



EMPLOYMENT TRIBUNALS

Claimant: Michelle Fahey

Respondents: 1) St Marks Parochial Church Council
2) Keith Airey
3) Judith Watts-James

Heard at: Birmingham **On:** 26 September 2017

Before: Employment Judge Hindmarch

Representation
Claimant: Mr Swanson, Consultant
Respondents: Mr Herd, Counsel

JUDGMENT ON PRELIMINARY HEARING

1. The respondents' application for strike out of the whole of the claimant's claim is granted and the claims are dismissed.

REASONS

1. This application came before me on the application of all three respondents all represented by Mr Herd to strike out the claimant's claims of disability discrimination and arrears of pay or a Deposit Order in the alternative. The application was opposed by the claimant's representative Mr Swanson.
2. Evidence was called on discreet points as to knowledge of disability by the respondents and given by the second respondent Mr Keith Airey. The claimant was not present.
3. The respondents produced a bundle and I heard submissions from both representatives who handed up written arguments and some case law.

4. By a claim form issued on 18 February 2017 the claimant brought complaints of disability discrimination and arrears of pay.
5. In the response the respondents argued the claimant had failed to particularise the factual basis leading to her claims.
6. The case came before Employment Judge Lloyd for a Preliminary Hearing on 2 June 2017 and his Case Management Summary and the following Orders were in the respondents' bundle pages 52 – 59.
7. At that Preliminary Hearing the respondents repeated their concerns about the lack of factual particulars given by the claimant and Employment Judge Lloyd recorded this at paragraph 6 and paragraph 15.1.
8. In Paragraph 6 under the heading "The Complaints" Employment Judge Lloyd recorded that the respondents contended that the claimant had not adequately pleaded her claim and Mr Swanson, for the claimant told the hearing there was nothing further the claimant could add. Under heading "15 Strike Out Deposit Order" the Employment Judge recorded the respondents contention that the claimant has failed properly to plead her claim, moreover the claimant's representative has confirmed at this hearing that there is no further information which the claimant can offer in pleaded support for the claim. No further particulars have been given by the claimant to date.
9. Employment Judge Lloyd recorded the facts as best he could at paragraphs 9 – 10 and set down today's hearing.
10. The respondents set out its application to strike out in a letter to the Tribunal dated 28 July 2017 a copy of which is at page 62 – 63 of the bundle. The respondents' principal argument was that the claim should be struck out under Rule 37(1)(a) as having no reasonable prospect of success. As an alternative there were additional arguments put forward of a failure to particularise the factual basis, being a reason to strike out under Rule 37(1)(d), the claim not being actively pursued and/or under Rule 37(1)(c) for non compliance with orders of the Tribunal, the claimant having been ordered to file a Schedule of Loss by 30 June and not yet having done so and the claimant only filing her medical records and impact statement in support of the disputed issue of disability on Friday 22 September, despite having been ordered to do so by 30 June.
11. At the outset of my deliberations I reminded myself that when considering an application for strike out I should take the claimant's case at its highest and that there is a public interest in cases of discrimination going to a full merits hearing. At its highest the claimant says that she is a disabled person. I acknowledged the respondents dispute this and Mr Airey gave evidence today as to his lack of knowledge of the claimant's disability. Nevertheless taking the claimant's case at its highest and assuming that she is a disabled person, she has complaints of harassment which have not been particularised against any of the respondents in fact, and there is one factual specific pleaded which Mr Swanson told me today in submissions is the claimant's principal issue, namely that the claimant and another employee of the respondent were suspended in October 2016. The

respondent accepts there was a suspension as money had gone missing when the claimant and the other employee had responsibility for it. I note the suspension was lifted and no disciplinary action was taken against the claimant or her colleague. The claimant remains employed by the first respondent. The other employee I am told has issued a separate claim of race discrimination concerning the same circumstances.

12. The claimant gives no other factual particulars against any of the respondents and fails to say how the suspension is an act of discrimination whether it is said to be less favourable treatment, a provision, criterion or practice or harassment. Although all are mentioned at the end of the rider to the ET1.
13. Taking the claim at its highest before me, I had to decide whether it has no reasonable prospect of success. I except where there are facts in dispute having regard to the Court of Appeal in *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330 that it is only very exceptionally that I should strike out without evidence being tested.
14. Before me, I only have the particularised pleading as to the suspension which is not itself a dispute. The claimant failed to identify a comparator before today. Today Mr Swanson tells me it would be a hypothetical comparator.
15. I cannot see how the claim can have any reasonable chance of success and how the claimant could succeed. A hypothetical comparator without the claimant's disability would still on the face of the respondents' explanation have been suspended.
16. The facts such as they are and as alleged by the claimant at the highest, disclose no arguable case in law and can have no reasonable prospects of success.
17. The parties both referred me to *Anyanwu v South Bank Students' Union and South Bank University* (2001) IRLR 305. This is clear authority that I should not strike out unless in the most plain and obvious case. However, in my judgement the claimant's allegation, which boils down to "I am disabled therefore I must have suffered discrimination", in the absence of properly pleaded facts and a legal analysis as applied to those facts is fanciful. I take the view on the cases pleaded and at its highest as set out above that the claimant cannot succeed and I therefore use my discretion to strike out the discrimination claims.
18. Mr Swanson invited me and all the respondents to ask for further particulars but I note the claimant has had the benefit of his advice since before issue and he has been unable to add any better particulars since the respondent first raises in the ET3 and was unable to do so before a previous Preliminary Hearing with Employment Judge Lloyd on 2 June 2017.
19. The arrears of pay claim is ticked in box 8.1 of the ET1. However again, it is not particularised at all in the rider or since. I therefore have no case on the part of the claimant taken at its highest and there is nothing pleaded at

all. Therefore I again find that claim and any money claim that might be as having no reasonable prospects of success.

20. The respondents also asked me to consider a strike out under Rules 37(1) (c) and (d) in the alternative. Given my findings as regards no reasonable prospect of success, there was no requirement for me to go on and consider this albeit the failure to comply with the Orders and to the impact statement and medical records and/or the Schedule of Loss, had they been the only failings I would have not struck out. Save I would have warned Mr Swanson that as a consultant on record he does need to comply with the orders or at least let the respondents know of reasons for any delay.
21. Given the Judgment made today, there is no requirement for the parties to attend a further Preliminary Hearing listed for the 3 October 2017 as the proceedings in totality are dismissed.

Employment Judge Hindmarch

21 November 2017