons in writing on 27 May 2021. The written reasons refer to the above investigations and the likelihood of reputational risk to the respondent. The respondent's pleaded case was that the reason for the claimant's dismissal was "*to protect its reputation and interests"* and *"the fact that the claimant had suffered a medical incident was not a factor in its decision-making*".

18. There is what is, in many ways, a straightforward question at the heart of this case. Why did the respondent dismiss the claimant? The claimant says it was because of the respondent's perception of a disability (admittedly one he accepts he did not have), and the respondent says it was for reputational reasons arising from facts discovered more or less immediately after he started employment. The key task for any tribunal hearing this claim is to resolve that question. There are, of course, other issues that follow on from dismissal such as the question of the appeal, the allocation of Growth Shares and the DSAR which the tribunal will have to resolve, but the central question at the heart of the case is the reason for dismissal.

The law

Strike out

19. Rule 37 Employment Tribunal's (Constitution & Rules of Procedure) regulations 2013, Schedule 1 ("Rules") provides:

> *(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.*

20. In considering whether there is no reasonable prospect of success, the claimant's claim should be taken at its highest from a reading of the pleadings and any relevant documents in which the claim is set out (*Cox v Adecco* UKEAT/0339/19/AT).

21. Discrimination claims should only be struck out in the clearest and most obvious of cases. "*In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of is particular facts is a matter of high public interest*" (*Anyanwu v South Bank Students' Union* [2001] IRLR 305.

22. 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."

23. I note also that the guidance in *Mechkarov* "*where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence*" comes from the case of *Eszias v North Glamorgan NHS Trust* [2007] IRLR 603 where the factual dispute centred on the reasons why the claimant had been dismissed. As the learned editors of Harvey put it:

> *"It is also important that the reference in Ezias to 'disputed facts' is not limited to disputes about factual events (what happened) but also covers disputes over the reasons why those events happened, where that is relevant to the legal claim that has been brought. There will therefore be a crucial core of disputed fact in a case which turns on why a decision maker acted as they did, and the parties have competing assertions on those reasons, even where there is no dispute as to how that decision maker acted and what they in fact did. Where a claim will turn on the question of how a decision maker evaluated disputes of fact, and precisely what conclusions they reached, these are matters that can only be resolved at a full hearing (Lockey)."*

Deposit order

24. Rule 39 of the Rules provides:

> *(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 reasonable 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.*

25. Neither counsel drew my attention to any particular authorities on deposit orders, but I had regard to *Arthur v Hertfordshire Partnership University NHS Foundation Trust* UKEAT/0121/19/LA, in which the EAT reviewed the authorities and summarised the principles involved in the making of a deposit order:

    a. The test for ordering a deposit is different to that for striking out under Rule 37(1)(a).

    b. The purpose of the order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and creating a risk of cost. It is not to make access to justice difficult or to effect a strike out through the back door.

    c. When determining whether to make a deposit order a tribunal is given a broad discretion, is not restricted to considering purely legal questions, and is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and

reach a provisional view as to the credibility of the assertions being put forward.

Conclusions

Section 13 claims

Strike out

Dismissal claim

26. In respect of the dismissal claim, the tribunal will have to determine the reason why the respondent dismissed the claimant.

27. Mr Greaves made a number of points in support of his application to strike out. He submitted:

    d. The suggestion in the claimant's Grounds of Claim at paragraph 11 that the respondent perceived the claimant to be disabled was a mere assertion unsupported by facts or evidence;

    e. The claimant did not mention in his Grounds of Claim that there was an important and material change of circumstance after he commenced employment, namely the various investigations;

    f. To make good his claim of the perceived disability discrimination, the claimant must establish that the respondent perceived him to have had an impairment amounting to a disability. In this regard, he says the claimant will not be able to establish this, and he points towards:

        i. NICE guidance [**76**] and information on the NHS website [**77**] about TIAs, which makes clear that they resolve within 24 hours;

        ii. Communication coming from the claimant and his wife in the days immediately following his collapse were that experienced a TIA, he was "*feeling much better*" that he was "*itching*" to get to work, that he needed "*a few further tests to be sure there is no further complication*" and "*to be sure there is nothing else lurking*" and on 20 May 2021 that "*the event stemmed from a mineral deficiency*".

    g. The mere fact of dismissal (which he says is all the claimant can show) with nothing more is insufficient to shift the burden to the respondent to prove it unlawfully discriminated against the claimant.

28. I do not accept, taking the claimant's claim and its highest, that the claimant is relying on the mere fact of dismissal. On his claim he is relying on a dismissal within days of a medical incident (I use that neutral term for now, and will move on to the question of perception of the disability as opposed to simply a medical issue). Although the respondent has pleaded further investigations were an intervening event, I was not taken to any evidence about them and am in no position to gauge him whether and to what extent this may have influenced the respondent's decision making.

29. There is some force in Mr Greaves's submission that, effectively, the claimant will struggle to prove the respondent perceived that he had a disability when all the information coming from him and his wife was that he had suffered a transient condition from which he would make a swift recovery.

30. At the hearing, Ms Bone made the point that the claimant had, unsurprisingly, put a positive spin on things and there was scope for the respondent considering he was understating the medical picture. Mr Greaves took issue with this on the basis that this was the first time any such suggestion had been made.

31. The fact is that the tribunal will have to determine the reason why the claimant was dismissed by the respondent. There are two competing reasons advanced. The letter from the respondent's solicitors on 16 November 2021 [**139**], on the subject of the claimant's appeal, set out that the "*decision to terminate [the claimant's] employment was agreed by the Board*". Oral evidence will need to be given by the respondent about this decision and evaluated by the tribunal in order to resolve this dispute. While the respondent has identified what may amount to evidential difficulties in making good the claimant's case, they do not amount to clear or obvious reasons for the tribunal departing from the usual course of not striking out a discrimination claim.

Appeal, shares, Subject access request

32. At the time when these alleged acts of discrimination occurred the claimant had put forward that his "*event stemmed from a mineral deficiency*" on 20 May 2021 [**53**]. The point being, according the to respondent, post dismissal the claimant had gone even further to suggest that his medical issues did not substantially impact his day-to-day activities and were not long-term.

33. However, there is still a core dispute about the reason why the respondent acted as it did in making the decisions relating to the appeal, the Growth Shares and the Subject Access Request.

34. Also, all of these subsequent alleged acts of discrimination were consequent upon the dismissal; perhaps the appeal issues and the Growth Shares issues most obviously. An assessment of the prospects of success of claims in relation to these acts is perhaps best conducted in the context of evidence in relation to the decision-making on the dismissal. This can only be done at a final hearing where the oral evidence of the respondent will be heard and evaluated.

Deposit order

35. I will take all the claims together here, but repeat that the non-dismissal claims relate to events took place after the claimant's comments about the mineral deficiency on 20 May 2021.

36. The tribunal will only be in a position to resolve the reason why the respondent dismissed the claimant, dealt with its appeal in the way that did, did not allocate the Growth Shares and dealt with the Subject Access Request when it hears oral evidence on these points. Establishing

discrimination is always very fact sensitive and dependent on inferences which can generally only be properly made on examination of the evidence as a whole.

37. It may not be easy case for the claimant to establish that the respondent treated him less favourably in a number of respects based on a perception of his state of health that ran counter to what he was telling them. On balance, however, I find that just falls short of there being little reasonable prospect of success in these claims. The strength of these claims can only properly and fairly to be established on listening to the evidence of the decision-makers.

Section 15 claim

Strike out

38. The thrust of the application in respect of the section 15 claim is that it is unsustainable in law.

39. Section 15 EA provides:

> *(1) A person (A) discriminates against a disabled person (B) if—*
>
> > *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> >
> > *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does all not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

40. Mr Greaves pointed to an admittedly *obiter* footnote in in *Chief Constable of Norfolk v Coffey* [2019] IRLR 805, which reads:-

> *"If the disability is perceived rather than actual, s 15 may not be available, because, unlike s 13, it applies to discrimination 'against a disabled person'. The natural meaning of that phrase is that the person should in fact be disabled, and it is not apt to cover the case where they are only perceived to be. As pointed out in note 1 above, the definition of discrimination in the 1995 Act was formulated in the same way, and in J v DLA Piper it was submitted that the statutory language should be given a strained construction in order to accord with what was said to be the effect of EU law; but the EAT concluded that that submission could not be accepted without a reference to the CJEU. Since the Claimant (now) relies exclusively on s 13, it has not been necessary for us to explore these issues".*

41. He also relies on a passage at paragraph 20.28 in Volume 4 IDS Employment Law Handbooks:

> *"It should be noted that, in contrast to direct discrimination, the unfavourable treatment under S.15 has to arise because of a*

> *consequence of the disabled person's own disability and not because of disability in general. The alleged discriminator (A) must have treated the complainant (B) 'unfavourably because of something arising in consequence of B's disability' (our stress) — S.15(1). The effect of this is to preclude claims being brought in respect of a misperception that the claimant is disabled or because of the claimant's association with another person who is disabled. These avenues of complaint are open to those bringing claims of direct discrimination under S.13, given that the relevant statutory wording simply requires that the less favourable treatment be 'because of a protected characteristic' without stipulating that it has to be the complainant who has the relevant protected characteristic".*

42. In response, Ms Bone submitted that section 15 should be read purposefully to ensure it is consistent with the EU Directive. She noted that a potential inconsistency was noted in the case of *J v DLA Piper LLP* [2010] IRLR 936, in a judgement handed down a few months before the EA came into force on 1 October 2010. She argues that it cannot have been the intention of Parliament to bring into force a statute that was not in harmony with the Directive.

43. I further raised with counsel a passage in *Harvey on the Industrial Relations and Employment Law* (T633.02): -

> *Whilst neither of these statements is to be taken as amounting to a fetter on the tribunals' discretion (see Jaffrey v Department of the Environment, Transport and the Regions* [2002] IRLR 688 *at [41], EAT) and there is no blanket ban on strike out applications succeeding in discrimination claims (see Langstaff J in Chandhok v Tirkey* UKEAT/0190/14, [2015] ICR 527 *at [20]), the power to strike out in discrimination cases should be exercised with greater caution than in other, less fact-sensitive, types of case. This is of particular relevance where the argument is that a discrimination claim is misconceived, and it applies not only to cases where documentary evidence is said to be of paramount importance but to cases which involve questions of statutory construction where the case may turn on a disputed point of law, as the Anyanwu case shows.*

44. While Mr Greaves presents a forceful case that on a plain reading of the statute and relying on the *obiter* observations in *Coffey* views of the editors of *IDS Handbooks*, I consider that the respondent has raised an issue in response that is more than fanciful.

45. Mr Greaves submits that I am in as good a position as anyone to determine this point of law. However, it is a novel point of law with potentially far-reaching consequences. If the law on section 15 and perceived discrimination is to be advanced, I consider that it would be better if the legal issue could be determined together with the facts of this case rather than simply as a legal argument in a vacuum. Ms Bone gave the example of the dismissal of a worker following a misdiagnosis of cancer. It is often the case that the facts of a case help illuminate the legal principles.

46. In the circumstances, I do not find that there are no reasonable prospects of the claimant succeeding in his section 15 claims, and I do not strike them out.

47. I have considered whether the claimant has little reasonable prospect of making good this claim. On balance, I do not consider but I can say that there are little reasonable prospects of this claim succeeding. The determination of whether a claim has little reasonable prospect of success under Rule 39 is very much a broad and summary assessment. The legal issues raised are complex and require more detailed submissions and consideration than was available at the open preliminary hearing.

48. In the circumstances I do not find that the section 15 claims have little reasonable prospect of success, and I do not make a deposit order.

Employment Judge **Heath**

2 June 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

07/06/2022

FOR EMPLOYMENT TRIBUNALS