EMPLOYMENT TRIBUNALS

Claimant: Miss K Paczkowska

Respondents: 1. Europia (Social Enterprise) Charity No. 1161453
2. Procure Plus Holdings Limited

Heard at: Manchester **On:** 18 December 2019

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: In person
1st Respondent: Ms Gould (Solicitor)
2nd Respondent: Mr Jones (Counsel)

JUDGMENT

The judgment of the Tribunal is that all the claimant's claims against the second respondent are struck out as having no reasonable prospects of success.

REASONS

1. On 18 December 2019 I conducted a preliminary hearing in relation to this case. The full record of proceedings including the claimant's applications to amend and the first and second respondents' application for strike out or deposit orders is set out in the Case Management Summary of today's date. Below I set out my reasons for striking out the claimant's claim against the second respondent.

2. The details of the claimant's case are set out in the record of preliminary hearing of today's date. In brief, the claimant applied for a part-time administrator post with the first respondent. Her application was successful. She says that at a meeting on 13 November with the first respondent's Executive Director, Mr Chottera, she found out for the first time that the job was offered on a self-employed rather than an employed basis. She says she could not take the job on a self-employed basis and was very distressed at that meeting. There was a further meeting on 15 November 2018 which the claimant referred to as the mediation meeting.

3. At the hearing, Mr Jones representing the second respondent said that all claims against the second respondent should be struck out. I have decided that all the claims against the second respondent should be struck and explain why below.

The Relevant Law

4. Rule 37 of the Employment Tribunal Rules of Procedure 2013 gives the Tribunal the power to strike out all or part of a claim:

> "37.— Striking out
> (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;
> (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
> (c) for non-compliance with any of these Rules or with an order of the Tribunal;
> (d) that it has not been actively pursued;
> (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

5. Rule 37(2) says that 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.

6. In the House of Lords case of **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391**, Lord Hope said that "discrimination issues… should, as a general rule, be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

7. In **Abertawe Bro Morgannwg University Health Board v Ferguson [2013] I.C.R. 1108** the Employment Appeal Tribunal ("EAT") acknowledged that applications for strike-out may in a proper case succeed but warned that "in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not."

8. In **Ahir v British Airways Plc [2017] EWCA Civ 1392** the Court of Appeal said that "Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established,

and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'".

9. In **Ezsias v North Glamorgan NHS Trust [2007] I.C.R. 1126** the Court of Appeal said said that "It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation".

10. More recently, in **Mbuisa v Cygnet Healthcare Ltd UKEAT/0119/18/BA** the EAT said that it is only in an exceptional case that it would be appropriate to strike out a claim on the ground it has no reasonable prospect of success where the issue to be decided is dependent on conflicting evidence. However,

> "20. Such an exceptional case might arise where it is instantly demonstrable that the central facts in the claim are untrue or there is no real substance in the factual assertions being made, but the ET should take the Claimant's case, as it is set out in the claim, at its highest, unless contradicted by plainly inconsistent documents……
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> 21. … An ET should not, of course, be deterred from striking out a claim where it is appropriate to do so but real caution should always be exercised, in particular where there is some confusion as to how a case is being put by a litigant in person; all the more so where - as Langstaff J observed in **Hassan v Tesco Stores Ltd UKEAT/0098/16**- the litigant's first language is not English or, I would suggest, where the litigant does not come from a background such that they would be familiar with having to articulate complex arguments in written form."

Findings, discussion and conclusions

11. Mr Jones made submissions on behalf of the first respondent. He said that the claimant had made it clear at the preliminary hearing that the second respondent had to be involved in proceedings in her view because it was crucial to establishing the facts of the case. She had also said that she wanted Mr Chottera to attend the proceedings to give evidence because she did not know of any other relevant decision maker.

12. Mr Jones submitted that even taking what the claimant had said at its highest, there was no dispute between the second respondent and the claimant. There was, he submitted, no claim made by the claimant against the second respondent under the 2010 Act. On that basis he said that there was no reasonable prospect of the

claim against the second respondent succeeding and applied for the claims against it to be struck out.

13. In the alternative, he submitted that if I thought on considering the documentary evidence before it that Mr Chottera might not have been the sole decision maker, there was still little reasonable prospect of the claimant being successful against the second respondent. He would therefore ask for a deposit order with the deposit being £500 per claim.

14. The claimant said that there were facts which she disputed with the second respondent. In particular she said nobody explained what had happened which had led to her being offered a self-employed contract on 13 November 2018 rather than an employment contract, and she said that is where matters had all gone wrong.

15. The claimant said that the second respondent was involved throughout the incidents about which she complained. She said that the first respondent had referred to the second respondent as effectively being its HR function. For the second respondent, Mr Jones took me to the documents in the bundle used at the preliminary hearing which referred to the second respondent's role in the incidents which had led to the claimant's claim. Having read those, I am satisfied that the second respondent's role was limited to identifying the claimant as potentially a candidate for the role which she was offered and then liaising with the first respondent to keep track of her progress. There is nothing in the documentary evidence to suggest it had any part in the decision about the basis on which the role was offered to the claimant.

16. I do accept the claimant's submission that the second respondent had some limited involvement in events after 28 October 2018 (which was the last date that Mr Jones suggested it was actively involved). There is an email exchange between two of the second respondent's employees, Keeley Whittaker and Siobhan Murphy, on 14 November 2018 (page 125 of the bundle). It says, "Nowhere does it mention freelance/self-employed so can you please call [Mr Chottera] and find out what the mix-up is". However, that email does not seem to me to indicate that the second respondent took any part in the decision as to the basis on which the role should be offered to the claimant. In fact it suggests that it had no part in that decision, expressing confusion as to why the role was being offered on a self-employed basis. There no evidence that the second respondent took any part in the actions between 13 and 15 November which the claimant also complained about.

17. When I asked the claimant to clarify what her claim against the second respondent was, she said that it was important that it was involved in proceedings because their involvement was crucial to establish the facts of the case. It seems to me that at most, the second respondent or its employees may have relevant evidence about the incidents leading up to the claimant's appointment by the first respondent. However, I cannot see the basis for any claim against them under the Equality Act 2010. The claimant's complaint is about the job she was appointed to being offered on a self-employed basis and her further suggested complaints were about the treatment of her by Mr Chottera of the first respondent in the meetings on 13 and 15 November 2018. I am satisfied that the second respondent and its employees took no part in those meetings, nor was it part of the decision making which led to the role being offered on a self-employed basis.

18. On that basis I can see no reasonable prospects of the claims by the claimant succeeding against the second respondent and I strike out those claims.

Employment Judge McDonald

Date: 26 February 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

26 February 2020

FOR THE TRIBUNAL OFFICE