Case Numbers: 2201669/2018, 2204671/2018 and 2200424/2021

EMPLOYMENT TRIBUNALS

BETWEEN

Case Number: 2201669/2018 (“Claim 1”)

Claimant	**AND**	**Respondents**
Miss B Cuffy		(1) Middleton Murray Limited (in liquidation) (2) Ian Greaves (3) Tyrone Corsinie

Case Number: 2204671/2018 (“Claim 2”)

Claimant	**AND**	**Respondents**
Miss B Cuffy		(1) Middleton Murray Limited (in liquidation) (2) Ian Greaves (3) Tyrone Corsinie (4) Danny Harrer (5) Sharon Palmer (6) Julie Deschamps (7) Angela Middleton

Case Number: 2200424/2021 (“Claim 3”)

Claimant	**AND**	**Respondent**
Miss B Cuffy		Hiscox Insurance Company Limited

Heard at: London Central **On**: 15 and 16 September 2021

Before: Employment Judge Holly Stout
Tribunal Member Doris Olulode
Tribunal Member Frederick Benson

Representations
For the claimant: Mr N Gayle (pro bono lay representative)
For the respondent: Mr D Laffan (counsel for Hiscox)
Mr T Pullen (pro bono representative for Ms Deschamps)
No appearance or representation for any other respondent

OPEN JUDGMENT ON STRIKE-OUT APPLICATION

The unanimous judgment of the Tribunal is that the Respondent's strike-out application under Rule 37(1)(b) in relation to Claim 3 is dismissed.

REASONS

Introduction

1. This case has a complicated procedural history. Claim 1 and Claim 2 are claims for wrongful dismissal and discrimination and other matters brought by the Claimant against her former employer, Middleton Murray Limited (in liquidation) (**Middleton Murray**) and various individuals who used to be employed by Middleton Murray. Claim 1 was received on 11 March 2018 and Claim 2 was received on 24 May 2018. The agreed issues in those claims are set out in a List of Issues in the Order of Employment Judge Davidson sent to the parties on 10 May 2019. Both claims were originally due to have been determined at a Final Hearing on 8-11 October 2019 (4 days), but that was postponed. The case was then subject to further case management. At a Preliminary Hearing on 14 September 2020 before Employment Judge Brown, Middleton Murray and four of the individual respondents (Ian Greaves, Danny Harrer, Sharon Palmer and Angela Middleton) were represented by Mr J Brotherton (instructed by Croner Group Limited (**Croner**)); Ms Deschamps was represented by Mr Pullen and the Claimant

attended in person; Mr Corsinie was not represented and did not attend. Employment Judge Brown listed a Final Hearing 15-20 September 2021 (4 days).

2. On 15 December 2020 Middleton Murray entered voluntary liquidation. It is unclear when the Tribunal was notified of this. We have at this hearing been shown correspondence from Croner dating from July 2021 that suggests that they first notified the Claimant and the Tribunal months previously and came 'off the record' at that point. This correspondence notwithstanding on 27 July 2021, the Tribunal sent notice of this Final Hearing to the Claimant, Croner and Mr Pullen only. In August, however, correspondence between the parties and the Tribunal regarding this hearing copied in Middleton Murray's appointed liquidators (Paul Atkinson and Julie Humphrey of FRP Advisory) who were thus aware of this hearing.

3. In the meantime, by a claim form received on 1 February 2021, the Claimant brought Claim 3 against Hiscox Insurance Company Limited (**Hiscox**) for unfair dismissal, disability discrimination, notice pay, holiday pay, arrears of pay and other payments. She also seeks to add Hiscox as a respondent to Claims 1 and 2 on the basis of the *Third Parties (Rights against Insurers) Act 2010* (the *Rights against Insurers Act*). Hiscox responded to that claim on 25 June 2021 denying liability and applying to strike out the claim. Hiscox's strike-out application was listed to take place on 15 September 2021 at an Open Preliminary Hearing before judge alone.

4. With the consent of the parties, at the start of the hearing, we joined the three claims, bringing Claim 3 into the Final Hearing listed for Claims 1 and 2 before a full Panel. We did so because of the clear overlap between the three claims and in the interests of making efficient use of Tribunal time. Hiscox's strike-out application was therefore considered by the full Tribunal panel, but we record here that Employment Judge Stout would have made the same decision had she been sitting alone.

Rule 50

5. The Claimant made an application under Rule 50 that she be anonymised in these proceedings. After hearing submissions from the parties, we refused the Claimant's application for an anonymity order/restricted reporting order (RRO), but decided that it was appropriate to make an Order under Rule 50(3)(a) that the Claimant's medical evidence and condition should not form part of any public hearing, or otherwise be disclosed to the public by any party, and that the public record should refer only to the Claimant having a 'medical condition'. Our reasons for this are set out in a Closed Case Management Order.

Judgment on Hiscox's Strike-Out Application – Claim 3

6. As already noted, by Claim 3 the Claimant brings claims against Hiscox and/or seeks to add Hiscox as a respondent to her existing Claim 1 and Claim 2. She does so on the basis of the *Third Parties (Rights against Insurers) Act 2010* (the ***Rights against Insurers Act***), which is an Act over which the Court of Appeal has recently confirmed Employment Tribunals have jurisdiction: *Irwell Insurance Co Ltd v (1) Neil Watson (2) Hemingway Design Ltd (in liquidation) (3) Darren Draycott* [2021] EWCA Civ 67, [2021] ICR 1034. However, in order for a claim to be brought against an insurer under s 1 of that Act, the 'relevant person' (which here means Middleton Murray), must be insured in respect of the relevant (potential) liability.

7. Section 1 of the *Rights against Insurers Act* provides:

> "1 Rights against insurer of insolvent person etc
>
> (1) This section applies if—
>
> (a) a relevant person incurs a liability against which that person is insured under a contract of insurance, or
>
> (b) a person who is subject to such a liability becomes a relevant person.
>
> (2) The rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred (the "third party").
>
> (3) The third party may bring proceedings to enforce the rights against the insurer without having established the relevant person's liability; but the third party may not enforce those rights without having established that liability."

8. Although s 1(3) makes clear that proceedings can be brought before liability of the insured is established, it would not be in the interests of justice to allow this claim to proceed if there is no reasonable prospect of Ms Duffy showing, if liability is established against Middleton Murray, that it is *"a liability against which that person is insured under a contract of insurance"* such that the right of Middleton Murray under that contract may transfer to Miss Cuffy under s 1(2).

9. Likewise, the claim should be struck out if, whatever the merits of the rest of the Claimant's claim, there is no reasonable prospect of her establishing liability against Middleton Murray for something that falls within the terms of Middleton Murray's contract with Hiscox.

10. Middleton Murray had two contracts of insurance with Hiscox from 21 September 2017 to 16 December 2020: first, Professional Indemnity insurance, which specifically excludes tribunal claims by employees and thus cannot form the basis for a claim in these proceedings; and, secondly, Employers' Liability insurance. The terms of the latter require closer examination.

11. The Employers' Liability insurance describes *"what is covered"* as follows:

> "Claims against you - If any employee brings a claim against you for bodily injury caused to them during the period of insurance arising out of their work for you within the geographical limits, we will indemnify you against the sums you have to pay as compensation."

12. Bodily injury is defined as follows:

> "Death or any bodily or mental injury or disease"

13. In other words, Employers' Liability insurance covers 'claims for bodily injury', but not other types of claims by employees. As a matter of fact, Hiscox also offers Employment Practices Liability Insurance (EPLI), which does cover employment claims, but Middleton Murray did not take out that insurance with Hiscox.

14. Most of the claims made by the Claimant in these proceedings therefore on any view fall outside the scope of Middleton Murray's insurance contracts with Hiscox, but the Employment Tribunal does have jurisdiction to award compensation for personal injury caused by unlawful discrimination (see *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] ICR 1170) and the Claimant in these proceedings specifically made a claim for personal injury in her claim form in Claim 2 and included it in her Schedule of Loss that she was ordered to, and did, provide in June 2019.

15. Against that background, the questions for us, as they have been identified by Mr Laffan, are:

    a. Whether the Claimant stands a reasonable prospect of successfully proving not only that she was unlawfully discriminated against by Middleton Murray, but that any unlawful discrimination there was caused an exacerbation of a pre-existing medical condition (*the causation point*);

    b. If she does, whether it is reasonably arguable that that element of her claim falls within the terms of Middleton Murray's Employers' Liability insurance with Hiscox (*the contract point*).

The causation point

16. As to the first point, Employment Judge Brown at a preliminary hearing in September 2020 refused to strike out the Claimant's discrimination claims holding that they stood a reasonable prospect of success on liability, and Mr Laffan rightly does not invite us to go behind that ruling. He does, however, argue that the question of causation of exacerbation of her medical condition is one that would require expert evidence and since the Claimant has brought none to this hearing that claim is doomed to fail.

17. We disagree because it is normal in complex discrimination claims such as this for the Tribunal to reach a determination on liability and then adjourn for remedy, giving directions for medical evidence if that is required. In a case such as this, it is unlikely to be helpful to have expert evidence on causation prior to that point in any event because what the expert needs to assist with is whether the particular act of the employer that the Tribunal has found to be discriminatory is or is not causative of the exacerbation of the medical condition in question. That answer may be quite different depending on the scope of the discrimination found to have occurred.

18. We add that it is not inherently unlikely in this case that, if there was discrimination, it could have exacerbated the Claimant's existing medical condition, although we accept the Respondent's submission that in this case that is likely to be a complex issue requiring expert evidence. The fact that the Claimant does not yet have that evidence is not fatal to her claim. We are not prepared to say at this stage that the Claimant's claim stands no reasonable prospect of success on this point.

The contract point

19. We turn to the second issue, which we are aware from the presence of the press, and the submissions of the parties, is of wider interest beyond this case. We remind ourselves, however, that as this is a strike-out application, we are only deciding at this stage whether there is a reasonable prospect of liability against Hiscox being established if liability against Middleton Murray is established.

20. Mr Laffan argues that, as a matter of construction of the Employers Liability insurance contract, it does not cover claims for personal injury brought as part of a claim for compensation for discrimination as in this case. He submits that this is not a 'claim for bodily injury' because the claim is not 'completed' by the injury in the same way as other types of claim for personal injury that can be pursued in the County Court or High Court. Other claims for personal injury, he submits, can only be brought if there is an actual injury. There is no freestanding claim for 'negligence' for example without an injury. He contrasts the wording of the clause in the Employers Liability contract 'claim for bodily injury' with the wording in the Professional Liability contract concerning employment tribunal claims, which describes the claims as 'claims for discrimination, victimisation, unfair dismissal, etc', i.e. by reference to the causes of action that can be brought in the Employment Tribunal.

21. Mr Laffan further argues that in construing the clause we should, consistent with Supreme Court authorities on the construction of contracts such as *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, consider the background context, including industry practice. In particular, he points to the fact that Hiscox, like other insurers, does offer separate insurance to employers against employment tribunal claims, but Middleton Murray had chosen not to take that out. He also points to the statutory requirement on employers to have liability insurance of this

type, which is in s 1 of the *Employers Liability (Compulsory Insurance) Act 1969* and provides (so far as relevant) *"…every employer carrying on any business in Great Britain shall insure … against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business"*. Mr Laffan argues that as this pre-dated the introduction of anti-discrimination legislation in the United Kingdom (which we note began with the Sex Discrimination Act 1975) it cannot have been intended to cover employment claims such as this.

22. Mr Pullen (with whom Mr Gayle agreed on this issue) points out that there are regulations made under the 1969 Act which prohibit insurance contracts from contracting out of any element of the insurance that employers are required by s 1 of the 1969 Act to have, but Mr Laffan (rightly in our judgment), submits that can make no difference: either the liability is covered by s 1 or it is not.

23. Mr Laffan does, however, accept that the duty in s 1 of the 1969 Act does not prevent an employer from taking out insurance that goes beyond the requirements of that Act, but he submits that the scope of the Act is nonetheless relevant background to construing what the parties would reasonably have understood the clause in the Employers' Liability contract to mean.

24. While Mr Laffan's argument was attractively put, we are satisfied that the Claimant has a reasonably arguable case that, if she establishes liability against Middleton Murray for personal injury caused by discrimination, that is a liability that Hiscox would be required to meet under the terms of s 1 of the *Rights against Insurers Act*. This is because:

    a. On the face of the contract, it applies wherever a claim is brought *"for bodily injury"*, and does not deal with causes of action at all. Whether the Claimant brought a negligence claim, or a claim under the Health and Safety at Work Act 1974 or any of the other health and safety legislation, she would still have to establish that there was a breach of duty before liability for bodily injury would be made out. She could not, in any court or tribunal, simply bring a claim *"for bodily injury"*. She has to have a cause of action, and we cannot see at present that it makes any difference to liability under the insurance contract what that cause of action is, whether it is negligence, or discrimination or breach of some other statutory health and safety duty. If the claim (or part of it) is a *"claim … for bodily injury"*, that at least arguably suffices.

    b. While we see some force in Mr Laffan's argument that a discrimination claim is different to other forms of personal injury claim in that it can be brought whether or not there is a personal injury, we do not see that that is necessarily a critical difference. There cannot be a claim for discrimination causing bodily injury unless there has been a bodily injury, so in that respect personal injury caused by discrimination is no different from other types of personal injury claim.

c. We do not at present see that it makes any difference in that respect that the wording of the Professional Indemnity contract <u>does</u> spell out the various causes of action that may be brought in employment tribunals. That is what that contract needs to do in order to make clear that employment tribunal claims are not covered by that contract. The Employers' Liability insurance contract with which we are concerned is dealing with something different.

d. Even considering what would be the reasonable understanding of the parties based on the background context, we cannot at present see why we should give the Employers' Liability contract any different interpretation to that which it appears to us to have on its face. We consider that s 1 of the 1969 Act plainly imposes a duty on employers to insure against liability for bodily injury sustained by employees arising out of and in the course of their employment, without any limit at all as to what the sources of that liability or causes of action might be. We cannot see that it matters that the statutory tort of discrimination in the course of employment only arrived on the statute books after that 1969 Act came into force. Much other health and safety legislation has been passed since that date too. We are not prepared to accept, certainly not at the strike-out stage, that there have been no other new causes of action for bodily injury since 1969 and that the tort of discrimination is somehow anomalous in this respect.

e. We consider that there is greater force in Mr Raffan's argument that EPIL insurance is offered and Middleton Murray chose not to take it out, thus suggesting all parties in this context are aware that EPIL covers liabilities that Employers Liability insurance does not cover, but we are not prepared to find that the Claimant's case stands no reasonable prospect of success for this reason. In particular, we consider that while an insurance company may be surprised to find that it is liable under Employers' Liability insurance for any personal injury element of a discrimination claim, employers and employees may well take a different view, and may well consider that it is supposed to be insurance to cover liability for bodily injury, howsoever caused, and thus that it does cover the (admittedly rare claims) that arise in the employment tribunal for personal injury caused by discrimination.

25. For all these reasons, therefore, we consider that the Claimant's claim as against Middleton Murray for personal injury caused by discrimination has a reasonable prospect of success, and that she has a reasonably arguable case that Hiscox is liable to her for any compensation that she may receive in respect of that part of her claim and that therefore the application for strike-out must be dismissed. We add that, for the avoidance of doubt, the personal injury element is the only part of the Claimant's claim for which Hiscox could be liable. If the Claimant does not succeed both on liability for discrimination

and causation of personal injury, Hiscox will bear no liability at all even if the Claimant succeeds on other parts of her case against Middleton Murray.

26. As this is a strike-out application, our conclusions above are conclusions applying a 'reasonable prospects of success' test. The issue remains to be revisited, if the parties are so advised, by way of full argument at the final hearing.

Postponement / adjournment

27. Following our giving judgment on Hiscox's strike-out application the Final Hearing of Claims 1 and 2 had to be postponed and all three Claims adjourned generally for reasons set out in the Closed Case Management Order. Further case management directions are also set out in that Order.

Employment Judge Stout

16 September 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

16/09/2021.

FOR THE TRIBUNAL OFFICE