



EMPLOYMENT TRIBUNALS

Claimant: Miss R O'Connor

Respondent: Young & Co's Brewery PLC

Heard at: London Central

On: 21 July 2020

Before: Employment Judge H Grewal

Representation

Claimant: No appearance

Respondent: Mr R Hignett, Counsel

JUDGMENT

1 The complaint of unfair dismissal is struck out because the Tribunal does not have jurisdiction to consider it.

2 The complaints of race discrimination under the Equality Act 2010 are struck out because the Claimant has not complied with the Tribunal's orders and has conducted the proceedings in an unreasonable manner.

REASONS

1 This hearing was listed to determine whether any of the Claimant's claims should be struck out or made the subject of a deposit order.

Procedural history of the claim

2 In a claim form presented on 14 November 2019 the Claimant complained of unfair dismissal and race discrimination. The Claimant claimed that she had been

employed by the Respondent from 5 August to 30 August 2019. The Respondent's position is that she was employed until 1 October 2019. The particulars of her complaint of race discrimination were brief and lacking in detail. She said that she had been hit and punched and abused and spoken to offensively by her colleagues, and when she had complained to management, it had gotten worse. She also said that she had been ostracised by some customers.

3 Unfortunately, the claim was not processed by the Tribunal until February. On 19 February the Tribunal wrote to the Claimant that it was proposing to strike out her complaint of unfair dismissal as it appeared that she did not have two years' continuous service which she needed to have in order to bring such a claim. It also appeared that none of the exceptions to that requirement applied in her case. She was given until 4 March 2020 to give reasons in writing why her claim should not be struck out. She has never provided reasons in writing as to why her complaint of unfair dismissal should not be struck out.

4 On 19 February the Tribunal also gave notice to the parties that a preliminary hearing would take place on 10 June 2020 and the final hearing on 13 and 14 October 2020. It also made some case management orders. These included an order for the Claimant to provide a schedule of loss by no later than four weeks from that date. The Claimant has never provided a schedule of loss or sought any extension of time to do so.

5 The Respondent's case is that the Claimant was dismissed on 1 October for using racist and abusive language in emails in which she complained about an African work colleague called Lydia. She made comments such as "*she comes from the most ravaged and severe hell hole on earth*" and "*Lydia comes from a place where they chop, rape and eat each other.*" On 11 April 2020 the Claimant sent two emails to the pub where she had worked. The emails contained abusive and deeply offensive and racist remarks about Lydia and Africans. These included the following:

"She's a nasty piece of work. She came from the depths of hell to the UK."

"She's AFRICAN, she gets it. Their take usually is to sell their kids to the higher bidder (she knows all too well about paedophilia in her country and western men raping kids out there for fun, it's an actual tourist 'thing') and that's a fact, they'll give them away in marriage at 11 or 12 and be pregnant at 13."

"I shouldn't be shocked they clean their arses with their bare hands and YES massacre each other and eat each other with the next."

6 On 8 June the parties were informed that the preliminary hearing on 10 June would take place by telephone at 11 a.m. On 9 June the Claimant sent an email to the Tribunal and the Respondent in which she said,

"I need to postpone this for another day – medical reasons."

EJ James asked her to explain the reasons that prevented her from taking part in a telephone hearing and, if she had any supporting documents, to provide them. The Claimant responded in the early hours of the following morning,

"The medical condition is embarrassing, an infection or virus."

EJ James replied to that before 9 a.m. He said that she needed to provide more details about her medical condition before he could consider her application to postpone the hearing. He gave her details about the kind of information that he required. These included identifying the medical condition, details about any contact that she had had with her doctor about it, how it affected her ability to participate in a short telephone case management hearing and when she would be fit to participate in a rearranged hearing. The Claimant did not respond to that.

7 The Claimant did not attend the telephone preliminary hearing on 10 June 2020. It proceeded in her absence. He noted that the legal and factual bases of the complaints of race discrimination were not clear from the claim form and he made orders for the Claimant to provide by 1 July 2020 very clear and specific particulars of the allegations in her claim form, which entailed her answering simple questions about the allegations set out at paragraph 2 (above), such as who had hit her and when had this happened. He also made an order for the Claimant to provide by the same date a written explanation of why she had not attended the hearing and medical evidence to support that. He listed today's preliminary hearing. The note of the hearing and the orders were sent to the Claimant on 12 June 2020.

8 On 22 June 2020 the Tribunal sent notice to the parties of today's preliminary hearing. On 23 June the Tribunal informed the parties that it was likely that the hearing would be in person at the Tribunal.

9 On 29 June the Claimant sent the Tribunal an email in which she talked in very general terms about her health and the conduct of her colleagues at work. She did not answer the very simple and specific questions that she had been asked in order to get the details about her complaints. She did not comply with the two orders that the Tribunal had made on 10 June. EJ James wrote to the Claimant on 1 July that her email had not complied with the Tribunal's orders and that she must do so. He pointed out that her non-compliance with orders was something that could be considered at the preliminary hearing on 21 July when the Tribunal considered whether her claims should be struck out.

10 On 15 July the Respondent made an application for the claim to be struck out. It also sought clarification of whether the hearing would proceed as an in person hearing. The Tribunal confirmed on 17 July that it would.

11 On 20 July at 10.47 a.m. the Claimant sent the Tribunal an email in which she asked for the hearing to be postponed. The only reason given was that she had "*an appointment for tomorrow which is a little short notice.*" She also requested the hearing to be conducted over the telephone "*admist [sic] the current situation.*" I refused the application to postpone the hearing because it had been made late in the day and was lacking in detail as to why a postponement was necessary. I also refused to convert it to a telephone hearing as it was an open (public) hearing. The Claimant sent a further email in which she said,

1. *I have an appointment in the morning*
2. *I am dealing with pain*
3. *I have immunity issues and won't be in attendance due to Covid 19.*

I refused that application too because the Claimant had known of the hearing for six weeks and an application to adjourn on medical grounds needed to be supported by clear medical evidence and her application was not.

12 At 4.32 pm the Claimant sent a further email in which she said that she had an urgent appointment in the morning which she could not reschedule. No further details were given of the nature of the appointment or when it had been made. In response to the letter to strike out her claim, she said,

“I am black. Micro aggression and covert racism is nothing new. This women [sic] who does not know me cannot make claim as to what my issues are.

I have sent in basic information as to what I can deal with and if need be I can elaborate. I don't know where she found the audacity to try to manipulate a situation, as per usual, to project her ideology and 'gaze' onto me. Then try to influence the court as to what my circumstances are as a black woman.

I will send in any information I can and go from there. I will not be sharing my very personal info with this woman under any circumstances.”

It is not clear who is “the woman” to whom the Claimant is referring. I suspect that it is a reference to the Respondent's Senior HR Business partner who has had conduct of this case and made the application to strike out the claim. I did not consider that there was anything in that email to make me reverse the decision that I had made earlier about not postponing the hearing. The preliminary hearing today proceeded in the Claimant's absence.

The Law

13 Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 provides,

“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 otherwise 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).”*

14 Rule 2 of the Employment Tribunals Rules of Procedure 2013 provides,

“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with cases fairly and justly includes, so far as practicable –

- (a) ensuring that the parties are on an equal footing;*

- (b) *dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) *avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) *avoiding delay, so far as is compatible with proper consideration of the issues; and*
- (e) *saving expense.”*

15 Article 6(1) of the European Convention of Human Rights provides,

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

16 A finding that a party has conducted proceedings in scandalous, unreasonable or otherwise vexatious manner or has failed to comply with Tribunal orders is not in itself sufficient grounds for striking out a claim or response. The Tribunal must then consider whether the unreasonable conduct has taken the form of deliberate and persistent regard of required procedural steps or has made a fair trial impossible. If the Tribunal concluded that either of those conditions apply, it must consider whether, even so, striking out is a proportionate response (**Bolch v Chipman [2004] IRLR 140; Blockbuster Entertainment Ltd v James [2006] IRLR 630**).

Conclusions

17 The decision in respect of the unfair dismissal claim is clear. In order to bring a claim for unfair dismissal, a person must have been continuously employed for two years. There are some circumstances in which that length of service is not required. None of those circumstances applies in the present case. The Claimant was given the opportunity to state why the claim should not be struck out. She has not put forward any reasons. The Tribunal does not have jurisdiction to consider the complaint of unfair dismissal, and it will be struck out.

18 As far as the complaint of race discrimination is concerned, I find the following. The Claimant has not complied with a number of the Tribunal’s orders – she has not served a schedule of loss, she has not provided the very simple details which she was asked to provide of her complaints, she has not provided an explanation for her non-attendance at the last preliminary hearing or any medical evidence in support of it. She has not attended the two preliminary hearings that have been listed in this case. There is no good reason for her non-attendance. Other than her email of 29 June 2020 the Claimant has not had any contact with the Tribunal other than to seek postponements of the preliminary hearings. In the course of the proceedings, the Claimant has sent abusive, offensive and racist emails to her workplace. I am satisfied that the Claimant has not complied with the orders of the Tribunal and that she has conducted the proceedings in an unreasonable manner.

19 The effect of the Claimant’s conduct is that eight months after the case commenced it has not progressed at all (I accept that some of the delay in this case is attributable to the Tribunal). The complaint of race discrimination cannot progress unless and until the Respondent and the Tribunal understand the complaints. In order to be able to properly respond to the case the Respondent needs to know at the very least who is said to have done what and when he or is supposed to have done it. The Claimant worked for the Respondent for only two months. She was

asked very simple questions. When she did not answer those questions, she was given another opportunity to do so. She has made no attempt to answer those questions. In the past eight months the Claimant has not engaged with the process at all or co-operated in any way in progressing it. Whether it is because she is incapable of doing so, or has willfully chosen not to, I cannot say. She has not done so even when she has clearly been warned that it could lead to her claim being struck out.

19 I considered whether I should make further orders coupled with a warning to the Claimant that the claim will be struck out if she did not comply with them. I bore in mind that strike out warnings in the past had had no effect on making the Claimant engage with the process. She had been warned that her unfair dismissal claim would be struck out unless she provided some reasons why it should not. She ignored that warning and did not provide any reasons. The case management orders made on 19 February 2020 made it clear that failure to comply with those orders could lead to her claim being struck out. Notwithstanding that, the Claimant failed to comply with the order to produce a schedule of loss. The case was listed for a hearing today to consider striking out her claims and the Claimant chose not to attend. EJ James warned the Claimant that failure to comply with his orders could be considered at the application to strike out her claim. That did not make her comply. It was clear to me from that making further orders with the threat to strike out her claim if she did not comply was unlikely to have the desired effect. There was no indication that in the future the Claimant would behave any differently than she had done hitherto. All the evidence indicated that if I made further orders, we would find ourselves in exactly the same position as now in two months' time.

20 It was also clear to me that in those circumstances that it would not be possible to have a fair hearing, possibly ever, but certainly not in the foreseeable future. The Article 6 right to have a fair hearing applies to the Respondent as much as it does to the Claimant, and it is a right to have a fair hearing within a reasonable time. The Respondent has already incurred costs by having had to file a response and to attend two hearings. I did not see why it should have to incur further costs when there was no indication that the Claimant would act any differently.

21 As things stand, a fair hearing is not possible because the Claimant has not complied with the Tribunal's orders or engaged in the process in any meaningful way. I did not consider that the making of any further orders would improve that position. It would lead to additional costs being incurred by the Respondent. In all the circumstances, I concluded that there was no alternative to striking out the claim and that striking it out was a proportionate response.

Employment Judge – Grewal

Date 22/07/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON
22/07/2020.

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FOR THE TRIBUNAL OFFICE -