

Appeal No. UKEAT/0154/18/LA

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 20 December 2018

Before

THE HONOURABLE JUSTICE LEWIS

(SITTING ALONE)

THE SECRETARY OF STATE FOR THE DEPARTMENT
FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

APPELLANT

MR JOHN JAMES

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR GEORGE ROSWELL
(of Counsel)
Instructed by:
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One Kemble Street
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For the Respondent

MR JOHN JAMES
(The Respondent in Person)

SUMMARY

PRACTICE AND PROCEDURE – Striking-out/dismissal

DISABILITY DISCRIMINATION – Disability related discrimination

This was an appeal against a decision of the Employment Judge to refuse an application to strike out a claim for direct discrimination, a failure to make reasonable adjustments, and harassment related to a disability, and unfair dismissal. The Claimant was a Senior Veterinary Inspector. There were issues of underperformance in early 2015 to February 2016. The Claimant was diagnosed with prostate cancer on 8 February 2016 and informed his employer on the 9 February 2016. On the 17 February 2016, the employer terminated his employment. The Claimant contended that the high PSA levels prior to the diagnoses affected the workings of the brain and led to the mental impairment that caused his underperformance. At a Preliminary Hearing to consider these issues, the Tribunal found that the evidence was insufficient to conclude that there was any connection between the raised PSA level and the mental impairment leading to underperformance and concluded that the disability claims had no reasonable prospect of success. The Tribunal declined, however, to strike out the three disability claims in relation to the period from 9 February 2016. He also declined to strike out the unfair dismissal claim taking account of the disability claim and potential evidential uncertainties.

The Tribunal's decision not to strike out the disability claims was perverse in the sense that it was illogical. Having found that there was no factual connection or link between the underperformance and the prostate cancer, and having found that the claims had no reasonable prospect of success, it was illogical not to strike out the claim. The appeal on those issues would be allowed and an Order striking out the three disability claims would be substituted. In relation to the unfair dismissal, the Tribunal erred in so far as it took into account the disability claims (as those have been struck out). The appeal against the refusal to strike out that claim would be

allowed for that reason but the matter would need to be remitted to the Employment Tribunal to determine whether the claim for unfair dismissal had no reasonable prospects of success.

A **THE HONOURABLE MR JUSTICE LEWIS**

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1. This is an appeal by the employer, the Secretary of State for the Department for Environment, Food and Rural Affairs, who was the Respondent in the Tribunal below. The appeal is against a Decision of Employment Judge Powell who dismissed an application to strike out the Claimant, Mr James' claims under the **Equality Act 2010** ("EqA") for unfair dismissal. I will refer to the employer as the Respondent even though the employer is the Appellant in this particular appeal.

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2. The facts in brief are as follows. Mr James was employed as a Senior Veterinary Inspector from July 2012. It is agreed between the parties that there were concerns over the Claimant's performance between about March 2015 and January 2016, and that the performance was below the employer's expectations. The Claimant was subjected to a series of performance review meetings and formal procedures, which commenced with a written warning and escalated to a final warning. In January 2016 the Claimant was notified of an intention, on the part of the employer, to conduct a Hearing to determine whether the Claimant's employment should be terminated.

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3. On 8 February 2016 the Claimant was unfortunately diagnosed with prostate cancer, he informed the employer about that on 9 February 2016. The meeting at which the employer decided to terminate his employment was held eight days later on 17 February 2016. A subsequent appeal was rejected. The Claimant brought a claim for unfair dismissal and for unlawful discrimination, failure to make reasonable adjustment, and harassment because of his disability, that is the prostate cancer. In essence, the Claimant's case was that his mental capacity, to put it broadly, and hence his performance was substantially adversely affected by and

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A connected to his prostate cancer in the period from early 2015 to January 2016. The essence of his case is summarised in paragraph five of the Employment Tribunal’s Judgment in the following terms:

B “5. I aver that between January 2015 and June 2016 I was under the effect of a rising prostate gland secretion. Personal research of the prostate literature has revealed work in Germany has shown that a raised level of PSA interferes with the Phospho-lipid metabolism of the brain, this results in one’s mental capacity being compromised with resulting temporary impairment of the capability of the affected person.”

C 4. The Respondent accepted that prostate cancer was a disability within the meaning of the **EqA 2010 Act** but contended that there was in fact no link between the prostate cancer and the mental impairment in performance as claimed by the Claimant. A case management conference was held and that considered how to proceed in relation to the claim for direct discrimination under section 15 of the **EqA 2010 Act** and the failure to make reasonable adjustments under section 20, and the harassment in relation to disability. Underlying the consideration of how to deal with those matters was whether there was any factual link or connection between the Claimant’s disability, that is prostate cancer and his performance in the periods from early 2015 to January 2016. The Employment Tribunal ordered a Preliminary Hearing of certain issues and gave directions for the Hearing, including directions concerning medical evidence.

F 5. Turning to the legal framework, section 15 of the **2010 Act** provides as follows:

“15. Discrimination arising from disability

(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 not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had a disability.”

H 6. The unfavourable treatment has to be something arising in consequence of the person’s disability. As the Court of Appeal explained in the case of **City of York Council v Grosset**

A [2018] IRLR 746, section 15(1)(a) requires an investigation of two distinct issues. First, did the employer treat the employee in that way because of an identified reason that is because of something? Secondly, did that something arise in consequence of the employee's disability?
B That second issue is an objective matter as to whether there was a causal connection between the disability and the something. Here, for present purposes, the issue is whether there was a causal connection between the underperformance and the Claimant's prostate cancer.

C 7. Section 20 of the **2010 Act** imposes a duty on an employer to make reasonable adjustments. I remind myself of the provisions of section 20 and section 21 and in particular section 20(3), which provides that "*the first requirement is a requirement, where the provision, criterion or practice of A's 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*". Implicit in that subsection is that there is a factual link or connection between the disability and the substantial disadvantage that the person suffers. The provision criterion or practice must be one that puts a disabled person at a disadvantage, in other words there must be some kind of link between the disadvantage and the practice.
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F 8. Finally, section 26 deals with harassment and provides that:

"(1) A person (A) harasses another (B) if-

G (a). A person engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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A The phrase in section 26(1)(a) is unwanted conduct related to a relevant protected characteristic. That is not, as Mr James said this morning, a question of causation and he is right to make that distinction. However, the phrase unwanted conduct related to a protected characteristic does
B imply a factual connection or link between the conduct and the protected characteristic. If there was no factual link or connection, then the unwanted conduct could not be related to the protected characteristics.

C 9. In terms of strike out, the relevant provision is in Rule 37 of the **Rules of Procedure**. For present purposes, the relevant question is whether the employer can demonstrate that the three claims in relation to the **2010 Act**, and the unfair dismissal claim, has no reasonable prospect of
D success. It is well established that claims for discrimination, and indeed other claims, should not be struck out save in the most obvious and plain cases, see the observations of Steyn LJ in the case of **Anyanwu and Another v Southbank Students Union** [2001] IRLR 305, especially at
E paragraph 24. The fact that claims should not be struck out, save in the most obvious cases, is particularly true where the centre of facts of the claims are themselves in issue, see the case of **Ezsias v North Glamorgan NHS Trust** [2007] IRLR 603, especially at paragraph 29.

F 10. Against that background, it is necessary to consider in some detail the Decision of Employment Judge Powell. At paragraphs five to nine the Employment Judge sets out the essential issues between the parties, a recording of the essential contentions of the Claimant and
G the Respondent. In paragraph 10 he identifies the relevant statutory provisions, at paragraph 11 he correctly identified the issues for determination at the Hearing before him as follows, namely:

“11....

H (a). Whether the claim for discrimination, on the grounds of the Claimant’s disability should be struck out under rule 37 of the Employment Tribunal’s 2013 rules, or subject to a deposit order under rule 39.

(b). Whether the claim for unfair dismissal should be struck out under rule 37 of the Employment Tribunal’s 2013 rules, or subject to a deposit order under rule 39.”

A 11. At paragraphs 14 and 15 the Employment Judge sets out a summary of the Claimant's factual case in the following terms:

“14. The Claimant's case, which we discussed in detail and as summarise here, is a hypothesis deduced from a series of factual assertions

B (a) The Claimant had heightened PSA levels [87] of 6-7 (above the normal for a man in his 60's of about 4) from early 2015.

(b) Early 2015 is the time when the Respondent commenced formal management of his performance.

(c) The PSA level climbed to around 10 by January 2016

C (d) In the period between the aforesaid dates the claimant suffered from impaired memory and impaired mental acuity.

(e) In June 2016, after 3 -4 months of treatment, he experienced a dramatic improvement in his mental acuity.

D 15. From the above Mr James concluded that the hormone therapy and other treatments had the effect of alleviating the impairment of his mental function. As his prostate cancer had, prior to his dismissal, not exhibited any of the typical physical adverse symptoms the evidence supported a conclusion that his loss of mental acuity was itself a symptom because it coincided with an increase in his PSA level and was alleviated after a number of months of cancer treatment.”

E 12. At paragraph 18 the Employment Judge summarised the Respondent's response to those assertions. In summary, they included the fact the Claimant had initially identified personal factors, not poor memory or impaired thinking of the reasons for his underperformance. More significantly, the Respondent said there was no medical evidence or body of expert opinion which supported the Claimant's own hypothesis. The Employment Judge considered whether or not to allow a further adjournment to enable the Claimant to produce medical evidence. He decided that it was not proportionate to allow a further adjournment for further medical evidence. He considered that the Claimant had had ample time in the light of the Orders of the case management conference to produce medical evidence and opinion.

G 13. The only reply that the Claimant had been able to produce by the time of the Hearing before the Employment Judge was from a consultant, from Velindre, a Mr Kynaston who was not the consultant responsible for Mr James' treatment but may have had some prior involvement in the management of his condition. Mr Kynaston's observation did not in fact support the

A Claimant's hypothesis and it said this, "Like you, I do not think there is any scientific evidence
that asserts a slightly elevated PSA with the problems you described in your work and therefore
unfortunately I am unable to point you in any direction of any literature." No complaint has been
B made in relation to the Decision to refuse the further adjournment.

14. The Employment Judge then considered the medical evidence that had been produced at
the time of the Hearing before him. He discusses that in detail at paragraphs 28 to 40. At
C paragraph 41 the Employment Judge identified the issues as follows:

"41.

Was the claimant's impaired mental acuity a result, an effect or consequence of his prostate
cancer?"

D 15. The Employment Judge noted that Mr James' claim was that a raised level of PSA had a
chemical effect on the workings of his brain, and it is necessary to set out in detail the
Employment Judge's findings on those matters, which are in paragraph 47 to 51 of the Judgment:

E "47. I accept that the claimant can evidence the co-existence of two factors; the PSA level in his
blood and the lack of concentration. But the Claimant has not adduced any evidence to confirm
his assertion; This increased blood levels can cause abnormal phospholipid metabolism in the
brain".

F 48. If I was prepared to accept the Claimant's assertion of the possible chemical effects on the
brain consequent to high levels of PSA I would still expect the claimant to evidence that he was
actually subject to abnormal phospholipid metabolism in the brain. He has not done so and he
is not qualified to diagnose or form a clinically competent opinion on this matter; it was for that
reason he was allowed three months to produce a suitable independent opinion.

49. In any event, I have substantial doubts about the claimant's hypothesis. He has not
produced any articles from respected medical journals nor any published papers. His efforts
to find support amongst qualified experts led to one opinion which undermined the Claimant's
hypothesis.

G 50. Given that I have accepted the Claimant's factual statements and borne in mind all the
available medical evidence. This is case which falls within the ambit of the in *Ezsias v North
Glamorgan NHS Trust* [2007] ICR 1126; it is a case where I have before me all the evidence on
the issue which could reasonably be put before a tribunal and I am reasonably placed to form
a judgment on that evidence.

H 51. Thus, by reason of the above matters I have reached the conclusion that the evidence and
expert opinion before me is insufficient for me to conclude that the claimant's impaired mental
function during his employment with the respondent arose from his disability of prostate
cancer."

A 16. Turning then to his conclusion from the material issues, they are set out at paragraph 61-65 in the following terms:

“61. I am very cautious about inhibiting any claim of discrimination.

B **62. I am satisfied that the Claimant has had the fullest opportunity to present evidence to demonstrate a causal connection between prostate cancer and the mental impairment he asserts arose from his disability in respect of his claims under section 15 and 21-22 of the Equality Act 2010.**

63. I am afraid that the Claimant has not managed to identify any medical opinion to support his assertion and the only medical opinion before me undermines the Claimant’s case.

64. The Claimant cannot evidence nor find expert opinion to suggest his impaired concentration and memory, upon which two of his claims depend, arose from his disability.

C **65. For these reasons, I am of the judgement that this aspect of the claim has no reasonable prospect of success.”**

D 17. The Employment Judge then turned to another issue, namely whether the Respondent had knowledge of the disability in the period prior to 9 February 2016. He concluded that the Respondent did not. It was conceded that the Respondent had knowledge from 9 February 2016 because Mr James told them as soon as he had the diagnosis about the diagnosis for prostate cancer. Then at paragraph 68-71, the Employment Judge gave his final conclusions on the disability issues. They are in the following terms:

“68. Taking the two issues addressed above together I cannot see any possible prospect of success for the discrimination claims prior to 9th February 2016; the date on which the respondent was informed of the claimant’s disability. I have reminded myself of the stringent test identified in the authorities and if there were even a fanciful prospect that a Tribunal could conclude that the reduced mental acuity was a symptom associated with the claimant’s physical impairment or some contemporaneous indications to the respondent which could lead a tribunal to conclude the respondent was aware of a long term impairment which adversely affected the claimant’s day to day activities I would err on the side of caution and refuse the application to strike out this part of the claim.

F **69. In this case I refuse the application to strike out the disability claims in respect of events after 9 February 2016; the Respondent’s decision to dismiss and to reject the Claimant’s appeal because those decisions post date the Respondent’s knowledge of the Claimant’s disability. However, prior to that date, I cannot conceive of a scenario wherein a tribunal could reach a conclusion in which the Claimant, on the best evidence available to him (that being the evidence before me taken at its highest) could reach the conclusion the Claimant’s impaired mental acuity arose from, or was in any sense consequent to, his disability or that the Respondent, in possession of information from the Claimant and occupational health advice, which ran counter to any suggestion of a health related cause for the Claimant’s memory and concentration difficulties, could find in favour of the Claimant’s case for discrimination before 9th February 2016.**

G **70. Thus, I have concluded that the claims of discrimination prior to 9th February 2016 have no reasonable prospect of success and I therefore conclude that that part of the claim should be struck out.**

A 71. In respect of the allegations which are alleged to have occurred on or after the 9 February, I have concluded that they have little prospect of success and should be subject to consideration for a deposit order.”

B 18. In relation to the unfair dismissal, the essential conclusion is set out in one paragraph of the Judgment, at paragraph 78, in the following material terms:

“78. I have reached the conclusion that the claim of unfair dismissal is fraught with difficulties for the Claimant but, taking into account the confluence of the disability discrimination claims which post-date 9th February and the uncertainties of evidence under cross examination. I am not persuaded that the claim of unfair dismissal should be struck out, only that, taken at its highest, the claims have little prospect of success.”

C 19. Against that background the employer appealed against the Decision of the Employment Judge not to strike out the claims. Lavender J allowed the appeal to go forward on two grounds:
D “(1) it is arguable that the Employment Tribunal’s finding on causation at paragraph 51 of its Judgment ought to have led to the striking out of all of the claims for discrimination and harassment; (2) if that argument succeeds, it is arguable that the Tribunal took account of an irrelevant consideration in deciding in paragraph 78 not to strike out the unfair dismissal claim.”

E 20. Before I turn to that appeal, I should mention that Mr James has done more research, and after the Hearing before the Tribunal but before the Tribunal gave its Judgment, he found a study in an oncology journal in 2016 from Sweden. That summary says in its broad conclusions that
F patients diagnosed as having cancer had increased risks of several common mental disorders from the year before diagnosis, and there is then a very detailed analysis of that. Mr James sought to cross-appeal to rely on the Swedish evidence, as I will call it, but Choudhury J, refused to allow
G an appeal to proceed on the new evidence. Firstly, he commented that the Claimant had had several months to produce evidence in support of his contention. This evidence obviously existed at the time of the Hearing because it was published online on 28 April 2016 and then was corrected on 26 May 2016. Then Choudhury J concluded that in any event, far from supporting
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A the contention the further medical evidence focuses on the psychological effects of diagnosis, rather than the medically causal link suggested by the Claimant.

B 21. In my judgement, given that Choudhury J has refused to allow the appeal to proceed on the basis of this new evidence, it is not open to this Employment Appeal Tribunal to take it into account. I would reassure Mr James, however, that I have read it carefully more than once. **C** Whilst I would express myself differently from Choudhury J, the study is clearly aimed at psychological disorders such as depression, stress and adjustment disorder and other matters, and even if I had been allowed to take this into account, I would have been unlikely to be persuaded that it did in fact support the very specific link between the mental impairment that Mr James was **D** experiencing in 2016 and going back to early 2015.

E 22. Mr James also produced this morning a letter from a Professor at University College from earlier this year and that Professor says that any cancer diagnosis can cause psychological effects, as can any major life event. Again, I have looked at the email from the Professor. That talks about the cancer diagnosis causing psychological effects which one can well understand, a **F** diagnosis of cancer is a devastating thing to have. Different people will clearly react in very different ways but what we are talking about in this case is not the cancer diagnosis itself, but the Claimant's case that in the period before diagnosis, there was a link between the raised PSA levels and the metabolism of the brain and the performance of the brain. Although I therefore look **G** carefully at what the Professor says, it is not strictly evidence before me and in any event, it would not of itself assist Mr James in his case.

H 23. Turning then to the disability issues, in my judgement the Employment Judge did, on the particular facts of this case, act perversely in not striking out the three claims under the **Equality**

A **Act 2010**; that is the direct discrimination claim, the claim that there had been a failure to make
reasonable adjustments and the harassment claim. In the light of the finding that there was no
B connection, no factual link between the poor performance in the relevant period and the prostate
cancer, it was illogical not to strike out the claim. The illogicality can be seen from the terms of
the Judgment itself. Paragraph 51 is a clear finding that the evidence was insufficient to enable
the Tribunal to conclude that the Claimant's impaired mental function, during his employment,
C arose from the prostate cancer. That is then further reinforced by the Judge's conclusions at
paragraph 62-65 and the Judge concludes that, in relation to disability issues, the claim has in his
own words at paragraph 65, "no reasonable prospect of success." That is of course the test for
striking out a claim under the relevant part of Rule 37.

D 24. Further, the Employment Judge considered that in relation to the period before 9 February
2016, the claim should be struck out for essentially two separate reasons. He said at paragraph
E 69, that in relation to the period before the 9 February 2016, he could not conceive of a scenario
where a Tribunal could reach a conclusion that the Claimant's impaired mental acuity arose from
or was any sense consequent on the prostate cancer. Further, the Respondent did not know of it
before the 9 February. The first distinct reason for striking out the claim for the period prior to
F the 9 February, was that it was not possible to conceive of a scenario where there was a connection
between mental impairment and the prostate cancer. That applies equally to the period from the
9 February as it does to the period before the 9 February 2016.

G 25. In the circumstances therefore, on the findings of the Employment Judge, the only
conclusion that he could come to was that the three claims for discrimination under the **Equality**
H **Act 2010** should be struck out because they had no reasonable prospect of succeeding. The

A appeal on that ground succeeds. I will therefore substitute a finding that those three claims should have been struck out.

B 26. In relation to the unfair dismissal claim, the Decision not to strike out was influenced by two factors. First, the fact that the disability claim had not been struck out and second, the uncertainties on the evidence. That last point may relate to a number of matters including the date on which the disciplinary Hearing was held, coming shortly after the diagnosis of cancer.
C Those are matters for a different Tribunal and not for this Tribunal.

D 27. As far as the Decision is based on the fact that the disability claim had not been struck out, that is based on an erroneous approach as the Judge should have struck out those claims and they would not have been a relevant factor in considering the unfair dismissal claims. The Employment Judge would then have had to decide whether or not the test for striking out the claim was satisfied, given the uncertainties he thought existed on the evidence.
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F 28. The appeal against the decision not to strike out the unfair dismissal claim will therefore be allowed as the Tribunal took into account one irrelevant consideration, the non-striking out of the disability claims. The matter will need to be remitted back to the Employment Tribunal to reconsider whether or not it should continue in any event or whether the employer can satisfy the test in Rule 37. The matter can be remitted to the same Tribunal Judge if available and there is
G no need, in my judgement for it to be sent to a different Tribunal. That is, therefore, the order that I make.

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