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EMPLOYMENT TRIBUNALS

Claimant
Respondents

Mr W Whelpdale **AND** Moorefields Eye Hospital NHS Foundation Trust

Heard at: London Central **On**: 18 January 2018

Before: Employment Judge Palca (Sitting alone)

Representation

For the Claimant: In person
For the Respondent: Ms N Joffe, of Counsel

JUDGMENT

The Claimant's claims are struck out on the basis that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim.

REASONS

1. The Claimant was employed by the Respondent in its IT department from December 2001 until April 2014, when he was dismissed. It is the Respondent's case that he was dismissed by reason of redundancy. The Claimant filed his ET1 on 7 August 2014. However, the claim was not accepted because the Claimant declined to pay a fee. The case was reinstated, following the UNISON decision, on 1 February 2018. The response was filed by the Respondent on 1 March 2018.

Issue

2. The issue for the present preliminary hearing is whether or not the case should be struck out, pursuant to Rule 37 of the Employment Tribunal Rules, on the basis that it is no longer possible to have a fair hearing.

Evidence

3. The Respondent produced two bundles of documents, one essentially of pleadings and the other being a file of all relevant documents which it has found since being notified of the claim, in relation to the dispute. The Claimant gave evidence, as did Ms Denise O'Meara who is a Human Resources Business Partner employed by the Respondent. Both witnesses produced witness statements.

Facts

The Tribunal found that the material facts were as follows.

4. The Claimant was employed by the Respondent in their IT department from 8 December 2001 until his employment was terminated by reason of redundancy on 22 April 2014. By the time of his departure, he was the service desk supervisor. Before that, he had a distinguished career in the military serving among other places in the Falklands and Northern Ireland. In late 2013, the Respondent developed a plan to restructure its IT department. The Tribunal was told that this was part of a cost cutting exercise resulting from government changes in the method of provision and funding of healthcare. Staff, including the Claimant, were warned about the position in November 2013 and it seems that there were a number of consultation exercises between then and the end of January. As part of the reorganisation, the Claimant's role was redundant. He agreed with the Respondent that no suitable roles were available for him and in March 2014 the UNISON branch chair and steward, Lyanta Palmer confirmed that the Claimant wished to accept the redundancy offer with particular arrangements regarding his pension. The Claimant received an enhanced redundancy payment of £45,706.50, 12 weeks' pay in lieu of notice and his basic salary together with further payments, in all totalling about £45,000 net of tax, plus some further small payments totalling around £1,300 net.

5. The Claimant believes that his role was made redundant because he had complained about various data protection lapses carried out by his then manager, Mr Jennings, about which he had complained in 2012. He also had other concerns about Mr Jennings but did not inform management about them at the time believing that there would be no point especially because Mr Jennings' role was interim and he therefore might not be there for long. He exchanged correspondence with a Mr de Sousa who was the relevant HR Manager complaining about this in particular in a lengthy email of 22 May 2014. The Claimant's evidence is that he never received a substantive reply to his complaint. However, he did not appeal the decision to dismiss him.

6. Having obtained the appropriate ACAS early conciliation certificate, the Claimant lodged Employment Tribunal proceedings against the Respondent, but he was unwilling to pay the then fees necessary for the claim to continue. This was because he and his wife had concluded that since the Claimant was not enjoying employment in the civilian world, and since they had recently had another child, born in April 2014, the Claimant would remain at home looking after the children while his wife worked. He has therefore never looked for work

since his departure from the Respondent. His wife earns roughly what he would have been earning and the Claimant preferred to use the redundancy money he received to support the family rather than to pursue the claim.

7. The claim was therefore rejected and the Respondent never knew at the time that it had been brought.

8. Following the UNISON decision in the Supreme Court in 2017, in December 2017, the Employment Tribunal asked the Claimant if he wished to reinstate his claim. He promptly replied that he did and on 1 February 2018, the Employment Tribunal sent notice of the claim to the Respondent.

9. The claim, as drafted in 2014, was for compensation for unfair dismissal, payment in lieu of holiday entitlement and payment of unpaid wages. The latter two claims have since been resolved. The claim therefore in practice revolves around whether or not the redundancy processes which ended in the termination of the Claimant's employment were adequate, and whether or not the Claimant was selected for redundancy because of whistle blowing activities in 2012-2013. The claim itself lacks particularity at this stage.

10. Following receipt of the claim, which referred to a number of the Respondent's employees, the Respondent set about trying to retrieve the relevant evidence. Six individuals were named in the Claim Form and its attachments and a further two, the CFO, Mr Niles and the relevant HR Manager Mr de Sousa, were named in the accompanying documents. None of these individuals is still employed by the Respondent. One now lives in the USA and another lives in France but comes to UK from time to time. All are listed on LinkedIn. Mr de Sousa may co-operate in giving evidence to the Respondent about the redundancy process but the other witnesses have not been approached. They may be willing to give their time in relation to the matter, or they may refuse.

11. The Respondent has also conducted a very thorough trawl of its documents. The Respondent has changed its email system since 2014 and has attempted to access relevant information regarding the key relevant potential witnesses. Some documents have been found but they are scarce. The Respondent has also not been able to find the Claimant's personnel file which would contain key correspondence and documents. The Tribunal was given a copy of the documents unearthed so far. They do not present a full picture. In cross-examination the Claimant told the Tribunal that he did not have his own notes about the meetings concerning possible data protection breaches nor had he transferred to his personal email any of the emails he had received concerning his redundancy.

Law

12. Rule 37 of the Employment Tribunal Rules provides as follows:

> *37.1 At any stage of the proceedings … a Tribunal may strike out all or part of a claim [on the ground] … (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim … or the part to be struck out.*

Submissions

13. The Claimant said that the Respondent's programme to restructure the IT department did not achieve its aims because it was likely to be more costly than the original framework. He maintains that he was selected for redundancy because he had blown the whistle in relation to his boss' breaches of data protection provisions. He wanted to put on record that there had been a data protection breach about which nothing was done.

14. The Respondent's representative provided written submissions in support of the strike out application. The Tribunal does not propose to repeat those submissions in this document. In essence, their argument was that the claim was not yet fully particularised, events are now over five years old so that memories would have faded, no relevant witness remains employed by the Respondent and none is obliged to co-operate with it, the personnel file and many other relevant documents have been lost. The Respondent maintained that whistle blowing cases are profoundly fact sensitive so that evidence is key: if the Claimant were to establish a protected disclosure and that he had suffered a detriment, the burden would shift to the Respondent to prove that the detriment had not been suffered as a result of any protected disclosure.

Conclusion

15. The question of whether there should be a strike out must be exercised in accordance with reason, relevance, principle and justice.

16. Strike out is a draconian act and the power to do so must be exercised with great care, particularly when, as here, the Claimant is not personally responsible for the delay, which resulted from the government's erroneous (it now turns out), requirement that the Claimant should pay a fee before bringing his claim and this particular Claimant had other family priorities for what he wanted to do with his redundancy money.

17. However, sympathy for the Claimant is not sufficient. The Tribunal must review whether or not a fair trial is still possible. In the current position, we have a situation where all eight potential witnesses for the Respondent are no longer employed by the Trust. That does not mean that they would refuse to assist the Respondent. However, five to seven years have elapsed since the events in question. The witnesses have had no cause to try to remember what happened in the interim, because they are not aware of the claim. There are few documents which will help witnesses recall events, with many other documents missing, and the witnesses have other lives and careers to lead which may make it more difficult for them to prioritise, gathering information to defend the claim and remembering with precision what had happened. Given that a key element

of the claim relates to protected disclosure, accuracy and completeness of evidence is key.

18. Looking at the balance of prejudice, on the one hand the Respondent, if the case continues, faces the fact that it would be unable to examine its potential defence of the matter because of paucity of relevant documents and the fact that its witnesses' recollections will undoubtedly have faded with little written evidence which might prompt them to recall events. On the other hand, the Claimant informed the Tribunal that he felt really bad that he had gone down the route of bringing proceedings, and that his main aim was to highlight the data protection breaches which had occurred at the Trust in the past so that lessons could be learned. Representatives of the Trust were present in court, and they will no doubt have taken note of these concerns. In financial terms, the Claimant received a very substantial payment when he departed the Respondent and has made no attempts to find alternative employment since, for very understandable reasons. He has therefore made no attempt to mitigate his loss. Any compensation he might be awarded would be most unlikely to be significant. The balance of prejudice therefore lies in favour of the Respondent.

19. The tribunal also explored whether there were any other steps which might be taken to make a fair trial possible. However, given the paucity of documentary evidence and the passage of time between the events in question, which took place between 2012 and now, it is unlikely that any steps could be taken which might retrieve the situation, and the Employment Tribunal cannot conceive of any.

20. There are few relevant reported cases which relate to Rule 37(1)(e) of the Employment Tribunal Rules. The Respondent's representative helpfully drew the Tribunal's attention to all of them that she could find. The most relevant was **Elliott v The Joseph Whitworth Centre**, a case under Rule 37(1)(d) where the Claimant lodged a claim which was never sent out by the Tribunal to the Respondent, and about which the Claimant did not chase for 21 months. The EAT upheld the Employment Tribunal Judge's decision to strike the claim out. This case, while illuminating, is not directly relevant to the current dispute because there was some failing on the part of the claimant and his representative, whereas here there is none.

21. Taking all these things into account, the Tribunal has concluded that it is no longer possible for there to be a fair hearing of the present case, because of the five to seven year delay coupled with the understandable inability to locate relevant documents which might assist in jogging memory recall. This means that it will not be possible for the Respondent to mount a fair defence and therefore the case will be struck out.

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Employment Judge Palca

Dated:. 30 January 2019

Judgment and Reasons sent to the parties on:

4 February 2019

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For the Tribunal Office