



EMPLOYMENT TRIBUNALS

Claimant: Miss J Nguyen

Respondents: (1) London Borough of Newham
(2) Black Diamond Accountancy Services Limited

Heard at: East London Hearing Centre

On: 15 May 2020

Before: Employment Judge Burgher

Representation

Claimant: Did not attend

1st Respondent: Mr D Moher

JUDGMENT

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

The Claimant's claims are therefore dismissed.

REASONS

1 The matter was listed as an open preliminary hearing to consider whether to strike out the Claimant's claims on the basis of non-compliance with Tribunal orders, the claim not being actively pursued and/or the claim having no reasonable prospect of success. If the claims are not struck out I was required to consider whether the Claimant should be ordered to pay a deposit in order to proceed with any of her claims.

2 The parties were provided notice of this hearing by letter dated 4 December 2019. By the letter dated 14 May 2020 the parties were informed that the open preliminary hearing would no longer take place with the parties attending the Tribunal in person due to the COVID -19 pandemic and that the open preliminary hearing was being converted to a hearing by telephone. The parties were given a telephone number and a code to dial in to participate in the hearing. The parties were also instructed to send any documents by email by 9.30am on 15 May 2020.

3 The principle of open justice was assured by confirmation that the hearing was notified on the employment tribunal cause list allowing for the press and members of the public to observe the proceedings by telephone.

4 There was no attendance by the Claimant. I heard submissions from Mr Moher for the First Respondent and Ms Weedon for the Second Respondent. No written documentation or emails were submitted by any parties.

Procedural history

5 The Claimant submitted her claims of unfair dismissal race discrimination, unpaid notice, pay arrears of pay and other payments to the Employment Tribunal on 17 July 2018. Her claim mentions that she aimed to “whistle blow” what happened. The Claimant submitted a further claim on 18 July 2018 specifying discrimination based on nationality, harassment and blackmailing. In her claims the Claimant states that she is a French psychologist with Vietnamese origins and that she had worked as an educational psychologist for the First and/or Second Respondent between 6 November 2017 until the end of March 2018.

6 The First Respondent is a London Borough local authority. It denies that it employed the Claimant.

7 The Second Respondent is a recruitment agency. It accepts that it employed the Claimant and that it placed the Claimant on a temporary assignment with the First Respondent. However, it denies that the Claimant is entitled to any sums claimed and that it knew nothing about any alleged harassment or discrimination.

8 By letter from the Tribunal dated 4 October 2018 the Claimant was ordered to provide full particulars of alleged acts of less favourable treatment and unwanted conduct because of race.

9 A separate letter dated 4 October 2018 from the Tribunal notified the parties of the case management orders they were required to comply with for preparation for the final hearing listed for 21 to 24 May 2019.

10 A preliminary hearing took place on 8 October 2018 before Employment Judge Hyde. The Claimant did not attend. The Claimant was ordered to provide further specific details of her claim by 19 November 2018. These orders were sent to the parties on 29 October 2018.

11 The Claimant did not comply with Employment Judge Hyde’s order and consequently the First Respondent applied for a strike out and/or unless order on 30 November 2018.

12 The Claimant emailed the Tribunal on 13 December 2018 stating that she was unable to provide specific names or contacts as the Respondent had over 300 employees. She also stated that she did not have the preliminary hearing judgment. The Claimant emphasised that she had serious health problems and memory loss and that she had a medical certificate that justified her absence due to hospitalisation. This email was not copied to the Respondents.

13 On 14 January 2019 the parties were informed by the Tribunal that strike out and/or unless order was not appropriate.

14 On 22 January 2019 the First Respondent applied for a request for reconsideration and or further directions in respect of not striking out the Claimant's claim.

15 On 6 February 2019 the Claimant provided medical certificate from her psychiatrist stating that she has traumatic stress reaction and difficulty focus on her work with outburst of sadness suffering in the society.

16 On 27 February 2019 the First Respondent's request reconsideration of not striking out was denied. It was stated that the Claimant had sent some information to the Tribunal.

17 On 29 March 2019 the Claimant requested the Respondents ET3's.

18 On 12 April 2019, following a review of the file, the Claimant was given a strike out warning on the basis that the Claimant's claims had no reasonable prospect of success and that she had not complied with the Tribunal orders which are sent to the parties on 29 October 2018. It was also stated that the psychiatric report that the Claimant relied on gave no indication of when she was fit to attend the hearing or whether she could answer the Tribunal's orders that were sent on 29 October 2018. The Claimant was urged to seek independent legal advice.

19 The Claimant sent a further medical certificate Tribunal on 2 May 2019 asking for an extension of two months for hearing. This was in effect an application for a postponement of the hearing listed for 21 – 24 May 2019.

20 By letter dated 10 May 2019 the Tribunal notified the parties that the hearing listed to commence on 21 May 2019 was postponed. However, the Claimant was given until 30 July 2019 to provide answers the case management orders sent to the parties on 29 October 2018

21 The Claimant failed to comply with that and on 13 August 2019 the First and Second Respondents requested to strike out the Claimant's claim.

22 A preliminary hearing to consider the strike was listed for 2 September 2019. The Claimant provided numerous documents to the Respondents and the Tribunal on 30 August 2019.

23 The preliminary hearing to consider strike out took place before Employment Judge Prichard on 2 September 2019. The Claimant had counsel Mr Angus Gloag attending in her behalf. The strike out application was adjourned to allow the Claimant a final opportunity to provide requested particulars to base her claim. The Claimant was ordered to provide a redrafted comprehensive ET1 by 30 September 2019.

24 The matter was listed for further strike out hearing on 5 December 2019 to consider striking out or deposit and any consequential any matters. A notice of hearing in this regard was sent to the parties on 2 October 2019.

25 The Claimant did not comply with Employment Judge Prichard's order. However, on 2 December 2019 she Claimant wrote to the Tribunal asking for a postponement of 5

December hearing strike out hearing. She stated that she has serious health issues and was being monitored in hospital in France. She stated that she collapsed in the street and that she had lost an abnormal amount of weight during the previous two months. The Claimant stated that she is exhausted and could not cope with any effort. A medical certificate was attached.

26 The Claimant was granted a postponement request by Employment Judge Gardiner. However, Employment Judge Gardiner provided the Claimant with a list of questions for her medical provider to answer relating to her illness and ability to participate in proceedings. He relisted the open preliminary hearing to consider strike out on 15 May 2020.

27 No further medical information was provided and the Claimant did not attend the hearing on 15 May 2020 or provide any correspondence as to why.

Law

28 Rule 37 of the Employment Tribunal Rules 2013 specify the basis on which a claim or response can be struck out. It states:

37.—(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).

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

29 on behalf the First Respondent, Mr Moher contended that the Claimant had failed to comply Tribunal orders and that the case has not been actively pursued. Ms Weedon for the Second Respondent concurred with Mr Moher.

30 It is evident that the Claimant has not complied with the Tribunal orders. The procedural history outlined above underlines that.

31 The Claimant's medical evidence and her intermittent contact with the Tribunal and the reasons she gives for non compliance leads me to conclude that it is likely that she is medically indisposed and she is not able to proceed in her case. Whilst there is no recent medical evidence to demonstrate this position, and I accept that she has been sufficient time to provide this, I do not consider that it is appropriate to strike out the claim

on the basis of non-compliance with rules or that the claim is not being actively pursued. The information available to me including the medical reasons underlying her previous adjournment applications and reason for non compliance weighed heavily in my consideration in this regard.

32 However, the circumstances were such for me to consider whether it is no longer possible to have a fair hearing in respect of this matter.

33 I considered that judgment of Peixoto v British Telecommunications Plc UKEAT/0222/07/CEA per HHJ McMullen QC at paragraphs 47 – 49, which although it deals with the previous of the Employment Tribunal rules is still relevant.

47 We accept that the application of rule 18(7)(f) is a draconic measure to be used sparingly and almost never at the hearing of the case. Discrimination claims in a diverse society cry out to be tried on their merits, see the speech of Lord Steyn in *Anyanwu v South Bank Student's Union* [2001] UKHL 14. This is a truly extraordinary case and to put it in a nutshell is to do a grave injustice. The nutshell is this: at the opening of the Claimant's hearing her case was struck out while there was in place a medical certificate indicating her unfitness for a further two months at least. It is unfair to reduce this judgment to a nutshell because as we have indicated the Tribunal itself paid reference to the three previous employment judges who had dealt with this matter.

48 The first question is: who makes the decision as to whether a fair trial is possible? In rule 18 it is emphasised that this is a matter for the Employment Tribunal. That is because there is reiteration, alone amongst the eight strike-out rules, of the opinion of the Chairman or Tribunal. In other words, those who know most about whether a fair trial is possible in an Employment Tribunal are those specialist members and employment judges who are there day in and day out. That is not simply a matter of construction of rule 18(7)(f) but is clear from the powers which it has been given.

49 The assessment of whether a fair trial is impossible obviously invokes consideration of what other matters can be considered. This is the application in a different context of Sedley LJ's approach to the rule dealing with unreasonable conduct. In every case, there must be some question of proportionality. In our judgment that arises when dealing with rule 18(7)(f) at stages prior to the determination that a fair hearing is not possible. It could not be said that once the judgment had been made that a fair trial was impossible, any further steps need to be considered. If the Tribunal reaches that conclusion and yet orders the case to go on for some other reason, it would be allowing itself as a public authority under the Human Rights Act to commit a violation of the Convention Art 6.1.

34 In this matter the Claimant has had two failures to attend hearings without any notification and she has been granted two late adjournments.

35 Contrary to Employment Judge Gardiner's order there is no medical evidence regarding when, if at all, the Claimant will be in a position to engage with the litigation process and progress her claim.

36 Significant time has passed between the submission of the claim and even now there is no clarity of the claims she wishes to advance.

37 Whilst the Claimant's failures to attend or engage with the Tribunal orders may be due to her medical condition the fact remains that the case has not been progressed and there is no medical information to indicate when, if at all, the case could proceed.

38 Strike out is a draconian step and I considered whether alternatives such as further adjournment and directions would be proportionate.

39 I conclude that further the adjourning claim with orders is not proportionate. Even now the claims have not been specified. Almost two years have elapsed since the Claimant presented her claim and the further necessary particulars for the Respondent to be in a position to properly respond to them have not been provided. The Claimant has not complied with orders given to her by the Tribunal. There is no indication that would change.

40 A further adjournment would require the Respondent to have to wait for some unspecified time for such particulars to be provided to then have to source unspecified witnesses to engage with and investigate such particulars at a hearing where it is not known whether the Claimant will even be fit to attend.

41 In these circumstances, that it is no longer possible to have a fair hearing in respect of the claim.

42 Consequently, I strike out the Claimant's claims on the basis of is no longer possible to have a fair hearing. The Claimant's claims are therefore dismissed.

**Employment Judge Burgher
Date: 19 May 2020**