



EMPLOYMENT TRIBUNALS

Claimant: Mrs. M Stodczyk.
Respondents: Alma Square Dental Limited (First Respondent)
Josephine Rytooja (Second Respondent)
Zuzana Nemcik (Third Respondent)

On: 19 January 2021.

Before: EJ Rogerson.

Representations: Written representations received from claimant and 1st Respondent.

Judgment

The 1st respondent's application to strike out the claim is refused.

Reasons

1. By way of background to the claim. The claimant asserts that she was a worker and has been subject to 5 detriments (including the termination of her contract) on grounds of making a protected disclosure. The claimant also claims that she has been subjected to unlawful deductions of wages on the termination of the contract. The 1st respondent is a dental practice located in Scarborough, which is owned by the 3rd respondent. The 2nd respondent is the Managing Director of the 1st respondent and is also the daughter of the 3rd respondent. She became involved in the business in late 2018/early 2019.
2. At a preliminary hearing before Employment Judge Jones on 21 October 2019, the complaints and issues were identified and case management orders were made for the disclosure of documents and witness statement exchange for a liability and remedy hearing listed for 5 days in September 2020.
3. The list of issues identifies that there was an issue as to the claimant's status and whether she was a 'worker'. If the claimant was a 'worker' she alleges she was subjected to 4 disputed detriments and 1 admitted detriment (the termination of her contract). Of the 4 disputed detriments only one detriment complaint is made solely against the 3rd respondent. It is alleged that in April 2019, the 3rd respondent attempted to vary the claimant's contract previously made with Mr. Kent, an employee of the 1st respondent.
4. Two detriment complaints were allegedly committed by all three respondents (the termination of the contract and the failure to rectify superannuation payments). One alleged detriment, a complaint made against the claimant of professional negligence to the General Dental Council, was allegedly committed by the 2nd and 3rd respondent acting vicariously for the 1st respondent. The alleged protected disclosure was made to an employee of the 1st respondent (Mr. Kent) and to other external bodies (NHS England, the CQC and the GDC). The list of issues identifies that if the disclosures were protected disclosures, the Tribunal would have to determine whether any of the (proven) detriments were acts or failures to act, because the claimant had made the

protected disclosure.

5. At a preliminary hearing on 7 September 2020, the 1st respondent made an application to strike out the claim against all three respondents, on the ground, that a fair hearing was no longer possible.
6. Mr. Gilbert, who represents the 1st respondent makes the application. The 1st respondent has entered a response to the claim. The 2nd and 3rd respondents have not entered a response. They did not attend the hearing or make any separate representations. The 1st respondent's application was opposed by the claimant, who was represented by Mr. Mallett, of counsel.
7. I refused the application to strike out the claim because I was not persuaded that a fair hearing of the claim was no longer possible. I was also concerned as to whether the 1st respondent (as the only respondent that had entered a response) could make the application on behalf the other respondents who have not entered a response and are only entitled to very limited participation in these proceedings in accordance with Rule 21 of the Rules of Procedure.
8. An additional complication in these proceedings is that the 3rd Respondent suffers from dementia and she lacks capacity to conduct these proceedings and a litigation friend has not been appointed for her.
9. I sought further information from Mr. Gilbert as to how he had authority to act for the other respondents with regards to the strike out application and whether any steps could be taken by the 1st respondent to appoint a litigation friend for the 3rd respondent, in circumstances where, it appears that the 1st respondent wishes to rely upon the 3rd respondent's witness statement at a final hearing, if the claim is not struck out.
10. Reasons for the refusal of the strike out application were given orally at the hearing. Since that hearing the 1st respondent has requested written reasons which are provided here, together with the decision made on the 1st respondent's 'renewed' application on behalf of the 3rd respondent, to strike out the claim against the 3rd respondent.

Reasons for refusing the 1st respondent's application to Strike Out the Claim against all 3 respondents.

11. The 1st respondent is the only respondent that has entered a response to the claim brought by the claimant of whistleblowing detriments and an unlawful deduction of wages. The 1st respondent relies upon the witness evidence of the 2nd respondent and 3rd respondent to defend the claim. Mr. Gilbert has on behalf of the 1st respondent prepared lengthy witness statements for the 2nd and 3rd respondents covering all the relevant matters and issues. The claim is ready for a final hearing. The 2nd respondent and other witnesses can give evidence at a final hearing. Mr. Gilbert says that although he believes the 3rd respondent had mental capacity when he prepared the witness statements in February 2020, she no longer has capacity to give evidence or conduct proceedings.
12. The 1st respondent is the only respondent who has entered a response and is represented in these proceedings by Peninsula. Mr. Gilbert is the representative who has had conduct of this case throughout. The claimant is also legally represented. The 2nd respondent has capacity and is not represented. The 3rd respondent lacks capacity and is also not represented.
13. Documents have been disclosed and witness statements have been exchanged between the 1st respondent and the claimant. The case was ready to be heard in September 2020, when the 1st respondent made a late application to strike out of the claim, on the ground, that a fair hearing was no longer possible.
14. The issue of the 3rd respondent's lack of capacity has already been addressed in a report dated 14 June 2020, by the jointly instructed expert, Dr. Wald, a Consultant Psychiatrist for Older Adults. Her assessment is that the 3rd Respondent lacks mental capacity to conduct these proceedings and to give evidence.

15. Despite that assessment, and the fact that the 3rd respondent is the owner of the 1st respondent (and the principal for the purposes of any insurance policy) and a witness whom the 1st respondent relies upon to defend the claim, no proactive steps have been taken by the 1st respondent to appoint a litigation friend for the benefit of the 3rd respondent. While the 2nd respondent has previously indicated an intention to act as litigation friend, Mr. Gilbert informs me she has now decided against that course of action and appears not to have taken any steps to find anyone else that would be a suitable litigation friend.
16. It is also unclear how any 'instruction' could have taken from the 3rd respondent to make this application. In the absence of any proactive steps or enquiries to find a suitable alternative litigation friend, the 1st and 2nd Respondent seek to rely on the 3rd respondent's lack of capacity as a ground to strike out the claim in its entirety. That decision would obviously benefit the respondents by ending the claim without a liability hearing. It would however deny the claimant her right to have her claim heard and decided on its merits, when it is ready for a final hearing. If the claim was to proceed to a hearing, the 1st and 2nd respondent would seek to rely on the 3rd respondent's witness statement to resist the claim based on the 1st respondent's response. In those circumstances it would expect the Tribunal, to attach appropriate weight to that statement, because the 3rd respondent cannot give evidence or be cross examined on it. On the face of it they are taking the 'have your cake and eat it approach'.
17. All the witness statements the 1st respondent relies upon to defend the claim were prepared by Mr. Gilbert in February 2020. He has also provided his own witness statement confirming that when he prepared the 3rd respondent's witness statement, he was satisfied she had capacity to make the statement and the contents accurately reflect her instructions on the relevant issues following his discussions with the 2nd and 3rd respondent at that time. Mr. Gilbert submits that the 3rd respondent's witness evidence is 'paramount' to the 1st and 2nd respondent's defence of the claim. In the absence of the 3rd respondent, being able to give oral evidence, he contends that the parties are not put on an equal footing, which means that a fair hearing of the claim can no longer take place and the claim should therefore be struck out.
18. Mr. Mallett resists the application reminding me that striking out the claim is an exceptional and unusual step to take and I must be satisfied that it is no longer possible to have a fair hearing of the whole of the claim. He confirmed that the witness statements provided by the 1st respondent to defend the claim are lengthy and detailed. The case is ready to proceed to a final hearing. Any issues arising about the weight to be attached to the evidence of any witness who cannot be cross examined, is usually addressed by the Tribunal, which will have had sight of all the other evidence and will see the full picture at a hearing before deciding liability.
19. Mr Mallett submits that the application made by the 'respondents' was completely self-serving opportunistic and extremely prejudicial to the claimant. All the other witness evidence could still be tested and all documentary evidence could be considered at the hearing before any findings of fact were made. The 3rd respondent's statement was prepared by Mr. Gilbert at a time when she had capacity. That statement can be given whatever weight the Tribunal considers is appropriate having regard to all the other available oral and documentary evidence. The Tribunal will be best placed to assess that evidence and decide the merits of the claim at a full and fair hearing.
20. Mr. Mallett also submits that the claimant believes that the 3rd respondent has the financial means to instruct a solicitor as a litigation friend if necessary, owning property in central London and the dental practice in Scarborough. There is no evidence that she or her power of attorney, cannot bear those costs, and if there is evidence to the contrary, it should be provided. The Tribunal having been alerted to the 3rd Respondent's lack of capacity could ensure the appropriate checks and balances are in place to ensure fairness and justice to all the parties at a hearing. If the claim was

struck out against all 3 respondents now without any consideration of the merits of the claim that would be a disproportionate response which would be severely detrimental to the claimant while being very advantageous to all the respondents.

Conclusions

21. I was concerned that only the 1st respondent has entered a response to the claim to resist it and is the only respondent that can fully 'participate' in the hearing. The 2nd and 3rd respondents have not entered any response to the claim even though the claim was served upon them individually. Rule 21(3) of the Rules of Procedure provides that where a response has not been entered, the respondent is only "*entitled to notice of any hearings and decisions and shall only be entitled to participate in any hearing to the extent permitted by the Judge*". Liability in relation to the 2nd and 3rd respondents will have to be determined at a hearing on the basis that no response has been entered by them and their participation at the hearing will be subject to the Judge's control.
22. Mr. Gilbert is only instructed by the 1st respondent, yet he seeks to make this application on behalf of respondents who have not entered a response, do not instruct him and have a limited right to participate at any hearing.
23. I agree with Mr. Mallett that no effort appears to have been made by the 1st or 2nd Respondent to find a suitable litigation friend for the benefit of the 3rd respondent to help her conduct these proceedings in circumstances where it is argued that her evidence is 'paramount' to the 1st respondent's response. I agreed the 3rd respondent's lack of capacity was being used opportunistically to strike out the whole of the claim which would deny the claimant any fair hearing of her claim when it was ready for hearing and a fair hearing was still possible. While the 3rd respondent did not have capacity to give evidence at the final hearing, her witness statement had been prepared by the 1st respondent, when she had capacity and other witnesses could give evidence on behalf of the 1st respondent. Documentary evidence could also be relied upon by both parties. The Tribunal is best placed to consider all the evidence and to decide liability against each respondent whether they have entered a response (1st respondent) or not entered a response to the claim (2nd and 3rd respondent) and no longer have capacity (3rd respondent).
24. While further enquiries were to be made about the appointment of a litigation friend for the 3rd respondent, the case is prepared and ready for a hearing, and liability can in my view, still properly be determined at a fair hearing. The Tribunal could decide liability as against each respondent and to what extent (if any) any individual respondent should be held liable for any proven detriment. Striking out the claim would put the 2nd and 3rd respondent's in a better position than they would otherwise have been, failing to enter a response. It would also be a disproportionate response to strike out the claim and prevent it from being heard, thereby excluding all the evidence of the claimant and the 1st respondent when a fair hearing was still possible. Balancing all the parties' interests, it would be severely and unjustly prejudicial to the claimant if the claim was struck out in its entirety because of the 3rd respondent's lack of capacity. For those reasons the application to strike out the claim is refused.

First respondent's application to strike out the claim against the 3rd respondent

25. Following the hearing on 7 September 2020, Mr. Gilbert wrote to the Tribunal by email dated 21 September 2020. The 1st respondent accepted that the application to strike out the claim had been rejected by the Tribunal. He confirmed the 1st respondent sought to rely on the 3rd respondent's witness statement but remained of the view that it was severely prejudiced by the fact that the Tribunal '*would almost certainly attach less weight*' to the content of the 3rd respondent's unsigned witness statement. He confirmed that the 1st respondent was not in a position, to apply to the Tribunal to appoint a litigation friend, on behalf of the 3rd respondent because the scope of the insurance policy did not extend to pay for those costs. He confirmed the strike out the claim against the third respondent was still being pursued by the 1st respondent and

- confirmed that the instructions in this regard had been obtained by 2nd respondent, who is the daughter of the 3rd respondent and has since 3 May 2019, had lasting power of attorney for the 3rd respondent in respect of her health, welfare and financial affairs.
26. Mr. Gilbert had attached correspondence from the insurers dated 10 September which had initially indicated the cost of appointing a litigation friend could be covered *'if it was in the 1st respondent's interests'*. A later email dated 17 September 2020 then stated that the *"policy does not extend to pay for the legal costs associated with the appointment of a litigation friend"*.
27. By email dated 2nd October 2020, the claimant's representatives opposed the application relying on the submissions made orally at the hearing on 7 September 2020 and submitting that there was no merit in the application to strike out the claim against the third respondent because there can still be a fair hearing. Any prejudice (if any) to the third respondent can be properly met by the tribunal in the usual way. The absence of a litigation friend for the third respondent is due to the respondents' actions and did not justify any dismissal of the claim.
28. The claimant's representatives also made some comments in response to Mr. Gilbert's recent correspondence with insurers questioning the significant change in position adopted in appointing a litigation friend which raised a question in the claimant's mind as to whether there was some oral discussion between Mr. Gilbert and the insurer had occurred which out of self-interest may have caused the insurer to change its position. The claimant's representative invited Mr. Gilbert to confirm whether he had an oral conversation with the insurer and requested an explanation for the change in the position between the first and second email. The claimant contends that *"it is clear from this correspondence that the insurance policy **could** cover the costs of a litigation friend. This course has not been followed, in an attempt to bolster the respondent's application to strike out the claim against the 3rd respondent"*. Given the change of position the claimant requested disclosure of the policy itself.
29. The claimant's representatives also question Mr. Gilbert's capacity/authority to act. Mr. Gilbert has suggested in his correspondence with the insurer that the 1st respondent cannot act has a litigation friend of the 3rd respondent as they have a 'conflict of interest' (which has never been suggested before at any time of the proceedings). It is submitted that *"If right (which seems unlikely given the previous submissions by Mr. Gilbert) they cannot properly act on behalf of the third respondent and make this application. Furthermore, Mr. Gilbert has indicated that he has been instructed by the 2nd respondent to apply to strike out the claim on the basis that she has a power of attorney for the third respondent. The second respondent can only provide any instructions if she has been appointed as the third respondent's litigation friend. A power of attorney does not create any rights to conduct litigation on behalf of an individual. Mr. Gilbert does not therefore have any instructions to make this application and it should be dismissed on this basis."*
30. I agree with the claimant's representatives that if the 1st respondent asserts that there is a conflict of interest with the 3rd respondent, the 1st respondent cannot make this application. The 2nd respondent has not made any direct application but also lacks authority to make this application on behalf of the 3rd respondent. On that basis the 1st respondent's application to strike out the claim as against the 3rd respondent is refused. In the alternative the reasons given previously in refusing the strike out application still apply and a fair hearing of the claim in which there is only one response to consider. The participation of the other respondents who have not responded to the claim will be limited at the hearing to the extent that is permitted by the Tribunal. As witnesses for the 1st respondent their evidence can be assessed with all the other evidence. The Tribunal will be best placed to decide liability against each respondent on the merits of the claim or can decide to take any other step it considers is appropriate at the hearing.

Case Management Orders.

31. The final hearing is to be relisted based on the availability dates provided by the parties.
32. Within 14 days of the date these orders are sent out to the parties, the 1st respondent should provide the claimant and the Tribunal with a copy of the insurance policy that is referred to and relied upon in relation to these proceedings, together with an explanation from Mr. Gilbert and the 1st respondent's insurers to explain the change of position taken with respect to the payment of the legal costs of appointing a solicitor to act as a litigation friend for the 3rd respondent.
33. Within 14 days of the date these orders are sent out to the parties, the 2nd Respondent is to provide a copy of the lasting power of attorney for the 3rd respondent together with a statement of the 3rd Respondent's financial means (capital assets/liabilities income/expenses). The 2nd respondent must also provide an explanation of the steps she has taken, as power of attorney, to appoint a suitable litigation friend on behalf of the 3rd respondent.

Dated: 8 February 2021
Employment Judge Rogerson