



EMPLOYMENT TRIBUNALS

Claimant: Ms C McFarlane

Respondent: ABC Recruitment & Training Ltd

Heard at: London South via CVP

On: 11 August 2020

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: Ms F Reilly, FRU

Respondent: Mr A Alexandrou, Consultant

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 116 pages, the contents of which I have recorded.

JUDGMENT

The respondent's application for the claimant's claim to be struck out because it has no reasonable prospects of success is refused.

REASONS

These written reasons are provided at the request of the respondent.

The application

1. The respondent made an application for the claimant's claim to be struck out because it has no reasonable prospect of success.
2. Today's hearing was originally intended to be an in person open Preliminary Hearing of the claim listed for 3 hours. However, it was converted to a video open Preliminary Hearing for 3 hours.
3. I conducted the hearing remotely using the Ministry of Justice's Cloud Video Platform (CVP). I had a limited number of documents before me. These documents are as follows: the Claim Form (pages 16), the Response (12 pages), the Case Management Summary from the Preliminary Hearing held

on 18 June 2019 (5 pages) the Early Conciliation Certificate (1 page), the Respondent's submissions (9 pages) and bundle (73 pages). This was a total of 116 pages.

4. I heard submissions from both parties which I address in my findings and conclusions.

My findings

5. By a claim form presented on 20 January 2019, following a period of Early Conciliation from 21 November to 21 December 2019, the claimant presented complaints of whistleblowing (detriments and dismissal). The respondent denied the claims in its response received on 2 April 2019.
6. A closed Preliminary Hearing was held on 18 June 2019 in front of Employment Judge Martin. At that hearing, EJ Martin identified the complaints and issues and set a full hearing date for 5 days commencing 24 August 2020. In addition she set a number of case management orders, which required the claimant to provide additional information relating to her complaints, which had not been clearly set out in her claim form, as well as disclosure, provision of a statement of remedy/schedule of loss, preparation of bundles and exchange of witness statements.
7. Since then, the claimant, who was then acting in person, provided some further information but appears to have struggled with the case management orders. Subsequently Ms Reilly took on representation of the case for the claimant through the Free Representation Unit. Ms Reilly made an application to amend the particulars of claim on 28 February 2020, the respondent objected on 5 March 2020, Ms Reilly made a further application to add another respondent to the claim (Mr Clayton Barnes) and for disclosure of documents on 16 June 2020.
8. A further closed Preliminary Hearing was held on 17 June 2020 conducted by Regional Employment Judge Freer. At that hearing, REJ Freer set a further Preliminary Hearing for 16 July 2020 with a time estimate of 3 hours to consider the claimant's three applications. In addition, the respondent was given some time in which to submit any applications it wishes to make.
9. At some point the respondent made the application for the claimant's claim to be struck out.
10. Unfortunately, the hearing scheduled for 16 July 2020 was postponed due to lack of judicial resources and a provisional date of 11 August 2020 for a closed Judicial Mediation Preliminary Hearing was converted to an open Preliminary Hearing to consider the claimant's applications. The claimant was a litigant in person when she brought her claim and when she produced the additional information.
11. I considered the claimant's claim form and set out below what this records.
12. It sets out a claim which was originally brought against UK Care Partnership Ltd (UKCP), but the name of the respondent was subsequently amended to

ABC Recruitment & Training Ltd (ABC), in which the claimant was seeking compensation and a discrimination recommendation. The narrative relates to the claimant being attacked by an 18-year old female on 24 August 2018 at the private residential home where she worked. The claimant reported this to Mr Clayton Barnes, the Director of UKCP, although it is not clear what she reported.

13. On 26 August 2018 the claimant brought to Mr Barnes' attention that a kitchen knife was stored in an ununlockable drawer in the office where the attack took place. She asked for immediate action to be taken.
14. The matter passed to Mr Anderson, the Designated Safeguarding Lead and at a meeting with him on 31 August 2019, the claimant gave him a full account of all the safety concerns that she had encountered whilst working for UKCP and explained that she had received no response, and those matters had not been acted upon. She further explained to Mr Anderson that she felt unsafe at work because Mr Barnes ran all aspects of the company and she did not feel supported or that there was a structure in place to protect her.
15. The claim form also talks of the claimant's safety concerns which she raised before the attack. These being: lack of security at the property; a young male resident with a machete in his room; no landline at the property.
16. The claimant emailed Mr Barnes on several occasions to find out next steps with regard to her job.
17. On 28 September 2018 the claimant received 2 weeks' wages without a pay slip and was removed from the respondents' social media groups which denied her access to work rotas.
18. On 10 November 2018 the claimant received a copy of Mr Anderson's report, but this made no mention of the safety concerns she had raised.
19. The claimant believes that she was "shut out" of the respondent because she spoke out about safety concerns including but not limited to the attack at work.
20. The Employment Tribunal wrote to the claimant asking for clarification as to ACAS Early Conciliation number and as to section 8 of her claim form on 12 February 2019.
21. The claimant sent a further claim form in which she said that she was making a whistleblowing claim as set out in the attachment sent with the original form.
22. I then considered the respondent's response which records the following.
23. The claimant employed by ABC and not UKCP.
24. The claim is denied in its entirety.
25. The grounds of resistance set out a narrative of the claimant's employment and the facts relied upon. In essence, the claimant reported the assault, the

respondent attempted to place her elsewhere, she placed restrictions on where she would go, and ultimately it was not clear whether she had resigned or not.

26. The respondent accepted that the reports of 19 May and 26 August 2018 could be protected disclosures under section 43B of the Employment Rights Act 1996 subject to exactly what it was alleged was reported.
27. The respondent sought further and better particulars of the disclosures made, the claimant's reasonable belief that they were true, as to how they were made in the public interest and as to the detriments suffered.
28. At the Preliminary Hearing held on 18 June 2019 the name of the respondents was substituted to ABC, being the claimant's employer. EJ Martin identified the issues in the protected interest disclosure detriment and unfair dismissal complaints by reference to the legislative steps. The claimant was required to provide additional information of the disclosures. By later amendment in correspondence EJ Martin added the issue of whether the claimant was dismissed and when to the list of issues, which had been omitted from the record of that Preliminary Hearing.
29. The claimant provided the additional information ordered on 30 August 2019 setting out the protected disclosures protected disclosures and detriments relied upon.
30. Having considered this document it does seem to me that they are all capable of being disclosures in that they disclose information which could fall within section 43B of the Employment Rights Act 1996. In particular, criminal offences, legal obligations or health and safety disclosures made to Mr Barnes and others within the respondent employer and to Mr Anderson, the Safeguarding Lead. As to reasonable belief and public interest, the claimant deals with these matters and so again potentially she could meet those tests. The detriments are set out and the dismissal is set out. But really the determination of these matters cannot be made without hearing evidence from both parties at a full hearing.
31. I also note that the respondent did not object to the additional information at that time.
32. Indeed, in the amended particulars of claim provided by the claimant (which is to be dealt as an application to amend in the closed Preliminary Hearing on case management taking place after this open Preliminary Hearing), the Claimant narrows down the disclosures to those from 15 August 2018 onwards.
33. Dealing with some specific issues raised by the respondent in submissions.
34. The issue of the true employer and the substitution of the respondent from UKCP to ABC does not rule out the possibility of success, although given the confusion in the claimant's mind and the dual involvement of at least Mr Barnes in both companies, it is matter that needs to be dealt with in evidence from both parties at the full hearing. Indeed, there is a separate application

seeking to join Mr Barnes as a second respondent, which is to be dealt with separately after this hearing in the closed Preliminary Hearing.

35. The nature of the remedy sought again does not impinge upon the chances of success. Even if the claim has no monetary value, as the respondent submits, given that the claimant was employed on a zero hours contract, this does not affect liability but goes to remedy. The claimant is entitled to seek a declaration as to whether her employment rights have been infringed. In any event, a successful detriment complaint attracts a possible award for injury to feelings.

Relevant Law

36. Essentially under Rule 37(1)(a) of the Employment Tribunals Rules of Procedure, I am required to form a view on the merits of certain elements of the claimant's claim and only where I am satisfied that those elements have no reasonable prospect of succeeding can I exercise my power to strike out.
37. In North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 the Court of Appeal found that it would only be in an exceptional case that a claim would be struck out as having no reasonable prospects of success when the central facts are in dispute.
38. Clearly special considerations arise if a Tribunal is asked to strike out a claim of unlawful discrimination. In Anyanwu v South Bank Student's Union [2001] IRLR 305, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.
39. In Ezsias, the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. The Court of Appeal stressed that it will only be in an exceptional case that an application 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 claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.
40. In Tayside Public Transport Company Ltd v Reilly [2012] IRLR 755, the Court of Session noted that almost all unfair dismissal claims are fact-sensitive and that, where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute, it is not for the Tribunal to conduct an impromptu trial of the facts. The Court observed that there may be cases where it is instantly demonstrable that the central facts in the claim are untrue -such as where the alleged facts are conclusively disproved by the productions- but in the normal run of cases, where there is a "crucial core of disputed facts", it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out the claim.

41. The Honourable Judge Mitting, at paragraph 14 of Mechkarov v Citibank NA UKEAT/0041/16, having reviewed the above authorities, set out the approach that should be taken in a strike out application in a discrimination:

“(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

42. On a general level, of course, similar principles apply to all types of claims.

Conclusions

43. Having considered the above matters I am not going to strike out the claimant's claim. I cannot conclude that the claim has no reasonable prospects of success. It simply does not meet that threshold.
44. For the sake of completeness, Dealing with some other specific matters raised by the respondent in submissions.
45. The matter of the correct respondent was cured at the first Preliminary Hearing.
46. The respondent knows and identified the claimant's date of employment and her earnings and the lack of these matters in themselves do not give grounds on which to strike out a claim.
47. Similarly, the lack of particulars of mitigation does not provide grounds on which to strike out a claim and is a matter of evidence to be dealt with in a schedule of loss, in disclosure of documents and within the claimant's witness statement.
48. The issue of unfair dismissal was identified at the first Preliminary Hearing at which point the claimant was still a litigant in person. Again, it is not a matter which in itself gives rise to grounds on which to a strike out a claim stop
49. Whilst the claimant mistakenly ticked the box relating to discrimination recommendations at section 9 of the claim form, at that time she was a litigant in person, and again, this is simply not a matter which in itself justifies a strike out.
50. The other matters as to the deficiencies in the schedule of loss, disclosure and bundles are case management steps in preparation for a full hearing if indeed they have not already been complied with.
51. I do not agree that there are deficiencies in the additional information which render the matter capable of a strike out.
52. For all these reasons the respondent's application for a strike out is refused.

Employment Judge Tsamados
Date 28 August 2020