



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss S Amir

and

Respondent

Royal Berkshire Foundation
NHS Trust

**Public Preliminary Hearing held at
Reading on:**

25 March 2019

Appearances:

For the Claimant:

In person

For the Respondent:

Mr R Steer, counsel

Employment Judge:

Mr SG Vowles (sitting alone)

RESERVED JUDGMENT

Claimant's application to reinstate her disability discrimination claim

1. The Claimant's application for reinstatement of the disability discrimination claim was refused. Reasons for this decision were given orally at the hearing and are set out in writing below.

Respondent's application to strike out the remaining claims

2. The Respondent's application to strike out the remaining claims was granted. The claims of direct discrimination on the grounds of religion, harassment related to religion, victimisation and unlawful deduction of wages are struck out. Reasons for this decision are given in writing below.

Respondent's application for a costs order

3. The Claimant was unable to attend the hearing after lunch and it is ordered that this application be dealt with later. A case management order was made separately in respect of this matter.

REASONS

Claimant's application to reinstate her disability discrimination claim

1. I heard submissions from the Claimant Ms Amir and from Mr Steer on behalf of the Respondent.
2. I do not have the full Tribunal file available today but I have received documents from that file and also documents from the Respondent and from the Claimant which have been given to me today. I consider that I have sufficient information to make a decision on the Claimant's application today.
3. The background to the case is that on 18 February 2017 the Claimant presented a claim to the Tribunal which had claims of disability discrimination, discrimination based upon religion and belief, and a claim for unpaid wages.
4. A preliminary hearing was held on 19 December 2017 at which the Claimant was present in person. Part of the case management order (sent to the parties on 9 January 2018) made at that preliminary hearing related to the disability discrimination claim. At paragraph 1.4, it was ordered as follows:

*1.4 The Claimant is ordered to disclose by list and copy so as to arrive with the Respondent by **27 March 2018** all medical records held by the Claimant's GP and/or by any Hospital, including notes, whether manual or on computer, of attendances by the Claimant, referrals to other medical or related experts, reports back from such experts, copies of X-rays, test results or other examinations relevant to her condition of migraine and any associated complications thereof.*
5. The Claimant failed to provide such medical evidence but was granted an extension of time from 27 March to 25 May 2018 to do so. Even with that extension, the Claimant failed to comply with the order.
6. On 24 August 2018 the Respondent complained about that matter to the Tribunal.
7. On 18 September 2018 an Employment Judge sent a strike out warning to the Claimant in respect of the disability discrimination claims on the grounds that the manner in which the proceedings have been conducted by or on behalf of the Claimant has been unreasonable and she had not complied with the order of the Tribunal dated 9 January 2018 as subsequently varied. She was given an opportunity to object to the strike out and to give reasons in writing or request a hearing at which she could make them.
8. The Claimant did not respond to the strike out warning. On 16 October 2018 the disability discrimination claim was struck out. That was because the Claimant had failed to produce the medical evidence which she had been ordered to produce.

9. The other claims, that is the claims of discrimination based upon religion and belief and unpaid wages, were allowed to proceed. The strike out related only to the disability discrimination claims.

10. On 29 October 2018 the case came on for a 5 days full merits hearing on 29 October to 2 November 2018.

11. On 29 October 2018, the Employment Judge recorded the following:

The case came before the Tribunal for hearing today. The Claimant and the Respondent have not exchanged witness statements. The Claimant was not able to proceed with the hearing today she has not produced a witness statement and has failed to disclose evidence on which she would seek to rely.

The Claimant attended the hearing with her new born child. The Claimant did not have any alternative child care. It would not have been practicable for the proceedings to go ahead today as the Claimant had to provide care to her new born baby which meant that the Claimant could not sensibly conduct the hearing.

The Claimant indicated that she wished to make an application for the judgment striking out her disability discrimination complaints to be reconsidered and the disability discrimination claims to be reinstated.

12. Accordingly, an order was made as follows:

The Claimant is ordered to send to the Respondent to arrive by no later than 4.00 pm on 1 November 2018, any evidence including any witness statements or medical evidence on which she wishes to rely in support of her application or in order to resist the Respondent's application.

13. The Respondent's application was an application to strike out the remaining claims.

14. When the hearing resumed on 2 November 2018 the Claimant failed to attend. In the meantime, on 30 October 2018 the Respondent's representative had written to the Claimant to set out what was required arising out of the orders made on 29 October 2018. The Claimant having failed to attend the hearing on 2 November 2018, the Tribunal made the following order:

The Claimant not attending, not being represented and the Claimant having failed to serve on the Respondent any evidence including any witness statements or medical evidence in support of her application for a reconsideration of the judgment striking out her complaints about disability discrimination by no later than 4.00 pm on 1 November 2018, the application is dismissed.

15. Today, the Claimant has submitted that she has been suffering from serious health problems over the past year or so, and that she had a difficult

pregnancy and gave birth on 16 May 2018. She then had the responsibility of looking after the baby. She said that she has made efforts to obtain medical evidence but her GP surgery has not been co-operating. She produced two emails dated 12 November 2018 and 6 March 2019 which she sent to the GP surgery asking for disclosure of her medical records. She also produced a handwritten letter from her GP dated 13 March 2019 which says: *"This patient of mine suffers from depressive illness and more recently post-natal depression. She is on treatment with Mirtazapine (daily) and counselling"*. That is the only medical evidence which the Claimant has produced over the past 15 months.

16. I have taken into account what the Claimant has said about her difficult pregnancy, her ill health, having to look after a child, and also the efforts that she says she has made to obtain her medical records. But I cannot avoid the simple fact that, after 15 months, the Claimant has not produced any medical evidence in support of her disability discrimination claim. She accepts that fact.
17. The disability discrimination claim having been struck out by reason of the Claimant's failure to comply with the Tribunal's order to provide medical records and the Claimant's acceptance that, even at today, she has still failed to do so, I can find no grounds upon which to grant her application to reinstate the disability discrimination claim. The application is therefore refused.

Respondent's application to strike out the remaining claims

18. The Tribunal heard submissions from Mr Steer on behalf of the Respondent and from Miss Amir on her own behalf.
19. The Respondent's application for strike out of the remaining claims (direct discrimination on the grounds of religion, harassment related to religion, victimisation and unlawful deduction of wages) was based upon Rule 37 of the Employment Tribunals Rules of Procedure as follows:
 - (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 – ...*
 - (c) *for non-compliance with any of these Rules or with an order of the Tribunal;*
 - (d) *that it has not been actively pursued;*
 - (2) *A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*
20. The Respondent said that the Claimant had failed to comply with the case management orders made on 19 December 2017 at a preliminary hearing at which she was present in person. Orders were sent to the parties on 9

January 2018. The Respondent claimed that the Claimant had failed to comply with the following orders:

1.1 *The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list so as to arrive on or before **13 March 2018**. The parties are then to provide copies of documents on their respective lists which are not set out in the other party's list so as to arrive on or before **27 March 2018**. This includes, from the Claimant, documents relevant to all aspects of any remedy sought.*

...

2.1 *The Claimant is ordered to provide to the Respondent and to the Tribunal, so as to arrive on or before **6 February 2018** a properly itemised statement of the remedy sought (also called a schedule of loss).*

...

5.5 *It is ordered that witness statements are exchanged so as to arrive on or before **1 October 2018**.*

21. The Respondent said that the Claimant had not, even now, some 15 months later, complied with these orders.
22. As found above, at the start of the full merits hearing on 29 October–2 November 2018, the Claimant arrived without having produced a witness statement or any documents. She did not bring with her a copy of the trial bundle of documents which had previously been served on her by the Respondent. She brought with her a young child.
23. Additionally, the Claimant had the opportunity to provide a witness statement and supporting documents no later than 1 November 2018. She failed to do so and failed to attend the hearing on 2 November 2018.
24. Hearings have taken place on 19 December 2017, 29 October 2018, 2 November 2018 and again today, 25 March 2019. Despite these hearings and the various case management orders referred to above, even at today's date, the Claimant has not produced a witness statement or any documents in support of her claim.
25. There is no indication that the Claimant has, over the past 15 months, actively pursued her claim, despite several opportunities to do so.
26. Following Mr Steer's application, the Claimant was given a 25 minute adjournment to consider a response to the Respondent's application. When she returned, she said that most her claim related to the disability discrimination claims. She requested a postponement so that the Respondent's application could be put in writing to her and an extension of

time for her to put in a written response. She said that she was not a lawyer, English is her third language, and the application was not straightforward for her to understand and she would prefer it to be put in writing. She said she was under pressure and stress.

27. I refused that application for a postponement. The Claimant was given notice of the Respondent's application to strike out the claim in the case management order made on 2 November 2018 and has had ample time to prepare for this hearing. It was not in the interests of justice to further delay matters when the Claimant had been given the opportunity to make representations at this hearing.
28. I was satisfied that the application was straightforward and I took the opportunity to explain it again to the Claimant. It was simply that she had failed to comply with the Tribunal's orders and had not actively pursued her claim in the last 15 months.
29. The Claimant did not provide any further explanation for the failure to comply with Tribunal orders in addition to the reasons given above for the failure to provide the medical evidence.
30. Just before the break at 01:00pm for lunch, the Claimant said that due to childcare commitments, she would not be able to return in the afternoon. I therefore confirmed that I would reserve my decision on the Respondent's application for strike out of the remaining claims and that would be given in writing at a later date. Also, the Respondent's further application for a costs order would be dealt with at a later date.
31. I found as follows.
32. The magnitude of the non-compliance by the Claimant is high. She did provide a schedule of loss on 6 February 2018, but has otherwise failed to comply with the Tribunal's other orders.
33. The Respondent is prejudiced because a case that should have proceeded in October 2018 is now, other than the schedule of loss, no further forward than it was in December 2017. The hearing in October 2018 was non-effective because the Claimant had not complied with the Tribunal's orders and attended without any papers and with a young child to care for. The Claimant was a litigant in person, but I noted that in November 2018 she had the assistance of Mwaniki Gachuba (whose status was not stated but claimed to act on her behalf) who wrote to the Tribunal on her behalf on 1 and 20 November 2018, but did not appear to represent her. The Claimant then failed to provide any documents on 1 November 2018 and failed to attend the hearing on 2 November 2018.
34. It is unlikely that a further full merits hearing could be listed before April 2020 by which time some of the events involved in the case would be 5 years old.

35. I considered whether a lesser sanction than strike out would be an appropriate response to the disobedience to the Tribunal's orders. In view of the previous failures to comply with the Tribunal's orders, I was not satisfied that a postponement of the hearing or the making of an unless order would be effective.
36. The Claimant has not actively pursued her case in the past 15 months. I was conscious of the fact that the approach of Tribunals should be facilitative rather than penal but could not see what lesser course would facilitate a fair procedure towards a full merits hearing when the Claimant has failed to engage with the process.
37. Both parties are entitled to a fair process and a fair hearing but in this case the Claimant has shown an unwillingness to engage in the process. In these circumstances a fair hearing is not possible.
38. Although I took account of the Claimant's ill health and difficult pregnancy, there was no medical evidence produced to indicate that she was unable to participate in the Tribunal process.
39. In these circumstances, I considered that the remaining claims should be struck out for non-compliance with the Tribunal's orders and because the Claimant was failing to actively pursue the claims. A fair hearing is not possible. The Respondent's application was therefore granted

Respondent's application for a costs order

40. Because the Claimant was unable to attend the hearing after lunch, I ordered that this application should be dealt with later and a case management order was made separately in respect of this matter.

Employment Judge Vowles

Date:10.04.2019.....

Sent to the parties on:

...12.04.19.....

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For the Tribunals Office

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