EMPLOYMENT TRIBUNALS

Claimant: Trevor Alleyne

Respondent: NHS Business Service Authority

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD remotely: on CVP **On: 6 and 7 July 2021**

Employment Judge: Employment Judge Henderson (sitting alone)
Members:

Appearances
For the claimant: Mr P Tomison (Counsel)
For the respondent: Mr N Caiden (Counsel)

JUDGMENT

The respondent's application to strike out the claimant's claims under Rule 37 of the Tribunal Procedure Rules 2013 - or in the alternative to consider making a deposit order under rule 39 do not succeed.

REASONS

The following Reasons were delivered orally at the conclusion of the hearing on 7 July 2021. The respondent asked for full written reasons to be provided.

1. This was an application by the respondent to strike out the claimant's claims under Rule 37 of the Tribunal Procedure Rules 2013 - or in the alternative to consider making a deposit order under rule 39. The issues before me on this Preliminary Hearing was (1) whether the claim should be struck out on the ground that either the manner in which the proceedings have been conducted by one behalf of the claimant has been unreasonable, scandalous or vexatious and/or whether there has been non-compliance with a tribunal order and (2) whether the disability claim should be struck out as having no reasonable

prospect of success, or the alternative subject to a deposit order for having little reasonable prospect of success.

2. The claimant was employed by the respondent from September 2013 as a GP IT Support Manager until 20 February 2019 when he was dismissed on grounds of redundancy. On 15 May 2019 the claimant's brought claims for unfair dismissal and disability discrimination which were defended by the respondent.

Conduct of the Hearing

3. The application was heard over 2 days. The hearing was conducted using the Cloud Video Platform (CVP). The Tribunal was assisted by written skeleton arguments from both parties' counsel; from an agreed bundle of legal authorities; an agreed bundle of documents (378 pages) and an agreed chronology of issues relevant to the strike out application. The tribunal was also referred to what was described as an agreed list of issues, but on further discussion during the hearing required some amendments.

4. Neither party had produced any witness statements and no oral evidence was heard.

5. The main dispute between the parties related to the extended process of disclosure by the claimant with regard to the issue of his disability. The claimant's alleged disabilities were degenerative disc disease and his mental health namely a history of depressive illness at various intervals which resulted in severe anxiety and other symptoms.

Disclosure process and tribunal orders

6. On 18 October 2019 the tribunal made an order for disclosure by 22 November 2019 by both parties (at paragraph 5.1) of the claimant's "medical notes, reports, occupational health assessments and other evidence in their possession and/or control" relevant to the issue of whether he was a disabled person within the statutory definition in s6 EA 2010. The order stated that the disclosure should relate to the period from February 2017 to date. The order also referred to the fact that documentation already in existence could be requested by the claimant from his GP or other treating healthcare providers and would be deemed to be within his possession and/or control. The CMO also provided for the claimant to make a disability impact statement. Following provision of this information the respondent was ordered to confirm by 13 December 2019 whether the issue of disability was conceded.

7. There was also the general standard disclosure provision at paragraph 6.1 of the CMO.

8. Both parties provided disability disclosure on 22 November and the claimant provided his disability impact statement on 26 November. The respondent raised concerns that the claimant had not complied fully with the medical disclosure (page 143/4) obligations highlighting references to letters which referred to appointments for CBT, but noted that the claimant did not supply any

reports/notes of those appointments. The respondent also noted at the hearing that the claimant's initial disclosure had included documents prior to February 2017 and that therefore the claimant appeared to be voluntarily disclosing items outside the strict scope of the Tribunal order at paragraph 5.1.

9. On 29 November 2019 (page 150) the claimant solicitors responded stating that the claimant was unwell and that instructions would be sought in the next week. In the absence of any response the respondent applied to the tribunal as it was unable to comply with the order by 13 December.

10. Following an order from the tribunal on 19 December 2019, the claimant's solicitor confirmed on 22 December 2019 (page 158) that they had reviewed the additional GP medical records obtained by the claimant sent to them on 16 December relevant to the disabilities pleaded and that "we are instructed that the claimant has disclosed all relevant medical records relevant to his disabilities in his possession and/or control and has complied with paragraph 5.1 of the Tribunal order". The phrasing of this letter suggests that the confirmation of compliance had come from the claimant and was not made by the solicitor. Given that the claimant had been legally advised from the commencement of his claim, it is not acceptable that a solicitor should place the obligation of compliance on his client, when clearly the client would be looking to the legal adviser to explain the full extent of the obligation of disclosure.

11. The respondent solicitors raised further concerns, on several occasions, about the claimant's disability disclosure and the claimant's disability impact statement in January 2020. The respondent explained to the tribunal on 10 January 2020 that it was still unable to comply with the 18 October 2019 order as a result of the claimant's ongoing failure to provide adequate disclosure. It would have course been open to the respondent to comply with the order by confirming that it did not concede the issue of disability and that that were made a live issue in the proceedings.

12. The respondent also raised on 10 January 2020 (page 161-3) its concerns about the Working Well Trust report dated 23 April 2018. This had been disclosed by the claimant on 22 November 2019. That version had included amendments requested by the claimant to the original report. However, at the time the report was written Mr Rahman of WW T had written confidentially to the respondent sending the original version of the report i.e. prior to the claimant's requested amendments. The respondent had disclosed the original version as part of its medical disclosure on 22 November 2019.

13. Following a request for disclosure of a full copy of his medical records, the claimant provided a 2nd tranche of disability disclosure on 24 January 2020. These documents were of the claimant's GP notes relating to his stress/depression from February 2017 onwards. His solicitors confirmed that there had been no reports produced following the CBT appointments and that there were no documents relating to his spinal condition prior to the relevant date (page 165-181)

14. The respondent notified the Tribunal and the claimant on 6 February 2020 (pages 182-185) that they believed that the claimant had still failed to comply with his disclosure obligations and that joint medical experts may be required to deal with the disability issue. Despite assurances from the claimant solicitors that they would respond, no reply was received by 8 June 2020 and the respondent sought an order at the Preliminary Hearing on 10 June 2020 to deal with its concerns and also requested Further and Better Particulars in relation to the claimant's exercise regime.

15. The CMO of 10 June 2020 ordered the claimant to provide FBPs by 30 June and also made provision for the parties to agree and instruct joint medical experts over the period 26 June - 23 December 2020, when the experts should provide their report. The respondent was also required by 15 January 2021 to confirm the extent to which the disability issue was conceded and any justification on which it was relying in relation to the section 15 claim.

16. There was an ongoing exchange of correspondence between the solicitors with regard to the identity of the joint medical experts. On 1 July 2020 the claimant solicitor responded in relation to the exercise regime and provided further information about the CBT appointments (page 197-198).

17. The respondent raised concerns about the FBPs, the disability impact statement and the disability disclosure generally (page 199-203).

18. The claimant provided the 3rd tranche of his disability disclosure on 8 August 2020, following a slight delay due to a bereavement.

19. The respondent raise concerns about that disability disclosure including the lack of records from the claimant's appointment with Dr Natali. It had emerged during the course of correspondence about the joint medical experts that the claimant had previously been treated by Dr Natali.

20. On 3 September 2020 the respondent applied to the tribunal for a preliminary hearing to deal with all outstanding issues relating to disability disclosure expert witnesses and the claimant's impact statement (page 212-217)

21. On 16 October 2020 the claimant solicitor confirmed that the claimant would provide full disclosure of medical records from February 2017 including further information in relation to the exercise regime. The claimant also provided a revised disability impact statement acknowledging the respondent's reference to a mistaken inclusion of "an adjunctive primary diagnosis of recurrent depressive illness (moderate to severe)". And agreed to the respondent suggested medical experts. (pages 218-223)

22. On 22nd October the respondent again noted that the claimant had not complied with his disclosure obligations and explicitly requested all medical notes relating to any appointment letters and prescriptions disclosed.

23. On 23 October 2020 the claimant provided the 4th tranche of disability disclosure (pages 226-346).

24. On 23 November 2020 (pages 347-351) the respondent still noted a number of outstanding concerns with the disability disclosure in relation to the CBT appointments and the appointment with Dr Natali. The respondent also stated that as "the claimant has failed to provide sufficient evidence that he was at all relevant times a disabled person under s.6 . It is clear that the claimant's discrimination claims have no reasonable prospect of success and we do not consider that it would be proportionate for our client to incur further costs by instructing medical experts".

25. I note that this appears to be a unilateral decision and is technically a breach by the respondent of the tribunal's order of 10 June 2020 that medical experts be instructed to prepare a joint report. The claimant had agreed the identity of the medical experts on 16 October 2020 (albeit after the deadline set by the tribunal order).

26. On 18 December 2020 (page 352-354) the claimant's solicitors stated that the claimant "has confirmed to us that he has disclosed all of the documentation in his possession relating to his medical impairments. We believe that we have taken all reasonable steps to confirm that the claimant has complied with his disclosure obligations". I note again that the claimant solicitors do not take any responsibility for this confirmation but place the onus on the claimant complying with the obligations and make no reference to the advice they may or may not have given him about such obligations.

27. The claimant's solicitors did not accept the suggestion that they had misled the tribunal in their letter of 22 December 2019, which they said accurately represented their understanding of the position at the time.

28. I specifically raised with Mr Tomison these two assurances by the claimant solicitors (one year apart) and asked for an explanation. He said that the first solicitor dealing with the claimant's case, Mr Mohadeen no longer worked at Thompsons and he was unable to take instructions from him. Mr Ellis, the claimant's current solicitor, when writing the letter of 18 December 2020 had taken "possession" to mean literal physical possession and had not taken it to mean and/or in the claimant's control. Mr Tomison accepted that the statement in the 18 December 2020 letter was inaccurate.

29. The respondent's application to strike out the claims was considered at the preliminary hearing on 8 April 2021 and following that hearing the current OPH was listed. On the 1st day of this hearing, Mr Tomison confirmed that on 3 July 2021 the claimant's solicitor had requested information about the claimant's CBT appointments from the relevant NHS authorities. He said that failure to do so prior to this date was the result of a misunderstanding and a mistake.

The Relevant Law

30. The relevant provisions are rule 37 of the Tribunal Rules as regards strike out and rule 39 as regards a deposit order.

Rule 37

(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;
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;
(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

Rule 39

(2) 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.
(3) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

31. The parties provided an agreed bundle of relevant authorities. There was no dispute between them on the relevant legal principles to be applied to the application. The disagreement focused on the interpretation of the factual scenario concerning disclosure as set out above.

Respondent's submissions

32. Mr Caiden took the issues of unreasonable conduct and non-compliance as part of the same test. He cited the unreasonable conduct as being:
-disclosing the WW T report as amended by the claimant and not the original;
-repeatedly failing to disclose material relevant to the disability issue and he noted that there was still information outstanding pending the request to the NHS authorities on 3 July 2021;
-providing an inaccurate disability impact statement;

-failing to adequately answer and provide information with respect to the claimant's exercise regime.

33. He said that all this was a case of wilful disobedience in respect of the tribunal orders and should lead to a strike out without the need to consider the question of whether a fair trial could be heard (**De Keyser v Wilson EAT/1438/00 and Chidzoy v BBC UKEAT/00971/17/BA)**. He cited incidents of several occasions when the claimant was asked to comply with an order and had failed to do so.

34. Further there was nothing to show that the claimant had taken steps to request information relevant to his alleged disabilities from other healthcare providers although he knew that these existed: such as the consultation with Dr Natali; any notes from his physiotherapy team and any notes in relation to the CBT sessions.

35. As the claimant had been legally represented throughout, Mr Caiden said it could only be inferred from the facts presented that there had been a deliberate decision not to comply with the tribunal's orders and that this merited striking out the claimant's entire claim on disability discrimination.

36. In the alternative, he argued that a fair trial was not possible as the respondent and the tribunal could have no trust that the claimant would produce all the relevant evidence, given his/his representatives previous conduct. However in response to questions from me, Mr Caiden accepted that a fair trial would be possible in principle if, having given detailed directions, the tribunal could satisfy itself that the claimant had complied with his disclosure obligations, though he repeated that he did not believe that this would be possible.

37. As regards the application for strike out on the merits, Mr Caiden said that the discrimination claims had no reasonable prospect of success. The direct discrimination claims put forward by the claimant did not present a prime facie case and were simply speculative.

38. As regards the S 15 claim there was nothing to show that the relevant act was because of something arising from the claimant's disability and no medical evidence had been produced to make the relevant link to the claimant's disability. As regards the reasonable adjustment claim a similar point arose as there was no evidence to substantiate the disadvantage namely the need to undertake a strict exercise regime.

Claimant's submissions

39. Mr Tomison accepted that the disclosure of medical evidence had been delayed and was even now not yet complete. He attributed the claimant's and his solicitors conduct to misunderstandings and mistakes; in particular, a mistaken view as to the concept of relevance which meant that the claimant had not disclosed his full GP notes. He said the claimant and his solicitors now realised their mistakes.

40. However, Mr Tomison said he believed the fault did not lie solely with the claimant as the respondent has engaged in lengthy and uncooperative

correspondence raising disproportionate queries and disputes. The summary of the events on disclosure set out above would in my view, appear to support that statement.

41. Mr Tomison did not accept that the proceedings had been conducted in an unreasonable or deliberately obstructive manner by the claimant. However, even if it could be argued that such conduct was unreasonable it could not be said that a fair trial was impossible. He pointed out that the respondent would be entitled to cross-examine the claimant on any of the alleged points and make appropriate submissions on disclosure and credibility at the full merits hearing.

42. Having accepted that there was some outstanding disclosure, Mr Tomison said that this was minor in that the respondent already had a considerable amount of disclosure on the disability issue including all of the claimant's GP records.

43. Mr Tomision said the non-compliance had not been deliberate but mistaken. He accepted that there could be a situation in which mistakes could be regarded as unreasonable conduct given the relevant context, but he said that this was not such a case.

44. Further, he said that the delay to disclosure had caused no disruption to the proceedings. The dates fixed for the full hearing in June 2020 had to be postponed because of the Covid 19 restrictions. He said that the postponement of the April 2021 date was not solely because of the claimant's failure to comply with directions but also due to the respondent's conduct: in particular the extended discussions about the identity of the joint medical expert but then the unilateral decision of the respondent in November 2020 not to appoint such an expert.

45. Mr Tomison also noted that there was no current listing for a full hearing and therefore the respondent would suffer no prejudice by the late provision of the CBT records if they were subsequently received. Further, it would be disproportionate to strike out the claimant claims when a far less drastic option was available namely clear further directions and proceeding to a full trial.

46. As regards the strike out on the merits, Mr Tomison cited the established authorities which stated that where there were disputed facts it would not be appropriate to strike out and that the tribunal must not carry out a mini trial at any preliminary hearing.

47. A closer discussion of the list of issues during the OPH hearing, clarified that as regards the direct discrimination claim there were two allegations of less favourable treatment. As regards the failure by the respondent to consider 10 suitable alternative roles for the claimant, the claimant cited a hypothetical nondisabled comparator. The claimant said that he was a 66% match for 3 of the roles. As regards the remainder of the roles he believed that the respondent (in accordance with their policy) could exercise a discretion to afford training to assist with meeting the requirements of such roles.

48. Having taken instructions, the respondent disputed the 66% match for the 3 roles and also disputed the fact that their policy contained such a discretion. This is a clear factual dispute, for which no evidence was available at the preliminary hearing.

49. The other allegation of less favourable treatment in the direct discrimination claim was the claimant's dismissal. Here there was an actual comparator Mr Rahman. Again, there was no evidence available for me to determine that the claimant had no or little reasonable prospect of success in this claim.

50. As regards the S 15 claim, the claimant said that his severe anxiety and depression meant that he was unable to work his prescribed contractual hours and as regards his physical impairment, he was unable to work 5 days a week in the office or at the respondent's external premises because of the need to carry out his exercise regime. Again, this was a matter on which the tribunal would have to hear detailed factual evidence in order to determine.

51. The failure to make reasonable adjustments claim was couched in the same terms. Mr Tomison clarified after taking instructions that the relevant PCPs were the requirement for the claimant to work in the office or at the respondents external premises and for the claimant to have regular working patterns. Again, there was no evidence available to the tribunal to form a conclusion as to whether such arguments had no or little reasonable prospect of success.

Conclusions

52. There was no dispute between the parties as regards the legal principles applicable to this application. It was agreed that striking out the claim is a Draconian measure that should not be imposed lightly (**Blockbuster Entertainment Limited v James [2006] EWCA Civ 684**).

53. Further, where the tribunal is considering striking out there were four matters which needed to be addressed: (**Bloch v Chipman**)

    -whether the proceedings have been conducted unreasonably by the claimant or his representatives, if so
    -whether a fair trial was possible (unless the conduct was such namely wilful deliberate or contumelious disobedience that led to a Debarring order as per **De Keyse**r)
    -even if a fair trial was not possible the tribunal must consider what remedies appropriate whether a lesser remedy might be more proportionate
    -if a strike out is appropriate the tribunal should consider the consequences of that order

54. I also note reference in the respondent's submissions to the EAT case **Arriva v Maseya UKEAT/0096/16** - which said that even where a tribunal is satisfied that a claimant's conduct the proceedings unreasonably it should not move to strike out the claim when firm case management might still afford a solution.

55. I refer to the summary set out above of the protracted and delayed disclosure in this case on the disability issue. I find that the claimant solicitors have acted unreasonably in particular that they have transferred the responsibility of complying with disclosure obligations from themselves, as officers of the court, to their client. Their letters consistently referred to their instructions and to the fact that their client has told them he has complied with his disclosure obligations. It is the duty of a solicitor to make his/her clients aware of the disclosure obligations and to ensure wherever possible that those obligations have been complied with.

56. However, I do not find that this conduct was wilful deliberate or contumelious even though it was not best practice. I also note that it would be extremely unfair to prejudice the claimant for such conduct.

57. I accept some of the respondent's concerns with regard to apparent reluctance to disclose all relevant documentation. However, I do not accept the submission that this was such that all trust in the claimant's ability to provide full disclosure has been lost.

58. I also find that the respondent could have taken alternative means at various points in the proceedings rather than simply citing non-compliance with the tribunal's order and insisting on further disclosure.

59. I also note as set out above that the respondent appears to be in breach of a tribunal order by unilaterally deciding that a joint medical expert is not to be appointed to avoid incurring further costs. This is especially noted as it was the respondent who requested the appointment of a joint medical expert.

60. Bearing all this in mind I find that it would not be proportionate to strike out the claims under rule 37 (1) (b) or (c) and that a fair trial is still possible with the assistance of clear and rigorous case management going forward. The claim to strike out on this basis does not succeed.

61. As regards the strike out on grounds of no reasonable prospect/little prospect of success. The authorities agree that such strike out should only be in an exceptional case where the facts sought to be established by the claimant are totally and inexplicably inconsistent with undisputed contemporary documentation (**North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330**). This is not such a case. As identified above, there is a core of disputed facts which would not be capable of determination in such a preliminary hearing. I also note that even at this stage, the list of issues (although the parties said they were agreed) need refinement and given that situation, it would not be appropriate to strike out for no or little reasonable prospect of success.

62. The claim the strike out on this basis does not succeed under Rule 37. Further, the claim for a deposit order under Rule 39 does not succeed on the same basis.

63. Following the delivery of the Judgment and Reasons, I suggested that we deal with Case Management issues. In fact, the parties had already agreed a timetable for further disclosure, which are included (with other directions) in a separate Case Management Order.

64. The Final Hearing on this matter is listed for eight days to commence on 13 June 2022.

_____

Employment Judge Henderson

JUDGMENT SIGNED ON: 9 July 2021

JUDGMENT SENT TO THE PARTIES ON

09/07/2021

FOR THE SECRETARY OF THE TRIBUNALS