EMPLOYMENT TRIBUNALS

Claimant: **Ms A Anoman**

Respondent: **Property Support Services UK Limited**

RECORD OF A PRELIMINARY HEARING

Heard at: London Central Employment Tribunal (by video)

On: 15 February 2021

Before: Employment Judge Palca (sitting alone)

Appearances

For the claimant: Mr A Aminu (solicitor)
For the respondent: Ms J Williams (Counsel)

JUDGMENT

1. The respondent's name is amended to Property Support Services UK Limited.
2. All the claimant's claims are dismissed.
3. The claimant is ordered to pay £300 towards the costs of the respondent.

REASONS

The claim

(1) The Claimant has been employed by the respondent, a company which provides cleaning services, as a cleaning operative, from 6 July 2009. By a claim form presented on 14 May 2020, following a period of early conciliation from 14 April 2020 to 21 April 2020, the claimant brought complaints of constructive unfair dismissal, disability discrimination and possibly personal injury. The claim arises from an accident the claimant suffered while at work on 20 March 2019, following which she has been certified by her doctor as not fit

to work. The respondent denies the claims, and in addition argues that they should be struck out on a number of grounds.

Conduct of this preliminary hearing

(2) The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The tribunal considered it just and equitable to conduct the hearing in this way.

(3) In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended

(4) The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties.

(5) No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.

(6) The participants were told that is was an offence to record the proceedings.

(7) There was an agreed bundle of documents. Evidence was heard from s L Shebani, the respondent's Payroll Manager.

(8) The tribunal ensured that the witness had access to the relevant written materials which were unmarked. I was satisfied that she was not being coached or assisted by any unseen third party while giving her evidence.

The issues

(9) The issues for this tribunal to determine are:

(i) Whether the claimant has irrevocably withdrawn her claim;

(ii) Whether the claimant's claims should be struck out as disclosing no reasonable prospect of success, pursuant to Rule 37(1)(a) of the Employment Tribunal Rules of Procedure ("Rules") on the following grounds:

a. the Claimant remains employed by the Respondent and therefore she has not been constructively unfairly dismissed,
b. the Employment Tribunal does not have jurisdiction to hear the Claimant's disability discrimination claim (which is denied in any event) because it is out of time; and/or
c. the Employment Tribunal does not have jurisdiction to hear the Claimant's personal injury claim because it is a standalone personal injury claim.

Or alternatively whether a deposit order should be made pursuant to rule 39 of the Rules.

(iii) Whether any costs order should be made pursuant to rule 76I(1) of the Rules.

(iv) Any further case management orders

(10) So far as issues of time in the discrimination claim are concerned, the issues are:

(i) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA? In particular

a. When did the conduct complained of take place?
b. Did the conduct extend over a period, or were the acts discrete acts?
c. Have all aspects of the disability claim been brought within time?
d. If not, is it just and equitable to extend time?

(ii) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 15 January 2020 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Facts

(11) The claimant began working for the respondent as a cleaning operative from 6 July 2009. On her ET1, she has ticked the box stating that her employment is continuing.

(12) On 20 March 2019 the claimant was working at the premises she normally attended at the time, Roxburghe House, Regent Street. She fell down the stairs, and injured her back. The claimant claims that she was vacuuming in the stairs in the building when the light switched off and she misplaced her footing and fell. The claimant states that she had drawn the respondent's attention to the faulty lighting in the past. Facts are disputed by the respondent, but the precise facts of the fall are not relevant for this decision.

(13) On 31 July 2019 the claimant wrote to the respondent claiming compensation for personal injury. The respondent did not directly reply. On 25 October 2019 the respondent's insurers requested GP notes, which were sent to the insurer on 21 November 2019. The ET1 records that the claimant has heard nothing from the respondent since, and claims she considers she has been constructively dismissed because nothing has been done to support her since her injury. The claimant has been, at least until August 2020, ie following the issue of these proceedings, submitting Fitness to Work notes from her GP to the respondent. She remains on the respondent's payroll.

(14) The claimant has not resigned, nor given notice to resign. The respondent has not terminated the claimant's employment.

(15) On 1 October 2020 the claimant's solicitor wrote to the tribunal as follows:

> "RE: CASE NUMBER 2202760/2020; CLAIMANT: MRS YM AN OMAN V. RESPONDENT: PROPERTY SUPPORT SERVICES (PPS).
>
> We continue to represent the Claimant in the above-mentioned matter and the Claimant has instructed us to withdraw her claim against the Respondent in order to review the claim We therefore apply that the hearing listed for Thursday, 08 October 2020 at 2:00 pm be vacated by all parties".

(16) The hearing was postponed and the tribunal queried what the claimant meant, and whether she wanted the claim to be dismissed on withdrawal. Meanwhile, the respondent sought payment of costs wasted from preparation for the preliminary hearing. The claimant's solicitor replied to the tribunal on 8 October 2020:

> "Our request for the withdrawal of the matter was as a result of not having a copy of our claim in file….We were then forced to write our letter of 01 October 2020 without consider[ing] the rules 51 and 52 of the Rules of Procedure. We apologise for the oversight. After considering the rules 51 and 52, we have decided to go ahead to oppose the Respondent's application to struck out our client's claim and we are confident that we would be able to defend the claim at the court. We hereby apply to the court to allow us to continue with the matter."

The Law

(17) Rules 51 and 52 of the Rules, under the heading "Withdrawal", set out what happens when a claimant withdraws her claim, as follows:

> ***End of claim***
>
> ***51.*** *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.*
>
> ***Dismissal following withdrawal***
>
> ***52.*** *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.*

(18) Rule 37 (1) of the Rules sets out the circumstances in which tribunals may strike out claims, including

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;

(19) Rule 39 of the Rules sets out criteria for the making of deposit orders as follows:

(20)

(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.

(21) Costs orders may be made by the tribunal, under Rule 76 of the Rules, as follows:

76.(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.

(22) S123 Equality Act 2010 sets out the time limits by which people must bring discrimination claims, of the nature made by the claimant, as follows:

(1) proceedings …may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

(23) S3(3) of the Employment Tribunals Act 1996 specifically excludes claims for damages or a sum due in respect of personal injury from the employment tribunal's jurisdiction.

Submissions

(24) The respondent submitted that the claimant had appeared to withdraw her claim. The evidence was confusing, and the tribunal would need to be confident that the withdrawal was unambiguous, which was not necessarily made out for the purposes of ET rules 51 and 52.

(25) In relation to the strike out applications, the respondent's primary case was that the claims should be struck out. Ms Williams argued that the claimant remained employed, and therefore could not have been constructively dismissed; the tribunal did not have jurisdiction to hear a straightforward personal injury claim, which is what the claimant's claim amounted to as set out in the particulars, and that even if the claimant could establish that she was disabled prior to her accident in March 2019, the ET1, filed over a year later, was silent on any issue arising subsequently, and was therefore out of time. If the tribunal decided that the claims had some prospect of success, that prospect was limited, and deposit orders should be made.

(26) The claimant's representative submitted that the respondent had been notified of her claim in July 2019, and had been awaiting a response which never came. She had hoped that ACAS early conciliation would resolve matters, but the hoped-for mediation never materialised. She had therefore had no option but to start proceedings. She had thought to withdraw her claim and start again when she could not obtain a copy of her ET1, which neither the tribunal nor the respondent had supplied to her solicitors. However, she decided to proceed with the claim to resist the respondent's application for costs on withdrawal.

(27) The claimant's representative maintained that the claimant had a good prospect of succeeding in her claim because she had never been issued with a contract of employment.

(28) The claimant's representative told the tribunal that the claimant had not initiated a personal injury claim. The respondent had been ignoring the claimant since her accident, and had not offered support, making her feel that the respondent did not want her any more. She had not resigned. Her constructive dismissal arose from the respondent's unconcerned attitude towards her. The fact that they were not caring for her welfare went to the root of the contract.

(29) If the claimant's claims were out of time, her representative argued that it would be just and equitable to extend time because the claimant's letter before action had been served promptly but ignored, the claimant had suffered trauma in the current pandemic, and she had not been able to obtain a copy of her ET1 from the respondent or the tribunal.

(30) Finally, the tribunal was told that the claimant did not have the financial resources to pay a deposit.

Conclusion

(31) I find that the claimant's representative's letter of 1 October 2020, talking of withdrawing the claim, was not clear and unambiguous. This is clearly demonstrated by the fact that the tribunal was itself unsure what the claimant intended and requested clarification, following which on 8 October 2020, a week after the original letter, the claimant expressed the wish to pursue the claim. As a result I do not find that she had equivocally withdrawn her claim, and therefore ET rule 51 is not engaged. The claim should therefore not be dismissed on this ground.

(32) The claimant claims that she has been constructively dismissed because of the respondent's attitude towards her in ignoring her and not seeking to care for her welfare, which she says goes to the root of her contract. However, the claimant's representative does not seek to argue that the claimant has resigned. It is clear that when the claimant filed her ET1 she believed she remained an employee. This is the material date, but in any event it does not appear that there has been any change to the position between the start of these proceedings and the present hearing. The claimant remains on the payroll. She has been submitting fitness to work notes. I find she remains an employee. It is fundamental to the right to claim constructive dismissal set out in s95 Employment Rights Act 1996 that either the employer or the employee has terminated the relevant contract of employment. Since that has not happened here, the claimant cannot pursue a claim that she has been constructively dismissed. This claim therefore has no prospect of success, and shall be struck out.

(33) On her ET1, the claimant has claimed that she has been discriminated against on the ground of disability. The act of discrimination seems to be that the claimant had an accident in circumstances where she had been drawing the risk to her employer's attention, but nothing had been done. The claimant's argument is that her claim has been brought within time because her letter before claim was submitted on 31 July 2019. I note in passing that even this is over 3 months after the accident. The law is clear, as set out in s 123 Equality Act 2010 which refers to "proceedings" being brought – in other words, it is the claim itself which must be brought within the three month period, not simply written notification of the claim. The fact that the claimant has notified the respondent that a claim might be brought is not material to this issue. The claim for disability discrimination as pleaded relies

on the discrete event of the accident and, however it is framed, has therefore not been brought within time.

(34) The tribunal now needs to consider whether it would be just and equitable to extend time. The claimant relies on matters which largely arise after the claim has been filed. There was no argument before me on balance of risk. Clearly if I strike the case out, the claimant will be deprived of bringing this particular claim in the employment tribunal. Part of the claim however appears to be in the nature of a personal injury claim, which could still be brought against the respondent elsewhere. The rules of procedure requiring cases to be brought within three months of the events in question are there for a purpose, namely to ensure as much as possible that justice takes place promptly. The claimant was represented by a solicitor throughout the relevant time. She perceived by at least July 2019 when her letter of claim was sent that she might have a claim against the respondent. There was no evidence before the court as to why the claim could not have been brought earlier, save that the claimant was hoping for an out of court settlement. The delay is over a year from the event in question. As pleaded, the claim for discrimination does not appear strong: the claimant complains of damage caused by her accident, not for example of unfavourable treatment arising as a consequence of her disability or of having been treated less favourably than others not similarly disabled. For all these reasons, I find that it is not just and equitable to extend the time for commencement of this claim.

(35) I make two further observations: first, that the claimant has not brought a claim in relation to not having been given a contract of employment – this allegation has been included in the ET1 by way of background only. Second, the claimant's representative told the tribunal that the claimant was not making a personal injury claim. Had she been seeking to do so, I would have struck it out on the basis that the tribunal does not have jurisdiction to hear it.

Costs

(36) The respondent applied for costs under ET rule 76 (1), first for costs wasted as a result of the postponement of the hearing scheduled for 8 October 2020 and second in that the claimant's representative acted unreasonably in the way in which the matter has been conducted. The application for a postponement was made late, and the claimant's representative had not scrutinised ET rules 51 and 52 on withdrawal beforehand which had led to extra costs being incurred by the respondent. The claimant's claims have always been misconceived and were doomed. The claim seemed centred on a negligence claim which it was not appropriate to bring in the employment tribunal. The claimant had had plenty of opportunities to withdraw her claims, including after the ET3 had been served, which she had not taken. The respondent claimed payment of its costs in full, namely £6,951.50, failing which costs since 8 October 2020 of £3,376.50.

(37) The claimant resisted the application. She had genuinely felt she had reasonable claims, and believed she had been dismissed because she had

no contract of employment. She had been trying to resolve the issues, and had not withdrawn her claim in October, because of the respondent's unreasonable request for costs. The claimant is currently unemployed. Her solicitor has been representing her pro bono.

(38) I conclude that some costs order should be made. I have struck out all the claimant's claims as having no reasonable prospect of success. In these circumstances, I am obliged by ET Rule 76.1 to consider the question of costs. The claimant had earlier opportunities to withdraw, which she did not take: fearing a costs order was not a good reason to continue. I do however take into account that the claimant is currently not earning a normal salary and has been represented pro bono. I therefore order the claimant to pay a contribution towards the respondent's costs of £300.

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Employment Judge Palca

17 February 2021

Sent to the parties on:

18 Feb. 21

For the Tribunal: