



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Mr J May

AND

**Respondent**  
2gether NHS Foundation  
Trust

## OPEN PRELIMINARY HEARING

**HELD AT** Bristol

**ON** 19 August 2016

**EMPLOYMENT JUDGE Pirani**

### Representation

**For the Claimant:** Mrs J May (claimant's wife)

**For the Respondent:** Mr J Hoskins, solicitor

### **JUDGMENT ON PRELIMINARY ISSUES**

1. The claim for breach of Data Protection legislation is dismissed on withdrawal by the claimant.
2. The respondent's application to strike out the claim on the basis that it has no reasonable prospects of success does not succeed.
3. The Employment Judge considers that the claimant's allegations in relation to the complaint about the provision of periods of sickness absence have little reasonable prospect of success. The claimant is **ORDERED** to pay a deposit of **£150** not later than **21** days from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit.
4. No order is made in relation to the complaint about other critical comments on the reference form.

### Case Management Note and Reasons:

1. By a claim form received at the Employment Tribunal on 12 April 2016 the claimant, who was born on 19 May 1957, brought claims against his former employer for:
  - a. Disability discrimination
  - b. Breach of data protection

2. The dates on the ACAS certificate are 13-22 March 2016. He says he was employed by the trust from February 2000 until October 2014 as an Employment Specialist.
3. The claimant says he was employed by the trust up to October 2014 and subsequently had a new job offer retracted due to a reference from the trust. Within the claim form he also says that there was a breach of data protection legislation regarding his sickness absence which he says was disclosed without obtaining his permission.
4. It was clarified today that the only disability he relies on for the purposes of his claim to the tribunal is that of chronic fatigue syndrome.
5. He says he was offered a role with a small charity in January 2016 to start on in February 2016. However, prior to starting work says he was contacted by his prospective employer withdrawing the offer of employment because of high sickness absence shown in a reference and a comment about “needing encouragement to follow policies and procedures”.
6. In the response form received at the tribunal on 13 May 2016 the respondent says among other things:
  - i. The claimant resigned in October 2014 in order to take up a role with another employer
  - ii. It is admitted that the respondent knew the claimant may have suffered from chronic fatigue syndrome and that he was at the material times a disabled person pursuant to section 6 Equality Act 2010
  - iii. Employment reference: The said request contained six specific questions, one of which was please give dates of periods of sickness whilst in your employment. The respondent responded to the question by giving the correct factual information regarding the claimant’s sickness absence
  - iv. The respondent did not give any more details about the reasons for the absences
  - v. It is denied that any comments made on the claim form concerning a failure to follow policies and procedures related to the claimant’s disability.
7. The response also contained an application that the claim should be struck out as having no reasonable prospect of success or alternatively a deposit ordered.
8. On 24 May 2016 the tribunal wrote to the parties listing the claim for a preliminary hearing in public to consider:
  - a. Whether to strike out the claim because it has no reasonable prospect of success
  - b. Whether to order the claimant to pay a deposit (not exceeding £1000) as a condition of continuing to advance any specific allegation or argument in the claim if the tribunal considers that allegation or argument has little reasonable prospect of success

Further clarification of claims

9. By a letter dated 8 August 2016 the claimant indicated that he would not be continuing with his claim for the breach of data protection legislation.
10. The disability discrimination claim is brought only as discrimination arising from disability.
11. It is accepted that the absence data in the reference is accurate.
12. The respondent accepts that the dates of absence were disability related.
13. The respondent also accepts that the comments made were, in part, related to disability.
14. The respondent seeks to rely on the defence of justification, but the precise nature of the defence will be clarified by way of an amendment.
15. The claimant says the offer of employment was withdrawn on 11 February 2016.
16. Both parties are in agreement that the withdrawal of the claimant's offer of employment by the charity, without investigating the reasons for the claimant's sickness absence, is likely to amount to disability discrimination. Nonetheless, the claimant says that because the charity accepted they were in the wrong and also altered its procedures he does not wish to pursue a claim against them.
17. The claimant's case in brief form is:
  - a. the respondent should not have given information in relation to sickness absence
  - b. the further criticism of the claimant in the reference was unwarranted and could not be justified because although he did not follow the relevant procedures, they were not serious failings and the respondent never raised any issue in respect of his non-compliance

Brief outline of relevant law

18. The Equality Act 2010 includes a specific provision covering discrimination and harassment in relationships that have ended when it 'arises out of and is closely connected to a relationship which used to exist between them' - S.108.
19. A reference, or the decision to deny a former employee a reference, 'arises out of' the terminated employment relationship and nor could it be disputed that it is 'connected' to that relationship. Moreover, the courts have rejected the notion that there comes a point at which the connection between a reference and the employment relationship to which it relates is severed by the passage of time.
20. Most cases will turn on the question of whether the content of the reference, or the decision not to provide one, amounted to discrimination.

21. Discrimination arising from disability only requires the disabled person to show they have experienced unfavourable treatment because of something connected with their disability. The employer may avoid discrimination arising from disability if the treatment can be objectively justified as a proportionate means of achieving a legitimate aim.
22. Adopting the analysis in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14:
  - a. the treatment complained of is (i) proving dates of sickness absence to a prospective employer (ii) making further criticism of the claimant in the said reference
  - b. the “something” that has arisen in consequence of the claimant’s disability is both were linked to his disability related absence
  - c. Was either matter in unfavourable treatment?
  - d. The Tribunal must then consider whether there was a causal question as follows:- whether what happened was truly a consequence of the “something”, and in turn that the “something” was a consequence of the disability
  - e. If so, was the said unfavourable treatment a proportionate means of achieving a legitimate aim?
23. The EHRC code provides as follows at paras 10.25-10.27: Except in the specific circumstances set out below, it is unlawful for an employer to ask any job applicant about their disability or health until the applicant has been offered a job (on a conditional or unconditional basis) or has been included in a pool of successful candidates to be offered a job when a position becomes available. This includes asking such a question as part of the application process or during an interview. Questions relating to previous sickness absence are questions that relate to disability or health.
24. This provision of the Act is designed to ensure that disabled applicants are assessed objectively for their ability to do the job in question, and that they are not rejected because of their disability. There are some limited exceptions to this general rule, which mean that there are specified situations where such questions would be lawful.
25. There are six situations when it will be lawful for an employer to ask questions related to disability or health, which include reasonable adjustments needed for the recruitment process and implementing positive action measures.
26. Para 10.29 provides that: Although job offers can be made conditional on satisfactory responses to pre-employment disability or health enquiries or satisfactory health checks, employers must ensure they do not discriminate against a disabled job applicant on the basis of any such response. For example, it will amount to direct discrimination to reject an applicant purely on the grounds that a health check reveals that they have a disability. Employers should also consider at the same time whether there are reasonable adjustments that should be made in relation to any disability disclosed by the enquiries or checks.

**(i) Deposit Orders**

27. If, at a preliminary hearing, an employment judge (or, as the case may be, a tribunal) considers that any specific allegation or argument put forward by a party in relation to any matter to be determined by a tribunal has little reasonable prospect of success, he may order that party to pay a deposit of an amount not exceeding £1,000 as a condition of being permitted to continue to advance that allegation or argument (Employment Tribunal Rules 2013 Rule 39(1)). However, before making an order, the judge must make reasonable enquiries into the paying party's ability to pay the deposit, and have regard to any such information when determining the amount of the deposit (r 39(2)).
28. When determining whether to make a deposit order under Rule 39, a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (*Van Rensburg v Royal Borough of Kingston-upon-Thames EAT/95/07, 16 October 2007*).

**(ii) Strike Out**

29. An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the grounds that it has no reasonable prospect of success (rule 37(1)(a)).
30. As a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute (see *North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330, [2007] IRLR 603, [2007] ICR 1126; Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] CSIH 46*).
31. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances. In *Anyanwu v South Bank Students' Union [2001] IRLR 305, HL*, a race discrimination case in which preliminary questions of law—*res judicata* and statutory construction (RRA 1976 s 33(1))—had occupied the tribunals and courts on four occasions, Lord Steyn put forward the proposition against striking out in terms almost amounting to public policy, when he stated (at para 24): "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."
32. And Lord Hope of Craighead stated (at para 37):" ... discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The

tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

33. 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 para 41, EAT*), according to *Harvey* they nevertheless indicate that the power to strike out in discrimination cases should be exercised with greater caution than in other, less fact-sensitive, types of case.

#### **Decision on Strike Out/Deposit**

34. The respondent's primary contention is that the reference was both fair and accurate. Accordingly, they say the claimant is unable to sustain an argument that he has been unfavourably treated. Further, they say that the reference merely provided answers to questions posed by the potential employer.
35. Although, the respondent wrote to the claimant on 2 March 2016 saying "we are required to provide full and accurate references for all our employees" it is conceded that there is no such duty. In other words, the respondent was under no specific duty to provide any reference. Further, it appears that the respondent does not have a written reference policy.
36. The claimant relies both on section 60 Equality Act 2010 and what is said to be accepted human resources practice of not providing information about sickness absence to 3<sup>rd</sup> parties or prospective employers.
37. Whether or not the provision of the sickness absence information amounts to unfavourable treatment is potentially a difficult and nuanced point. In my judgment it is one which should be determined by a full tribunal panel. Accordingly, I decline to strike this element of the case out.
38. Further, if the said treatment amounts to unfavourable treatment the case is likely to turn on justification. However, the respondent has yet to provide a detailed response in relation to justification.
39. Nonetheless, although I have declined to strike the case out I consider that the claim in relation to the provision of sickness absence dates has little reasonable prospects of success because:
- i. it appears that section 60 Equality Act 2010 only applies to a situation before employment has been offered
  - ii. even though the justification defence has yet to be clarified and the burden is on the respondent, it is likely that the respondent will succeed in saying that it is entitled to assume that the third party will not discriminate against the claimant and investigate whether or not the absence was disability related
40. The claimant tells me that he is not working at the moment and has savings of just £500. Taking this into account, I consider that a deposit of £150 is warranted.

41. However, I decline to strike out or make a deposit in relation to the further comments on the reference about failing to follow policies and procedures. I do not accept that the claimant has little reasonable prospects of success in establishing this was unfavourable treatment. Further, there is clearly a factual dispute behind these comments pertaining to the seriousness or otherwise of the claimant's failings. In addition, the claim is likely to turn on a justification defence which is as yet not pleaded.

## ORDERS

I make the following case management orders with the express agreement of all parties:

### Schedule of Loss

1. By no later than **4pm** on 2 September 2016 the claimant shall send an updated schedule of loss to the respondent. . If the claimant seeks compensation for injury to feelings the schedule shall quantify the compensation by reference to the band of awards in Vento v West Yorkshire Police [2003] IRLR 102 CA as increased by Da'Bell v NSPCC UKEAT/0227/09.

### Amended response form

2. By no later than **2 September 2016** the respondent will centre the claimant and the tribunal and amended response form, dealing specifically with its defence of justification.

### Documents for Substantive Hearing

3. By no later than **2 September 2016** each party shall send to the other copies of all relevant documents which are or have been in that party's control including documents on which that party relies and documents which adversely affect that party's case. This can order can be achieved by the exchange of lists.
4. By no later than **9 September 2016** the parties shall agree the contents of a single bundle of documents. The bundle should contain only those documents that will be referred to in evidence. Any "without prejudice" communications must be excluded.
5. The respondent shall be responsible for the production of a properly paginated and indexed, agreed bundle of documents, which should be tagged or contained in a ring binder in chronological order. A copy shall be sent to the claimant by **16 September 2016**. Four copies will be brought to the tribunal on the first day of the hearing.

### Witness Statements for Substantive Hearing

6. By no later than **7 October 2016** the parties shall mutually exchange witness statements (including statements of the parties themselves). No further statements may be served without the consent of the tribunal.

7. No witness will be permitted to give evidence, (without leave of the tribunal), unless a witness statement has been prepared and exchanged in accordance with this order.
8. Each witness statement must contain all the evidence upon which that witness wishes to rely. Witness statements must refer to documents by their page number in the bundle but are not to be bound into the bundle itself. At the discretion of the tribunal, witness statements may be taken as read. Witnesses may be cross-examined.

#### Closing Submissions

9. Each party shall prepare a summary or skeleton of the case, for use during closing submissions. The summary shall attach copies of the authorised reports of all cases upon which that party relies. The summaries will be mutually exchanged by the parties after the evidence has been heard.

#### Hearing

10. The case will be heard for 2 days on **14 and 15 November 2016** before a **full tribunal** at **Bristol Tribunal**, commencing at 9.45 am or as soon thereafter as the case can be heard. No postponement will be allowed on the application of a party save in exceptional circumstances.
11. The hearing will consider liability and remedy.
12. The parties agree that pre-reading, evidence and submissions will be completed in one day.
13. Each side will call just one witness.
14. Every time estimate must make a realistic allowance for pre-reading by the Employment Judge and, if required, the members. The time within which a case must be concluded will thus run from the beginning of the pre-reading. Should the period allowed for pre-reading prove inadequate, the time available in tribunal will be shortened correspondingly. The same principle will apply if too little time is allowed for the judge (and members) to read any written closing submissions.
15. If the parties subsequently consider that the time allocated by the tribunal for the hearing of this case is insufficient or too long, that party should notify the tribunal immediately, explaining why they consider the allocation to be insufficient and giving their estimate.

#### Further Orders and variation of existing orders

16. All applications for further orders or for variation of these orders are to be made immediately upon receipt of this Order or as soon as is practicable thereafter.



The Overriding Objective

17. In accordance with the overriding objective, set out in Regulation 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, this case will be managed so as to ensure a fair hearing. This may include limiting the time for witnesses' evidence, cross-examination and the making of submissions.

Failure to comply with this Order

18. **Failure to comply with any part of this Order may mean that the tribunal has insufficient time to hear the application on the hearing date and may give rise, upon application by a party who has incurred extra costs as a result, to an Order for Costs or preparation time against the offending party. Further, the tribunal may regard any failure to comply with this Order as unreasonable conduct of proceedings in the event of an application for costs or a preparation time order against the party who has failed so to comply.**

*CONSEQUENCES OF NON-COMPLIANCE*

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

**Employment Judge Pirani**

19 August 2016

Sent to the parties on 23 August 2016 by email only

Mr JA Ongaro for the Tribunal Office