



EMPLOYMENT TRIBUNALS

Claimant: Ms J Padmore

Respondent: Nottinghamshire County Council

RECORD OF A PRELIMINARY HEARING

Heard at: Nottingham **On:** 16 July 2019

Before: Employment Judge (sitting alone)

Appearances

For the claimant: In person

For the respondent: Mr G Russell, in-house Counsel

JUDGMENT AT PRELIMINARY HEARING

1. None of the complaints shall be struck out.
2. No deposit orders will be made in relation to the complaints of unfair dismissal or direct discrimination.
3. The claimant is ordered to pay a deposit of £250, pursuant to Rule 39 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 as a condition of continuing to advance her victimisation complaint.

Background and issues

4. The case was listed for a Preliminary Hearing today to:-
 - a. Explore the current claims;
 - b. Consider whether both or either of the claims should be struck out as having no reasonable prospect of success;
 - c. Consider whether a deposit should be ordered as a condition precedent for the claimant to pursue one or both of her claims; and

- d. To consider case management orders and the present time estimate for the final hearing.

Proceedings at the Preliminary Hearing

5. The respondent had produced a bundle of documents running to 117 pages. The claimant told me that there were no documents that she wanted to refer me to.
6. I heard oral evidence from the claimant as to her means.
7. I heard submissions from the claimant and, on behalf of the respondent, from Mr Russell.
8. At the outset of the hearing I asked the claimant to confirm the claims that she was bringing and there was a discussion about the issues that fall to be determined in this case. Those issues are identified at paragraph (5) below.

Findings of fact

9. The claimant is currently working and has been doing so for approximately one year. She works between 20 and 25 hours a week and takes home approximately £1,000 a month.
10. She owns her own home, although has a mortgage on that home of £265 a month, which some months she is unable to pay.
11. She has no savings, but currently has £500 in her bank account, and gets financial support from her family.

The Law

Striking out a claim

12. Rule 37 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (“the Rules”) provides 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:-

(a) That it is scandalous or vexatious or has no reasonable prospect of success....”

Deposit Orders

13. Rule 39 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (“the Rules”) provides that:-

“(1) 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.

“(2) 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.”

Conclusions

Strike out

14. The respondent is not seeking strike out – the Tribunal raised the question of strike out of its own volition, as the Rules allow. In his submissions to the Tribunal Mr Russell stated that, in his view, there is no basis for striking out either of the claims. The respondent’s position is that the issues raised by the claimant are matters which should properly be the subject of a final hearing, and should not be struck out. The claimant had 28 years’ service with the respondent, raises serious issues, and the respondent understands the issues that she has raised.
15. The Tribunal’s power of strike out must be exercised with “reason, relevance, principle and justice” (*Williams v Real Care Agency Ltd (2021) ICR D27*). It is well established that in cases which are fact sensitive, such as discrimination claims, strike out will be rare. The House of Lords highlighted in *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*, that it was important not to strike out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.
16. It cannot in my view be said that either the unfair dismissal or the race discrimination claim has no reasonable prospect of success. Accordingly, it would not be appropriate in my view to strike out either the unfair dismissal or the race discrimination claim pursuant to Rule 37 of the Rules.

Deposit Order

17. The question of whether to order deposits was also raised by the Tribunal of its own volition, rather than by a party.
18. Mr Russell told me that the respondent is not seeking a deposit order in relation to the unfair dismissal claim because the respondent acknowledges that there is a substantive triable issue in relation to that claim.
19. Mr Russell did however ask that the Tribunal order a deposit in relation to the race discrimination complaints, which he submits are based purely on the claimant’s perception, and have no evidential basis.

20. There are two type of discrimination being alleged by the claimant : direct race discrimination and victimisation. In relation to the direct discrimination claim the claimant has identified two comparators (see paragraph (5) (vii) below) and particularised her claim, both today and in the Claim Form. She has identified treatment that, on the face of it, appears to be less favourable. It cannot in my view be said that the direct race discrimination claim has little reasonable prospect of success, and accordingly it would not be appropriate to make a Deposit Order pursuant to Rule 39 of the Rules in relation to that element of the claim.
1. I take a different view in relation to the victimisation claim. That claim relies on a protected act dating back to 2012, some 6 years before the alleged detriments. The claimant has not been able to identify today any prima facie evidence linking the disciplinary investigation, her dismissal and the appeal, to a collective grievance raised 6 years previously. Moreover, the claimant was one of 7 people raising that grievance, and there is no suggestion that any one else has been less favourably treated as a result of raising that grievance. It seems to me that the victimisation claim has little reasonable prospect of success and that the claimant should be ordered to pay a deposit in order to be able to pursue it.
2. I have considered the claimant's means. In the circumstances it would, in my view, be appropriate to order the claimant to pay a deposit of £250 as a condition of continuing to advance her claim of victimisation. The claimant has some income, and the amount of the Deposit Order equates to approximately one week's pay.

CASE MANAGEMENT SUMMARY

Final hearing

- (1) All issues in the case, excluding remedy, will be determined at a final hearing before an Employment Judge sitting with Members at **The Tribunal Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG** on **Monday 8th June 2020, Tuesday 9th, Wednesday 10th, Thursday 11th, Friday 12th and Monday 15th June 2020** starting at 10 am or as soon as possible afterwards. The first half day of the hearing will be for reading-in time for the Tribunal and for any preliminary matters to be dealt with. The parties and their representatives, but not necessarily any other witnesses, must attend by 9.30 am on that day. The time estimate for the hearing is 6 days, based on the claimant's intention to give evidence and call 4 further witnesses and the respondent's to call 4 witnesses, and on the following provisional timetable:
- (i) Half a day for reading in and any preliminary matters;
 - (ii) maximum 3.5 days for oral and other evidence on liability;
 - (iii) a maximum total of half a day (half each) for submissions on liability;

- (iv) approximately one day for the Tribunal to determine the issues which it has to decide, reach its conclusions and prepare its reasons;
- (v) half a day for the Tribunal to give judgment, with reasons if possible;

Remedy hearing

- (2) If the claimant succeeds in whole or part, there will be a hearing before an Employment Judge sitting with Members at **The Tribunal Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG** on **Tuesday 1st September 2020** for the Tribunal to deal with remedy, including hearing further evidence if appropriate, reaching conclusions and giving judgment.
- (3) The claimant and the respondent **must** inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

The claim

- (4) The claimant was employed by the respondent as a Social Worker from 1 January 1990 until she was dismissed with effect from 23 February 2018. By a claim form presented on 30 July 2018, following a period of early conciliation from 16 May 2018 to 30 June 2018, the claimant brought complaints of unfair dismissal and race discrimination. The claim is essentially about the disciplinary investigation and dismissal of the claimant, which the respondent says was for reasons of misconduct.

The issues

- (5) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Unfair dismissal

- (i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.
- (ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?
- (iii) The claimant alleges that the dismissal was unfair because:-
 - a. The issues for which she was dismissed were performance issues rather than gross misconduct, and should have been treated as performance issues;
 - b. The outcome of the disciplinary investigation was prejudged;

- c. The respondent failed to take proper account of her mitigating circumstances, specifically:-
 - (a) Her workload; and
 - (b) The fact that she was dealing with high profile cases and had been asked to prioritise those cases.
- d. The sanction imposed by the respondent was disproportionate and outside the range of reasonable responses.

Remedy for unfair dismissal

- (iv) If the claimant was unfairly dismissed, should she be reinstated or reengaged. (The claimant is seeking reinstatement and / or in the alternative, reengagement.)
- (v) If the claimant was unfairly dismissed and the remedy is compensation:
 - a. if the dismissal was unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];
 - b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
 - c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

EQA, section 13: direct discrimination because of race

- (vi) It is not in dispute that the respondent subjected the claimant to the following treatment:
 - a. Deciding to deal with the claimant's behaviour as a disciplinary issue rather than a performance issue, and carrying out a disciplinary investigation;
 - b. Dismissing the claimant; and
 - c. Rejecting the claimant's appeal against dismissal.
- (vii) Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it

treated or would have treated others (“comparators”) in not materially different circumstances? The claimant alleges that black employees are treated more harshly by the respondent than white employees, and that the disciplinary process was discriminatory. The claimant relies on the following comparators:

- a. Emma Woodward – who the claimant says ended up on a performance plan and with extra supervision following a poor report into children being exposed to domestic violence; and
 - b. Jo Coffey – who the claimant says was transferred to another office after the death of a child.
- (viii) If so, was this because of the claimant’s race and/or because of the protected characteristic of race more generally?

Equality Act, section 27: victimisation

- (ix) The claimant relies upon the following protected act : that in 2012 she was one of 7 employees who raised a collective grievance/complaint that the respondent gave black workers more work and a heavier caseload than white workers.
- (x) Did the respondent subject the claimant to the treatment described at paragraph (vi) above because the claimant did a protected act and/or because the respondent believed the claimant had done a protected act?

Other matters

- (6) The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’, which can be found at:
www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/
- (7) The parties are reminded of rule 92: “Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise)...”. **If, when writing to the tribunal, the parties don’t comply with this rule, the tribunal may decide not to consider what they have written.**
- (8) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.

- (9) If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.
- (10) The following case management orders were uncontentious and effectively made by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Judicial mediation

1.1 The parties are referred to the "*Judicial Mediation*" section of the Presidential Guidance on 'General Case Management', which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/. The claimant is interested in judicial mediation. The respondent must inform the tribunal and the claimant in writing by **23 July 2019** whether or not it is in principle interested in judicial mediation and if not, why not.

2. Complaints and issues

2.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

3. Documents

3.1 On or before **24 September 2019** the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so.

4. Final hearing bundle

4.1 By **22 October 2019**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle by the same date. The bundle should only include documents relevant to any disputed issue in the case that won't be in the remedy bundle referred to below and should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;
- documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

5. Remedy bundle

- 5.1 If the claimant succeeds in whole or in part a separate remedy bundle must be prepared by the respondent. The documents in that bundle must be arranged in chronological or other logical order and the remedy bundle must have an up to date schedule of loss at the front of it.

6. Witness statements

- 6.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **17 December 2019**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle; contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated.

7. Final hearing preparation

- 7.1 **On the working day immediately before the first day of the final hearing (but not before that day), by 12 noon**, the following parties must lodge the following with the Tribunal:

7.1.1 four copies of the bundle, by the respondent; and

7.1.2 four hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44), by whichever party is relying on the witness statement in question;

8. Other matters

- 8.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
- 8.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 8.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- 8.4 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.
- 8.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 8.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

Employment Judge Ayre

16 July 2019

Sent to the parties on:

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For the Tribunal:

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