Case No: 2203140/2019

EMPLOYMENT TRIBUNALS

Claimant: **Miss Z Simmonds-Plummer**

Respondent: **London Borough of Hammersmith & Fulham**

JUDGMENT

The claimant's application dated **22 March 2020** for reconsideration of the judgment dated **2 March 2020** has been considered without a hearing. The original judgement has not been varied or revoked.

REASONS

1. The claimant made a formal application on 22 March 2020 for a reconsideration of a reserved judgment made by me, Employment Judge E Burns (sitting alone). The judgment was promulgated and sent to the parties on 9 March 2020 and therefore the application for the reconsideration was received within the time lime set out under Rule 71 of the Tribunal Rules.

2. The reserved judgment contained decisions to strike out the claimant's claims in their entirety. It was reached following a preliminary hearing held in public on 20 February 2020. The claimant did not attend the hearing. I proceeded in her absence as explained in the judgment.

3. The application invites me to reconsider my decision to strike out the claimant's claims for sex discrimination and race discrimination on the grounds that the complaints do not have reasonable prospects of success.

4. Under Rule 72 (1) I could have refused the application on the grounds that there were no reasonable prospects of the original decision being varied or revoked. Given that the claimant was absent from the preliminary hearing and bearing in mind the decision I took leaves her with no ability to pursue a claim, I decided that it was in the interests of justice that I undertake the exercise of reconsidering the judgment. In reaching this decision, I also bore in mind that the claimant's claims were of discrimination and wanted to give her an additional opportunity to articulate the basis for such claims.

5. As required under Rule 72(1) I sent a notice by email to the parties asking them for any response to the application by 19 May 2020 and seeking the views of the parties on whether the application could be determined without a hearing. I set out my provisional views on the application. I received a written submission from the respondent, but nothing further from the claimant.

6. I have decided to determine the matter without a hearing. Both parties have provided written submissions and the claimant's written application is lengthy.

7. The courts have repeatedly warned of the dangers of striking out discrimination claims, particularly where "the central facts are in dispute" e.g. in *Anyanwu v. South Bank Student Union* [2001] ICR 391 and *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126.

8. However, while exercise of the power to strike out should be sparing and cautious in discrimination claims, there is no blanket ban on such practice. The question of striking out discrimination claims was considered by the Court of Appeal in *Ahir v. British Airways Plc* [2017] EWCA Civ 1392, where Underhill LJ stated at [16]:

"*Employment 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*."

9. In my original judgment, I set out the relevant paragraph of the claimant's particulars of claim that contained her claims for discrimination claims and explained my interpretation of it as follows:

> "59. Paragraph 14 of the claimant's detailed particulars of claim says the following:
>
> "*The claimant by letter dated 7 April 2019 responded to the respondent's dismissal decision of 3 April 2019 as contained in that letter voicing her concerns of the treatment that she had received surrounding the issue her allege summary dismissal at the hands of the respondent. That contained in the same letter the claimant has made a protected act of been discriminated on victimising grounds of race and sex by the respondent in the treatment that she has received pronunciation of a gross misconduct dismissal at the hands of the respondent to her detriment.*
>
> *The claimant maintains that because she had made various protected act during the course of employment and prior to the tender of her resignation which was known to the respondent's*

managers who took the decision to dismiss, the claimant suffered the unlawful detriment of summary dismissal where there existed no legal or legitimate basis for the respondent to have taken the actions that they did, as such the decision the claimant contends amounted to victimisation and harassment and bullying in accordance with section 26 and section 27 of the equality act 2010."

60. As noted above, this paragraph is very confusing and unclear. I have interpreted it, however as describing two separate complaints.

61. The first is a complaint that the alleged summary dismissal of the claimant by the respondent constituted unwanted conduct related to sex and/or race which had the purpose or effect of violating the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her pursuant to section 26 of the Equality Act 2010.

62. The second is a complaint that the respondent subjected the claimant to a detriment, consisting of summary dismissal, because she had done a protected act pursuant to section 27 of the Equality Act 2010. I note that the claimant has not provided details of any protected act, but I have proceeded on the basis that she would be able to do so, in order to take her claim at its highest."

10. I also explained my reasons for striking out the discrimination claims as follows:

"63. To succeed in both of these complaints, the claimant would need to persuade a tribunal to find that her resignation was not effective and that instead, the respondent's subsequent summary dismissal of her brought her employment to an end. As noted above, this is not what she has argued as her primary case.

64. I reiterate that taking the claimant's claim at its highest means finding it is likely that the tribunal would find that she was constructively dismissed rather than summarily dismissed.

65. I therefore judge that the claimant's claims of discrimination (as outlined above) also do not have reasonable prospects of success. If there was no summary dismissal, the detriment and/or unwanted conduct about which the claimant is complaining cannot have occurred. I therefore strike out these complaints as well."

11. The claimant's application for reconsideration asks me to reconsider my judgment on the basis I failed to have proper regard for the fact that the Equality Act 2010 allows claims to be brought for post-termination detriments.

12. The respondent's response to the application also makes reference to the provisions of the Equality Act 2010 that allow a claim for harassment and victimisation to be brought post termination, incorrectly citing section 107(8) (it should be section 108(1)), but correctly citing the Court of Appeal's decision in *Rowstock Ltd and anor v Jessemey* 2014 ICR 550. The respondent's response also points out that in principle, depending upon the facts, the carrying out of a disciplinary procedure post termination and in relation to an employee who has resigned could amount to an act of harassment and/or victimisation

13. As can be seen from the extract from my judgment above, my reason for striking out the claim was not because I failed to understand that a claim for a post termination detriment could not succeed.

14. Instead, my reason for striking out the claim was because I judged that the claimant had no reasonable prospects of establishing that she was summarily dismissed. Her expressly pleaded case was that:

    "…the claimant suffered the unlawful detriment of summary dismissal where there existed no legal or legitimate basis for the respondent to have taken the actions that they did…"

15. I interpreted this as being a complaint that the claimant suffered the detriment of actual summary dismissal rather than a complaint that she suffered the detriment of being taken though a post termination disciplinary procedure or that the detriment was that the respondent reached a decision that she would have been been summarily dismissed had she continued to be employed. The claimant has not sought to correct this interpretation of her claim. The claimant's concern related to her perception of future employment prospects if the reason for the termination of her employment was a summary dismissal for gross misconduct rather than due to her resignation.

16. I note that the respondent has raised the issue that the claimant failed to plead the particulars of the protected acts upon which she relied for her claim of victimisation. I did not disadvantage her as a result. I considered if was sufficient that she had pleaded that she had made protected acts. Had I allowed her claim to proceed, she would have been asked to provide further and better particulars of the protected acts relied upon.

17. Finally, I add that in any event, I consider this is a case where the claimant would have little prospects of success in establish that the respondent's actions towards her were because of her gender, race and/or any protected acts. The respondent appears, on the face of it, to have a cogent explanation for deciding to continue with the disciplinary procedure notwithstanding the claimant's resignation letter. The alleged misconduct involved, namely electoral fraud, was extremely serious. The respondent, as a public sector body and was arguably not only entitled to complete the investigation into the misconduct and reach a conclusion as to the appropriate penalty, but was probably bound to do so in view of its nature.

_____

Case No: 2203140/2019

Employment Judge E Burns
16 June 2020

JUDGMENT SENT TO THE PARTIES ON

16 June 2020

.....
FOR THE TRIBUNAL OFFICE