Case No: 1401128/2020/P

EMPLOYMENT TRIBUNALS

Claimant: **Mrs P Al Said**

Respondent: **Bath Spa University**

PRELIMINARY HEARING

Heard at: **Bristol** **On: 11 December 2020**

Before: Employment Judge Midgley

Representation
Claimant: In person, supported by Mr Al Said
Respondent: Mr R Shepherd, Counsel

RESERVED JUDGMENT

1. The claimant's application that the claim should not be dismissed on its withdrawal pursuant to Rule 52 is dismissed.

2. The claim is dismissed.

REASONS

The Claims

1. By a claim form presented on 7 March 2020, the claimant brought claims of unfair dismissal, and discrimination on the grounds of age, religion or belief, race, disability, marriage or civil partnership and sex. The respondent defended all of the claims.

Procedure, Hearing and Evidence

2. I was provided with the following documents, which I have considered in reaching the judgment above:-

   2.1. by the claimant: an electronic bundle in the form of a Zip file, containing a number of folders which themselves contain PDFs and other documents.

The nature of the documents within the electronic bundle are broad ranging, and are perhaps better suited to a final hearing, given that they include witness statements for individuals whom the claimant intended to call to give evidence in support of her claim at a hearing, the respondent's internal policies, and other documents that appear to have been produced during the course of her employment. I was not referred to any pages from the bundle during the hearing.

2.2. By the respondent: an electronic bundle of 77 pages containing relevant documents, the relevant rules and applicable case law.

3. At the outset of the hearing, I identified that Mr Shepherd was known to me and was a personal friend. I advised claimant of her right to apply for me to recuse myself on the grounds that that connection gave rise to a fear of apparent bias, but explained that such a course may lead to the hearing being adjourned if a new judge could not be found. I advised the claimant that it was not uncommon for members of the bar and judiciary to be known to each other and/or to be friends, and for hearings involving those connections to continue without issue because of the oaths taken by barristers and by judges, the latter to determine claims fairly, without favour and on the evidence.

4. After a brief adjournment to consider her position, which initially she had indicated was unnecessary but which I encouraged her to take, the claimant raised no objection to my continuing to hear the case.

5. During the course of the hearing, it became apparent that the claimant did not have access to a copy of the respondent's bundle (although she had received it prior to the hearing). In consequence, the Tribunal provided a hardcopy for the claimant to use during the hearing. As the claimant had previously received the bundle and was familiar with its content, I was satisfied that there was no prejudice to the claimant in that course.

6. In order to assist the claimant, Mr Shepherd made the respondent's submissions first, so that the claimant could respond to his arguments and develop her own.

7. Following his submissions, the claimant indicated that she wished give evidence in relation to her mental state at the material time. Mr Shepherd resisted that application on the grounds that the claimant knew of the issues and of the need to produce medical evidence in support of her application prior to the hearing, that she had produced the evidence that was available but now recognised that it was insufficient for the purposes of her application, and finally that if the claimant were to give evidence he would seek disclosure of medical records to enable him to cross examine effectively in relation to the issue of the claimant's mental state at the time of the withdrawal. That would necessitate the adjournment of hearing and it was not in the interest of justice to delay the hearing further. Finally, he observed that an adjournment for those reasons might give rise to an application for any wasted costs connected to the hearing and/or additional costs in relation to the preparation for any adjourned hearing.

8. I permitted the claimant to consider her position over a further adjournment.

The claimant indicated that she wished to apply for the hearing to be adjourned so that she could obtain and disclose contemporaneous medical records relating to both her health and her husband's and, if possible, to obtain an expert report addressing her mental state at the time she withdrew the claim.

9. For reasons that I gave orally at the time of the hearing, I dismissed the application. In summary, I did not believe that it was in the interest of justice or in accordance with the overriding objective for the case to be further delayed in circumstances where the claim was presented on 7 March 2020, was withdrawn on 30 June 2020, and it was unlikely that any preliminary hearing could be relisted before April 2021, almost a year after the claim was presented and almost three and half years after some of the events about which she complained in her claim. I was satisfied that the prejudice to the respondent in the further delay outweighed the prejudice to the claimant, given that the claimant was still able to make her application supported by the significant bundle of documents that she had produced, which included medical evidence, and that the claimant could apply for reconsideration in accordance with rule 70 of the Tribunal rules if she obtained further medical evidence, albeit she would need to comply with the tight time limits for such an application.

10. The claimant then made her submissions. During her submissions she made reference to some photographs, which had not previously been disclosed to the respondent. Mr Shepherd had no objection to the production of the photographs, but it was hoped that they might be provided in electronic form. In the event the photographs appeared to show a car accident and the claimant's husband on a hospital gurney. They were produced to support the claimant's argument that at the time she withdrew the claim both she and her husband were suffering from significant health conditions that affected their mental state. I could see no prejudice to either party in the claimant's reliance on them in that form. They were not however provided to the Tribunal because the claimant did not have copies.

Factual Background

11. Following a period of early conciliation between 23 January and 23 February 2020, the claimant presented a claim on 7 March 2020. It was a broad ranging claim, including claims of discrimination on the grounds of age, religion or belief, race, disability, marriage or civil partnership and sex arising out of the claimant's employment by the respondent between 22 August 2016 and 26 February 2020. The claimant was a Senior Lecturer in Criminology.

12. The respondent was permitted an extension of time to file its response, which was presented on 9 April 2020. In consequence the case was listed for a two hour telephone case management hearing on 24 April 2020. Unfortunately, the hearing was postponed until November 2020 as a consequence of the Covid-19 pandemic.

13. Prior to the hearing, on 30 April 2020, the claimant produced a Scot schedule detailing the allegations and claims which she pursued within the proceedings. The salient part of that document ran to 28 pages and covered events between November 2017 and the claimant's resignation. In essence

the claimant complained that she had been subjected to a prolonged, deliberate and sustained campaign of bullying in relation to a series of protected characteristics.

14. On 30 June 2020 the claimant emailed the respondent's solicitor and the Tribunal stating her wish to withdraw her claim. The words used are set out in their entirety given the nature of the application before me:

> "The Claimant wishes to formally inform the Tribunal that she no longer wishes to proceed with the claim, and this case is requested by the Claimant to be formally withdrawn.
>
> Furthermore, Mr Mohammed Al Said wishes for any association or mention of his name to be removed from any HMCTS records concerning this case. Mr Al Said wishes to seek justice openly, and feels that public interest will be served better in this way. This will also avoid prolonging the unnecessary suffering of the Claimant, and the nonsensical and malicious legalistic trickery employed by Bath Spa University thus far.
>
> The Respondent is copied into this email as per rule 92."

15. On the same day, Mr Al Said directly emailed the respondent solicitor, stating;

> "With regards to the above case… I am happy to inform you that Pauline has withdrawn the above case. Due to illness caused by Bath Spa its despicable immoral and unethical conduct against ourselves. And as I previously mentioned I fully intend to let the public decide." [Sic]

16. The explanation that the claim was being withdrawn to enable the matters raised in it to be aired in public was thus consistent between the claimant and her husband.

17. On 6 July 2020 in a standard letter, the Tribunal acknowledged the claimant's withdrawal, vacated the preliminary hearing and advised that a dismissal Judgment would follow in due course.

18. On 9 July 2020, the claimant applied for the claim to be reinstated. The grounds of that application set out in the letter, but in summary the claimant referred to the effect of the stress of the proceedings on her existing mental health difficulties, the claimant having been unfit for work since December 2019. In particular, the claimant stated;

> "When I wrote to withdraw my claim, I suffered a significant bout of depression and felt that I could not continue with the stress of the claim and being unable to move on."

19. The claimant clearly recognised the effect of her withdrawal. She wrote later in the letter, "I understand that my decision to withdraw the claim has now been accepted by the Tribunal. However, as the judgement [sic] has not yet been issued, I am writing to ask whether you might … allow me to reinstate the claim as it stood."

20. On 15 July 2020, the respondent objected to that application on the grounds that rule 51 stipulates that once a claim is withdrawn it comes to an end, and

placed reliance on the authorities which are addressed below.

21. On 26 July 2020, the claimant's husband, Mr Al Said, wrote to the Tribunal and the respondent, engaging with the arguments in the respondent's objection. Amongst the arguments made by Mr Al Said were the following:

    21.1. At the point of withdrawing the claim, the claimant was depressed and suicidal, and felt that she could not recover her health whilst the proceedings continued.

    21.2. Her condition since improved.

    21.3. The claimant should be permitted to proceed as it would be in the interests of justice to bring the (allegedly) reprehensible conduct of the respondent to the public's attention.

    21.4. The conduct of the respondent's solicitor (as alleged) was reprehensible and it would be in the interests of justice to bring that to the public's attention.

    21.5. Rule 52(b) permitted the Tribunal not to dismiss the claim following a withdrawal, and in consequence it was possible to reinstate a claim which had been withdrawn (as had occurred in the case of Campbell v OSC Group UK Ltd UKEAT/0188/16/DA).

22. On 3 August 2020 Employment Judge Cadney directed the claimant to identify the basis of the application, making reference to Khan v Hayward and Middleton Primary Care Trust [2007] ICR 24, CA, and asking expressly whether the claimant was seeking to retract the withdrawal on the grounds that there had not been a clear and unambiguous and unequivocal withdrawal of the claim, or whether she was applying in accordance with rule 52(b) that whilst the claim was withdrawn, the Tribunal should not issue a dismissal Judgment because it was not in the interests of justice to do so.

23. On 9 August 2020 Mr Al Said, to whom the claimant had given express written Authority to act as her representative (on 24 July 2020) wrote to the Tribunal confirming that the claimant's application was pursued on the grounds that the claim was not clearly, unambiguously or unequivocally withdrawn, she also intimated that it would not be in the interest of justice to dismiss it.

24. It is not in dispute that the claimant has been continuously unfit for work since December 2019 because of work-related stress. The respondent's bundle contained sick notes covering that period providing that diagnosis.

The Issues

25. The following issues therefore fell for me to determine:

    25.1. Did the claimant's email of 30 June 2020 contain a clear, unambiguous and unequivocal withdrawal of her claims?

    25.2. If so, did the claimant at the time of the withdrawal reserve the right "to bring a further claim against the respondent raising the same, or

substantially the same complaint"?

25.3. If so, has the claimant established to the Tribunal satisfaction that there would be a legitimate reason for the claimant to do so?

25.4. If the claimant did not reserve the right to bring a further claim, or if she did but the Tribunal is not persuaded that there would be a legitimate reason to do so, has the claimant established that to issue such a dismissal Judgment would not be in the interests of justice?

The Relevant Law

26. The relevant rules are rules 51 and 52 which provide as follows:-

> "51. End of claim
>
> Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.
>
> 52. Dismissal following withdrawal
>
> Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless -
>
> > (a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
> >
> > (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice."

27. Where litigants, particularly those who are self-represented or have lay representation, seek to concede a point or abandon it, the tribunal should always take steps to ensure that they do so on a clear, unambiguous and unequivocal basis before accepting the concession or abandonment indicated (Segor v Goodrich Actuation Systems Ltd [2012] UKEAT/0145/11/DM at [11]). That may include making enquiries to ensure that the withdrawal is clear and umabiguous, where the circumstances of the withdrawal give rise to cause for concern (Campbell v OCS Group Uk Ltd & Ors UKEAT/0188/16/D at [19])

28. It would only be in exceptional circumstances, and with exceptional care, that a tribunal should enquire into the reasons for a withdrawal which is clear and unambiguous (Drysdale v Department of Transport (Maritime and Coastguard Agency) [2014] EWCA Civ 1083 at [61]).

29. If a claim has been withdrawn by consequence of rule 51, it is at an end and cannot be resurrected (Khan v Hayward and Middleton Primary Care Trust [2007] ICR 24, CA at [74]). The only questions for the tribunal are:

29.1. Is the withdrawing party intending to abandon the claim?

29.2. If the withdrawing party is intending to resurrect the claim in fresh proceedings, would it be an abuse of the process to allow that to occur?

30. If the answer to either of these questions is yes, then it will be just to dismiss the proceedings. If the answer to both these questions is no, it will be unjust to dismiss the proceedings (Ako v Rothschild Asset Management Ltd [2002] ICR 899].

31. It is unreasonable and unacceptable to use withdrawal as an alternative to adjournment. To withdraw proceedings with the intention of resurrecting the same claim in fresh proceedings in exactly the same forum is an impermissible substitute for an application to adjourn (Campbell at [33] and see Verdin v Harrods Ltd [2006] ICR 396, per HHJ Richardson at [40])

> "where one party withdraws the other party will generally be entitled to have the proceedings dismissed. This is because the party who withdraws will generally have no intention of resurrecting the claim again, or if he does will generally have no good reason for doing so. There is sometimes a temptation for a litigant, as the day of battle approaches, to withdraw a claim in the hope of being better prepared on another occasion. That will be unacceptable. Tribunals will be no doubt be astute to prevent withdrawal being used as an impermissible substitute for an application for adjournment. Occasionally, however, there will be good reason for withdrawing and bringing a claim in a different way."

Discussion and Conclusions

32. The claimant accepted in her submissions that the email of the 30 June 2020 contained a clear, unambiguous and unequivocal withdrawal of her claim. Her primary argument was that at the time that she withdrew the claim she did not have sufficient mental capacity to make an informed decision that she wished so to act.

33. The difficulty for the claimant is that the test that I must apply is one that requires me to conduct an objective assessment of the words used in the withdrawal and their effect. It does not permit me to look behind those words to determine the mental capacity of the individual who wrote them. There was nothing in the wording of the withdrawal that suggested that the claimant, though distressed, was not making a rational and genuine decision. There was therefore no need for the Tribunal to enquire into the reasons for the withdrawal or to ensure the withdrawal was clear (applying Campbell). It was clear.

34. The claimant is therefore right to accept that the email contains a clear, unambiguous unequivocal withdrawal. That is the clear objective reading of her email, applying the plain English meaning of the words used by the claimant. Not only does the email expressly use the word "withdrawn", but it does so in the context of a request for a " formal" withdrawal, having identified that the claimant "no longer wishes to proceed with the claim." It could not be clearer. It is certainly not ambiguous or equivocal.

35. Although it is not necessary for the disposal of this case, I observe that whilst the claimant has clearly suffered for a significant period with work-related stress and possibly with depression, the symptoms of which may have been

very acute at times, the evidence before me does not persuade me that she lacked the necessary capability and fitness of mind to make an informed decision in relation to the withdrawal of these proceedings. That is apparent from the second paragraph of the email of 30 June 2020 which manifests a rational and considered reason for the withdrawal. The claimant and her husband had decided that the stress of the proceedings was taking a significant toll on her mental health, and the better course was to pursue recourse in the public domain rather than in the tribunal.

36. That that decision was taken in consultation with her husband is evident from the content his email to the respondent's solicitor on the same day, which repeated the reasoning.

37. The claimant's email of 9 July 2020, by which she sought to retract the withdrawal, is not consistent with the argument made by the claimant that she lacked the necessary mental capacity to make an informed decision on 30 June 2020. In that email she states "I was having a very difficult time due to the stress caused both by what I had experienced… and submitting this claim." She refers to having suffered "a significant bout of depression" and feeling that she could not continue the claim due to the stress. She does not there say that she lacked the necessary capacity to make an informed choice to withdraw. What has happened, as the claimant acknowledges in the fourth paragraph of that email, is that she has changed her mind.

38. Similarly, the claimant's husband does not identify in his email of 26 July that the claimant lacked the necessary capacity but rather identifies the claimant was depressed and suicidal.

39. I conclude therefore that the claimant's email of 30 June 2020 contained a clear, unambiguous and unequivocal withdrawal of a claim for the purposes of rule 51. The consequence of that matter is that the tribunal has no power to set aside the withdrawal and permit the claim to continue, applying Khan.

40. Secondly, the withdrawal did not contain any reservation of the right to bring a further claim against the respondent raising the same or substantially the same complaints. It follows, applying rule 52, that I must issue a Judgment dismissing the claims unless I am persuaded that such a Judgment would not be in the interests of justice for the purposes of rule 52(b).

41. The claimant argues that it would not be in the interest of justice to issue such a judgment because she was suffering from significant mental health difficulties at the time that she elected to withdraw her claim and she now wishes to proceed with the claims that were properly constituted in the tribunal.

42. Mr Shepherd argues for the respondent that the medical evidence relied upon by the claimant is insufficient to discharge the burden that the claimant bears to demonstrate that that would be in the interests of justice. In particular he argues that if an expert medical report in Campbell was insufficient to persuade the Employment Appeal Tribunal that it was in the interests of justice not to issue a dismissal Judgment, but only to remit it to the tribunal, then a series of fit notes identifying work-related stress must necessarily be insufficient to discharge that burden here.

43. The medical report in Campbell recorded that:

> "the patient suffers from poor mental health….
>
> Unfortunately, I have now advised the patient to withdraw from the case altogether if possible, as I believe the stress and anxiety cause further risk to her mental health.
>
> I do not feel she is currently – or at any time in the near future – able to give evidence or be subjected to cross-examination."

(See paragraph 3)

44. There is force in his argument, although the facts of the case relate to a claimant who withdrew proceedings on the advice of her GP because of the impact of the proceedings on her health. Whilst she sought to suggest that she lacked the necessary mental capacity to consider the question of withdrawal, the medical report did not support that, rather it drew the more obvious connection between the stress of proceedings and the effect on the claimant's health were she to continue with the claim.

45. Ultimately, in my view, I must consider the claimant's application under Rule 52(b) in all the circumstances of the claim and ask myself the questions in Ako.

46. Was the claimant intending to abandon the claim? The simple answer to that question is that she was. Here, as I have previously indicated, the reason for the withdrawal, whilst set against a background of ill-health, was a rational decision to cease the proceedings in the Tribunal and pursue avenues in the public domain, such as with the media.

47. Secondly, was the claimant intending to resurrect the claim in fresh proceedings? At the time of the withdrawal, it is clear to me that she was not; she did not intend to bring proceedings again in the tribunal or in any other court, she wanted to raise the way she was treated in the public forum and with the press.

48. Would it be an abuse of the process to allow that the claimant to pursue proceedings? The claim cannot be resurrected, but at the time of the claimant's application for reconsideration of the withdrawal, the claim had not been dismissed. She was therefore entitled under rule 52(b) to ask for the Tribunal not to issue a Judgment dismissing the claim on the grounds that it would be in the interests of justice to do so. However, Ako suggests that if a claim is withdrawn with the intention of abandoning it, then it will be in the interests of justice to dismiss the claim. Ako was decided prior to the change in the ET rules that permitted a claim to be withdrawn without being dismissed, and the change represented by Rule 52 in the 2013 Rules.

49. However, the essential principle remains – if a party withdraws a claim because they intend to abandon it and they subsequently change their mind, it will be in the interests of justice to dismiss the claim because of the requirement for the finality of litigation. That is supported by the fact that even where a party withdraws a claim and indicates that they reserve the right to bring a further claim, it does not automatically follow that it should not be

dismissed; the Tribunal must also be persuaded that there is a legitimate reason to do so (such a where there is a personal injury action or a breach of contract claim which exceeds the £25,000 statutory cap). It is not consistent with the interests of justice and the overriding objective that a party should be entitled to oscillate between pursuing a claim and withdrawing it; that would create an unnecessary and illegitimate burden on the tribunal's resources and upon the respondent. If a party to an action is unwell, they may apply for a case management order to be varied, or for a hearing to be adjourned or for the claim to be stayed. They cannot withdraw the claim to avoid their obligations in respect of it.

50. I bear in mind that if the claim were not dismissed, the claimant would be entitled to bring fresh proceedings in the tribunal in relation to the same matters. Those proceedings would be presented outside the applicable time limits. The tribunal would therefore need to consider whether it would be just and equitable to extend time to permit the claims, necessitating a further hearing covering the same evidential issues and arguments. That course cannot be in the interests of justice or in accordance with the overriding objective. It adds delay, and cost and unnecessarily duplicates matters.

51. Consequently, it is not in the interests of justice to deviate from the normal application of Rule 51 which requires the claim and the issues within it to be brought to an end. Rule 52 is clear that the usual course where a claim is withdrawn is for it to be dismissed to prevent the matters which are raised in the claim from being relitigated. That is the appropriate course here.

52. The claimant's application that it would not be in the interests of justice to issue a dismissal Judgment is dismissed. The claim is therefore dismissed.

Employment Judge Midgley

Dated: 13 December 2020

Judgment sent to parties: 8 January 2021

FOR THE TRIBUNAL OFFICE