



EMPLOYMENT TRIBUNALS

Claimant: Miss T Thanagaraja

Respondent: Asda Stores Limited

Heard at: London South, Croydon in public and by video
On: 14 July 2020

Before: Employment Judge Sage
Representation

Claimant: In person

Respondent: Mr Singh Solicitor

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V which has been by video. A face to face hearing was not held because it was not practicable, and all the issues could be determined in a remote hearing. The documents I have been referred to are in a bundle of 159 pages and a copy of written submissions. The orders made after the hearing are recorded in a separate document.

JUDGMENT

The respondent's application for a strike out and/or a deposit order is refused.

REASONS

Application for a strike out due to failure to fully comply with orders.

1. This matter was listed to consider the Respondent's application for a strike by EJ Khalil in a preliminary hearing on the 6 March 2020. The Claimant was ordered to provide further details of her claim as the ET1 served provided no details of why she claimed that her dismissal was unfair and no explanation of how she put her claim of disability discrimination. The Claimant was ordered to provide these details by the 17 April 2020; however she did not do so. The Claimant however applied for an extension of time by a letter dated the 19 March 2020 as she had

approached a solicitor to help her with the completion of the task. It was not clear if this letter was copied to the Respondent. The Claimant then chased this matter up on the 29 April having not heard from the Tribunal. The Claimant was granted an extension of time to present her further particulars until the 10 June 2020 and the Claimant complied with this time limit. The Claimant therefore complied with the order made by the Tribunal.

2. The Respondent in their submissions at paragraph 26 stated that the Claimant had failed to provide details of comparators and any alleged detriment as a consequence of her disability or to identify the PCP. They ask that the claim should therefore be struck out as the failure to comply is substantial and as a result, a fair hearing in this case is no longer possible.
3. The Claimant was asked why she was unable to comply with the date of the order in April and she explained that due to covid she was unable to get an appointment with a solicitor to assist her. As she was unable to get an appointment she asked for an extension of time, which was granted. She said that what she produced was her best effort, she needed help in doing this as she was not a lawyer, he was the person who knew the rules and regulations.
4. It must be decided whether the Claimant has failed to 'fully' comply with the orders made by the Tribunal. The order made by EJ Khalil was to provide some detail as to why the dismissal was unfair and "what the Claimant says was the nature/type of discrimination and the date(s) having regard to the Equality Act and why". The further particulars stated that the dismissal was for a reason arising from her disability and from the ordinary reading of the response (paragraph 8 on page 40 of the bundle) that was clarification that she was pursuing a section 15 claim. Paragraph 10 referred to a requirement for make a reasonable adjustment, this was clarification that the Claimant was pursuing a claim under section 20-21. The Claimant also stated that the dismissal was less favourable treatment because of disability.
5. Looking at the wording of the order and the particulars supplied by the Claimant, she has identified the nature and type of discrimination under the Equality Act and has provided a brief explanation of what facts were relied upon. Although the Claimant has not identified a comparator under direct discrimination or a PCP in respect of her claim for reasonable adjustment, the order did not specifically require this to be set out. The Claimant being a litigant in person could not be expected to set out the legal test unless this had been fully explained to her in the case management hearing and in the order. As there was no evidence that this had been explained to her or set out as a requirement in the order, there was no evidence to suggest that the order had not been complied with.
6. Although not apparent in the further particulars, the Claimant confirmed in the hearing that the dismissal was unfair because she was not asked for any input prior to dismissing her on the 10 June 2019 (the notes of this meeting were on ages 125-126 of the hearing bundle). The Claimant also stated that the dismissal outcome was predetermined.

Application to strike out the Claimant's claim on the grounds that it has no reasonable prospect of success.

7. The respondent further claims that the Claimant's claims should be struck out because they have no reasonable prospect of success. The respondent made a lengthy written submission at paragraphs 28-72. Dealing first with the claim of unfair dismissal, the Claimant has clarified above why she states that the dismissal was unfair. The burden is on the Respondent to show that they had a potentially fair reason, dismissed for that reason and acted reasonably in treating the reason shown as the reason for dismissal. Although the respondent cited many cases in their written submission (from paragraph 45-72) showing what a Tribunal must consider when deciding whether a dismissal is fair or unfair where capability ill health is relied upon, this is, in effect attempting to argue the case on the facts without hearing the Claimant's evidence. The Respondent will be able to make these points in the hearing with the benefit of hearing from both parties not just from the Respondent. The Claimant's claim for unfair dismissal will proceed to a full hearing.
8. The Respondent asks to strike out all the Claimant's claims for discrimination on the basis that the claims have not been fully particularised (no comparator, no identification of the PCP or detriment) and they submit further there are no core issues that are to be determined by oral evidence as they state that all the allegations of discrimination "stem from a reliance of medical assessments and whether that reliance was correct" (paragraph 74).
9. The respondent also reminded the Tribunal that only in the clearest of cases should a discrimination case be struck out and when a tribunal carries out the balancing act, they should take the Claimant's case at its highest. The Respondent contends that the case will be determined by the documents.

The Law

Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Schedule 1

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).

(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.

39 Deposit orders

(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.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

1.

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

2.

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the

amount of the deposit shall count towards the settlement of that order.

Decision.

10. The Respondent's application for a strike out on the ground that the Claimant has failed to fully comply with orders is refused. The Claimant complied with the order as soon as she was able to do so and acted reasonably in securing an extension of time during lockdown, which was granted. The response to the request for further particulars was complied with in time and the response fully complied with the general request made by Employment Judge Khalil.
11. Moving on to the next application that the Claimant's claims should be struck out on the grounds that they have no reasonable prospect of success. Having considered this application and having seen a snapshot of the documents (including the dismissal meeting minutes), this is a case where oral evidence will be crucial. The Claimant told the hearing that in the dismissal meeting she was not asked for input and dismissal was a forgone conclusion. One of the issues for the Tribunal will be whether the procedure was fair and if it was for a reason related to her disability. This is not a case that will rely on medical documents alone.
12. The person who took the decision to dismiss was Mr Balcombe, his evidence will be crucial on the issue of whether the decision to dismiss was discriminatory and what medical evidence he relied upon in order to reach the conclusion that he did. The tribunal will also need to consider what the Claimant said in the meeting and what points were discussed (under section 13 or 15). The tribunal will also need to hear evidence from the Respondent about whether the decision made was proportionate and legitimate in relation to the Claimant's section 15 claim and any defence to the claim for failing to make reasonable adjustments. The Appeal Manager's evidence will also be crucial as the appeal was pursued on the basis that the Claimant claimed she was disabled under the Equality Act. The Tribunal would also need to consider evidence in relation to reasonable adjustments (after clarifying the PCP and substantial disadvantage).
13. This is not therefore a case that can simply be decided on the documentation. The medical evidence merely informed the decision makers who then took the decision to terminate the Claimant's employment and then to reject her appeal. The evidence of the decision maker is crucial in deciding whether the decision taken to dismiss was an act of discrimination in this case and on these facts.
14. This is not therefore a case that should be struck out.
15. As it has been concluded that this case is highly fact sensitive it is also concluded that no deposit order should be made. There is no evidence to show that the claim has little reasonable prospect.

Employment Judge Sage
Dated: 14 July 2020