



EMPLOYMENT TRIBUNALS

Claimant

Mrs W Barker

Respondent

Intelecom Limited

v

PRELIMINARY HEARING

Heard at: Cambridge

On: 20 October 2017

Before: Employment Judge Postle

Appearances:

For the Claimant: Mr M Green, Counsel.

For the Respondent: Mr D Dixon, HR Consultant.

JUDGMENT

1. The respondent's application to strike out the claimant's claims on the grounds that they are vexatious, abusive or misconceived is not well founded.
2. The respondent is ordered to pay the claimant's cost for today's hearing in particular:-
 - 2.1 Counsel's brief fee note of £750 plus VAT.
 - 2.2 The claimant's air fare from Jersey in the sum of £107.

REASONS

1. This was and always would have been a preliminary hearing listed upon the respondent's original application for a strike out. That application has never been withdrawn by the respondent despite Judge Sigsworth's suggestion at the last case management hearing on 9 March 2017 that they await the claimant's further and better particulars and then make a decision as to whether to pursue that application.

2. In the absence of a withdrawal today's application by the respondent was clearly an open preliminary hearing to determine that application. If it were not the case then it seems surprising the respondent's bundle produced for today's hearing consisting of 53 pages and a second mini bundle consisting of 34 pages was clearly prepared to support the respondent's application for a strike out of the claimant's claims.
3. Mr Dixon for the respondent proceeded with his application which as the Judge indicated on occasions was simply Mr Dixon giving evidence on behalf of the respondent's, much of which was not even direct evidence.
4. Mr Green for the claimant addressed the tribunal briefly, and reminds the tribunal of the direction made by Judge Sigsworth that the respondent may wish to revisit their application for a strike out after further details of the claimant's claim had been provided. Those further details were provided and they certainly and clearly advance the case in law. There are also clear disputes of fact which would need to be determined at a full merits hearing.
5. The fact that the claimant may have relocated to Jersey does not prevent her from pursuing claims in the tribunal if she believes she has been treated badly, then she is entitled to resign.
6. Furthermore, the other claims surrounding discrimination again have no bearing on where the claimant may have relocated to. They are clearly set out and not in any way misconceived.
7. I conclude there are clearly disputed facts, as the EAT and Court of Appeal have said on many occasions where there are clearly disputed facts which are founded on clear legal principles ie the law itself the claims cannot be misconceived then it is wholly inappropriate to strike out such claims.
8. These disputed facts and claims need to be determined before a full tribunal and therefore I have no hesitation in refusing the respondent's application to strike out.
9. At the conclusion of the preliminary hearing Mr Green counsel for the claimant made an application for costs. Particularly his claimant is in Jersey, had the respondent withdrawn their claim for a strike out there would have been no need for the claimant to attend. There could have been a telephone conference to deal with listing and further orders for the progress of the claims.
10. Furthermore Mr Dixon has advanced no more valid arguments than he previously did before Judge Sigsworth earlier in the year. Mr Dixon has given large chunks of evidence together with additional matters, there are no witness statements and he has advanced nothing in law to support why the respondent believes the claims are misconceived.
11. In Mr Green's view the way the litigation has been conducted by the respondent's over this strike out application was not only unreasonable but misconceived.

12. Mr Green therefore asks for his costs in respect of his brief of £750 plus VAT together with the claimant's air fare from Jersey being £107.
13. Mr Dixon was given an opportunity to respond.
14. He seems to think that the reason for the preliminary hearing was confusing, notwithstanding the fact that he accepts he never withdrew the respondent's application for a strike out. Furthermore he attends this morning with a bundle which is clearly in support of an application to strike out.

Conclusion on costs

15. The power to award costs arises under rule 76 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Particularly:-

“A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that –

- a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way the proceedings (or part) have been conducted; or
- b) ...
- c) ...

The power to award costs is affectively a two stage process, firstly have any of the factors arisen under the above paragraph, and if they have should the tribunal exercise it's discretion to make an order for costs.”

16. I am entirely satisfied that to pursue this application for a strike out after a warning from Judge Sigsworth at the previous case management hearing was not only unwise but clearly unreasonable. Furthermore Mr Dixon has this morning simply given the tribunal a long summary of his own evidence on behalf of the respondent's, he has not addressed the fundamental question as to why any of the claimant's legal claims are misconceived in law.
17. Mr Dixon has failed to also address the long line of authorities from the EAT and the Court of Appeal that where there are clearly disputed issues of fact they need to be determined and should not be the subject of applications for strike out unless one can show that the basis of the factual matrix of the way the claim is pursued in law is misconceived.
18. In those circumstances I make the order as requested by the claimant's counsel that the respondent pay counsel's brief fee of £750 plus VAT and the claimant's air fare.
19. I emphasise had the application for a strike out been withdrawn this mornings hearing could have been dealt with by way of a telephone case management. Thereby reducing time and costs.

20. The tribunal then proceeded with a case management hearing to prepare for the full merits hearing.

CASE MANAGEMENT SUMMARY

Listing the hearing

21. After all matters had been debated and with the parties' consent in order to get the hearing brought forward, the parties have agreed to a hearing at **Bury St Edmunds Employment Tribunals, 1st Floor, Triton House, St Andrews Street North, BURY ST EDMUNDS, IP33 1TR with a time estimate of 7 days commencing on Monday 9 April 2018 and concluding on Tuesday 17 April 2018.**

The claims

22. By one claim form filed on 10 November 2016 with the appropriate ACAS certificate the claimant made claims of pregnancy related discrimination, harassment (race and sex) and victimisation under the Equality Act 2010. There were also claims for detriment and automatic unfair constructive dismissal for making protected disclosures, and Health & Safety detriment under the Employment Rights Act 1996. Some of the factual allegations overlap.
23. These give rise to the following specific issues:-

Public Interest Disclosure

24. What did the claimant say or write?
- 24.1 The claimant on 8 August 2016 advised her Team Leader the smell of 'vaping' was making her nauseous and on 9 August email that it was causing her blood in her nose each night.
- 24.2 On 10 August 2016 the claimant told Paul Hunt (Managing Director) verbally the nurse had advised her vaping in the office was illegal. Mr Hunt was annoyed the claimant had called him and stated he needed proof that it was illegal.
25. In any or all of these, was information disclosed which in the claimant's reasonable belief tended to show that the respondent had failed to comply with its legal obligations and/or health and safety requirements:-
- 25.1 Permitted vaping in the office;
- 25.2 Permitted the claimant to be exposed to potentially harmful chemicals
- Accordingly, the claimant relies upon s.43B (1) (a) and (d).
26. If so, did the claimant reasonably believe that the disclosure was made in the public interest?

27. If so, was the disclosure made to:-
- 27.1 The employer.
 - 27.2 Another person who had legal responsibility for the failure.
28. If not, was it made in circumstances were covered by s.43G:-
- 28.1 It was made other than for personal gain;
 - 28.2 The claimant reasonably believed that the information disclosed and any allegation contained in it were substantially true; and
 - 28.3 It was reasonable for her to make the disclosure having regard to the identity of the person to whom it was made, its seriousness, whether it was continuing, the action which had been made or might have been expected to have been taken and any procedures authorised by the employer; and where
 - 28.4 It was likely that she would be subject to a detriment by the employer.

S.103A Automatic Constructive Unfair Dismissal

29. Was the making of any proven protected disclosure the principal reason for the dismissal? The claimant had:-
- 29.1 Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosures?
 - 29.2 Has the respondent proved that the reason for dismissal, namely frustration of the contract?
 - 29.3 If not, does the tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the constructive unfair dismissal?

S.47B ERA 1996 Detriment

30. If the protected disclosures are proved, was the claimant, on the ground of any protected disclosure found, subject to detriment by the employer or another worker in that the claimant was subjected to:-
- 30.1 Refusal to take the claimant's health and safety concerns seriously;
 - 30.2 Failed to investigate the effects of 'vaping' on the claimant's health and that of her unborn child;
 - 30.3 Placed the claimant at a desk which put her in direct conflict with vapours produced by vaping;

- 30.4 If the act of detriment was done by another worker:-
- 30.4.1 Can the employer show it took all reasonable steps to prevent that other worker from doing that thing or act of that description; or
- 30.4.2 Can that worker show he/she had relied on a statement by the employer that the doing of the act did not contravene the Act, and it was reasonable to rely on that statement.

S. 18 EqA 2010 Pregnancy Discrimination/S.99 ERA 1996 Pregnancy/Sex Discrimination/Victimisation – Automatic Unfair Dismissal

31. Did the respondent treat the claimant unfavourably on account of her pregnancy by:-
- 31.1 On advising the respondent she was pregnant, the claimant was advised not to answer any calls;
- 31.2 The claimant was ostracised through a tense atmosphere and being really quiet around the claimant, people did not want to speak directly to or around the claimant. The claimant was made to feel unwanted;
- 31.3 The claimant was questioned by Jackie Edwards as to the authenticity of her sick note. The respondent rang Yaxley Group Practice to question the authenticity of the note;
- 31.4 Respondent failed to adequately, or at all address the claimant was told that her hours needed to be changed and reduced because of her pregnancy;
- 31.5 The claimant was moved to a different desk near Jackie Edwards, the claimant felt this was to keep watch over her;
- 31.6 The new desk placed the claimant in close proximity to the person testing potentially dangerous returned products. Vapour was exhaled in the claimant's direction;
- 31.7 The claimant's new desk blocked the passage access to the fire exit. There was approximately 50 to 60cm between her desk and a pillar, when the claimant was not sat at her desk. This would be greatly reduced when the claimant was sat down and more so as her pregnancy advanced;
- 31.8 21 July 2016 the claimant was threatened with disciplinary action if she took any further time off sick; and
- 31.9 On or around 30 July 2016 the respondent did not invite the claimant to bring her son to a dinner, which had been extended on previous occasions prior to her pregnancy.
32. Whether the respondent subjected the claimant to unfavourable treatment above because the claimant was pregnant and/or was exercising her right to ordinary or additional maternity leave (s.18 (4) EqA 2010)?

S.44 (1) (C) ERA 1996 Detriment

33. Whether the respondent's treatment of the claimant was by virtue of her bringing to their attention circumstances connected with her work, which she reasonably believed were harmful or potentially harmful to health or safety. The claimant asserts she suffered the following detriments:-
- 33.1 The claimant was moved to a different desk near Jackie Edwards, the claimant felt this was to keep watch over her;
 - 33.2 The new desk placed the claimant in close proximity to the person testing potentially dangerous returned products. Vapour was exhaled in the claimant's direction;
 - 33.3 The claimant's new desk blocked the passage access to the fire exit. There was approximately 50 to 60cm between her desk and a pillar, when the claimant was not sat at her desk. This would be greatly reduced when the claimant was sat down and more so as her pregnancy advanced;

S.26 EqA 2010 Harassment on the grounds of Race/Nationality and/or Pregnancy

34. Did the respondent engage in the unwanted conduct as follows:-
- 34.1 6 September 2016 David Dixon at the grievance meeting advised the claimant he was prepared for the meeting, by having a Polish-English dictionary to assist her, as she might not understand some of the words/phrases he would be using during the meeting. This made the claimant feel humiliated and belittled;
 - 34.2 Mr Dixon repeatedly asked the claimant to confirm she understood the words he was using, insinuating that she might not have understood what he was saying;
 - 34.3 Mr Dixon insinuated the claimant did not understand the language used by Human Resources and therefore would not understand legal language if she continued with her dispute;
 - 34.4 The claimant felt humiliated and demoralised and upset by Mr Dixon's actions and his belittling of her grasp of the English language;
 - 34.5 Mr Hunt told the claimant the reason she felt as she did in reference to Jackie Edwards was due to her hormones.
 - 34.6 Was the conduct related to the claimant's protected characteristics of nationality and/or race and/or pregnancy?
 - 34.7 Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

- 34.8 In considering whether the conduct had the effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

S.27 EqA 2010 Victimisation

35. Has the claimant carried out a protected act?
36. If there was a protected act, has the respondent carried out any of the treatment because the claimant had done a protected act?
37. Did the claimant suffer any detriments because of the protected act?

Failure to follow ACAS Code

38. Whether there should be any uplift or reduction due to the failure to follow the ACAS Code of Practice?

Section 10 Employment Relations Act 1999

39. Whether the respondent failed to offer the claimant to the right to be accompanied to the grievance hearing?

Limitation

40. The claim form was presented on 10 November 2016 after ACAS early conciliation certificate was issued on 10 October 2016. Accordingly bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 27 June 2016 is potentially out of time, so the tribunal may not have jurisdiction.
41. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
42. Was any complaint presented within such other period as the employment tribunal considers just and equitable?

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The claimant's solicitor shall confirm whether or not it is agreed that the claimant's employment commenced on 1 March 2015 as implied or whether they are advancing an argument that continuity starts from 18 September and shall do so on or before **27 October 2017**.

Schedule of loss

- 2. A schedule of loss has already been provided to the respondent, such schedule of loss to be updated by the claimant **14 days before the full merits hearing.**

Bundle of documents

- 3. The respondent shall submit their amended draft index for the joint bundle by **24 November 2017.**
- 4. The parties shall each prepare two copies of the joint bundle by the **19 January 2018.**

Witness statements

- 5. It is ordered that evidence in chief will be through typed witness statements. Such witness statements shall be in numbered paragraphs in chronological order. If a page number is to be referred to from the bundle the page number inserted in the relevant paragraph. Such witness statements to confine themselves to issues to be determined in the case as referred to above and shall not consist of hypothesis, supposition or theory. Such witness statements to be exchanged on **Friday 9 March 2018.**

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.
- 3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Postle

Date: 9 November 2017

Sent to the parties on:

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For the Tribunal:

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