



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Ms A Opinoc

Govia Thameslink Railway

RECORD OF A PRELIMINARY HEARING

Heard at: Watford

On: 26 June 2019

Before: Employment Judge Bedeau

Appearances

For the Claimant: Miss Taylor-Blaire, Lay representative

For the Respondent: Mr B Mitchell, Counsel

JUDGMENT

1. The respondent's application to strike out the claim based on the claimant's failure to comply with the Unless Order dated 19 March 2019, is refused.
2. The respondent's application that the tribunal does not have jurisdiction to hear and determine the claims because they have been presented out of time and should be struck out, is refused.
3. The claimant's application to amend the claim form by adding wrongful dismissal, is refused.
4. The claimant's unfair dismissal, sexual orientation, and age discrimination claims are dismissed upon withdrawal.

REASONS

1. The claimant presented her claim form on 8 August 2018, ticking boxes age, race, sex and sexual orientation. In section 8.2 of the form where she is required to give details of her claim, she wrote:

"I was working in Luton Airport Parkway Station for Govia Thameslink Railway. During this period, between the date I started and the date I finished I was harassed and bullied by a number of staff and managers. I [was] also racially abused by both colleagues and managers over a period of time which gave me a lot of stress, which caused me to become ill"

2. In the response presented on 20 September 2018, the respondent averred that the claims were not particularised and that it would require further

information in advance of the listed Preliminary Hearing on 24 January 2019. It would be applying for the claims to be struck out as having no reasonable prospect of success and that in respect of the unfair dismissal claim, there is no jurisdiction as the claimant did not have two years' qualifying period of service.

3. In relation to the substantive issues, it asserted that the claimant was dismissed for gross misconduct, in that she behaved in a bullying and intimidating manner on a number of occasions and had assaulted a colleague on 28 October 2017, namely Mr Thomas Mahoney, Revenue Control Officer, Luton Airport Parkway. Her dismissal was fair. The other claims were denied.

Background

4. On 9 November 2018, the respondent's representatives wrote to the claimant inviting her to clarify her claims by replying to its request for further information.
5. On 22 November 2018, the tribunal issued an Order for the claimant to set out in writing, the basis of her claims of age, race, sexual orientation and sex discrimination by 30 November 2018. She did not comply with the Order, instead raising in correspondence issues about her request that the respondent disclose documents relating to her health.
6. The Preliminary Hearing was postponed and relisted to be heard today.
7. By letter dated 17 January 2019, the respondent applied to the tribunal for an Unless Order for the claimant to provide the further information requested and repeated its request that the unfair dismissal claim should be struck out as the tribunal did not have jurisdiction. These were to be considered at the listed Preliminary Hearing on 24 January 2019, but the hearing was postponed. The tribunal then issued an Unless Order that the claimant should provide the further information as ordered on 22 November 2018, by 28 March 2019 and she was required to address the matters in the respondent's representative's letter dated 9 November 2018.
8. She sent her statement in compliance with the Unless Order and responded to the 9 November 2018 letter. In an e-mail dated 24 April 2019, the respondent's representatives repeated its request that the strike out order applications be determined at the hearing today.
9. In a further e-mail dated 3 June 2019, they stated that the claimant had complied in part with the Unless Order, in that she provided the information in relation to her claims on 27 March 2019 but the information gave rise to limitation issues as the majority of her claims, as understood, were presented out of time. They referred to their earlier e-mail of 24 April 2019, in which they set out a chronology of the acts the claimant sought to rely on.
10. Mr Mitchell, counsel on behalf of the respondent, admitted that the more recent acts relied upon by the claimant are, firstly, her dismissal on 11 June 2018 and, secondly, the outcome of her appeal on 28 June 2018. Those decisions were based on what the claimant asserted was tainted information

given by Mr Mahoney in January 2018, as part of his grievance against the claimant and the investigation into his grievance. Mr Mitchell submitted that having regard to the case of CLFIS (UK) Limited v Reynolds (2015) EWCACIV439, as the claimant was relying on tainted information given by Mr Mahoney who was allegedly motivated by race, time ran from the date on which that information was given and not the date on which it was acted upon. It follows that as Mr Mahoney had given the information on 25 January 2018, the claimant cannot rely upon it in relation to her dismissal and appeal. The alleged incident of race discrimination of 17 March; sexual discrimination on 17 August 2017; alleged racist discriminatory act on 25 January 2018; and acts relied upon in January 2018, are out of time. The claimant notified ACAS on 28 June 2018 and a certificate was issued on 24 July 2018. This, submitted Mr Mitchell, mean that all the acts relied upon by the claimant are out of time and do not form a continuing act as they involve different individuals.

11. Mr Mitchell further submitted that the claimant had failed to comply with the Unless Order as the statement she submitted on 27 March 2019, is simply a narrative and did not specifically reply to the questions asked by the respondent's representatives in their request for further information dated 9 November 2018.
12. In addition, for the first time, the claimant referred in her statement to wrongful dismissal. This was a new claim requiring her to make a formal application to amend. Such an application is well out of time and should be refused.
13. I heard submissions from Ms Taylor-Blaire, on behalf of the claimant, who submitted that the last act in the series was the outcome of the appeal. The decision to dismiss and the appeal were tainted by information motivated by race given by Mr Mahoney and relied upon during the dismissal and appeal hearings. She referred to paragraph 45(3) of Reynolds in support of submission. She also submitted that the claimant was relying on a continuing state of affairs to bring into issue a course of conduct. Tainted information was the primary factor in the dismissal and appeal decisions.
14. There are issues in dispute between the parties and the tribunal should be careful when considering striking out the claims in those circumstances. There was an arguable case to take forward to a final hearing.
15. Ms Taylor-Blaire further submitted that the claimant had complied with the terms of the Unless Order in her statement written by her who is not legally trained.
16. In relation to the wrongful dismissal claim, Ms Taylor-Blaire made an oral application to amend. She stated that the claimant was in error when she put unfair dismissal on the claim form when in fact she should have put wrongful dismissal. She was genuinely confused and had limited access to a solicitor and the RMT Union.

Conclusion

- 17. After hearing submissions and considering the relevant law, I decided to refuse the respondent’s application for a strike out order based on the claimant’s alleged failure to comply with the Unless Order. The claimant did provide a narrative setting out the dates of the discriminatory treatment on the grounds of sex and race. Further, she stated that she was not pursuing unfair dismissal, nor age or sexual orientation. She referred to a continuing state of affairs in relation to her treatment by her managers, as well as by Mr Mahoney, and the respondent, in part, acknowledged that she had complied the Unless Order.
- 18. It is my judgment that the claimant had substantially complied with the Unless Order and that it would be unjust to dismiss the claims.
- 19. In relation to the out of time issue, I only need to be satisfied that there is an arguable case to be heard before full tribunal. Having listened to Ms Taylor-Blaire on how the claimant put her discrimination claims against the respondent, and her reliance on tainted information, the state of affairs between her, Mr Mahoney and management, I concluded that there is an arguable case to be heard by a full tribunal. I did not hear evidence and the out of time issue will be determined after the tribunal considers all relevant evidence. It may also consider it appropriate to hear evidence from the claimant on extending time on a just and equitable grounds.
- 20. In relation to the wrongful dismissal claim, I have come to the conclusion that the application to amend is out of time. The claimant had not provided a good reason for the delay and it was reasonably practicable for her to have presented this claim in time as she had access legal advice as well as to her union. As regards prejudice, were I was to refuse the application, she will still rely on the act of her dismissal and her unsuccessful appeal as part of her discrimination claim, and if successful, she is entitled to be awarded loss of wages in addition to injury to feelings. In relation to the respondent, it would have to address a new claim and adduce evidence in support of its case at this stage.
- 21. Having considered the above matters, I refused the claimant’s application to amend.

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Employment Judge Bedeau
14 August 2019
Date:
15 August 2019
Sent to the parties on:
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For the Tribunal Office