EMPLOYMENT TRIBUNALS

Claimant: Mrs S Henderson

Respondent: Asda Stores Limited

Heard at: Manchester **On:** 26 August 2020

Before: Employment Judge Ainscough
Mrs A Jarvis
Mr M Stemp

REPRESENTATION:

Claimant: Mr Vero (Partner)
Respondent: Ms Duane of Counsel

JUDGMENT ON PRELIMINARY ISSUE

The unanimous Judgment of the Tribunal is that the respondent's application to strike out the claims is unsuccessful.

REASONS

Introduction

1. Prior to the start of the substantive hearing the respondent made an application to strike out the claim on the basis that it was no longer possible to have a fair hearing in light of the claimant's conduct.

Respondent's Application

2. The respondent made an application under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

3. In the first instance, the respondent relies upon rule 37(1)(b), that the manner in which the proceedings had been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious. By way of example, the respondent

highlighted the fact that on the first day of the hearing the claimant sought to introduce 16 further incidents which she said amounted to breach of contract and/or race discrimination.

4. The respondent also relies upon comments from the claimant's representative contained in an email of 25 August 2020. It is the respondent's case that those comments demonstrate behaviour and set the tone for how the claimant has presented her case. The respondent draws the Tribunal's attention to the fact that the claimant has sought to submit irrelevant information and has had two claims dismissed. The respondent also cites that the claimant has sought to submit documents at the eleventh hour and has not set out the detail of claims until the last minute.

5. The respondent highlighted that the claimant had submitted 22 separate witness statements and was acting scandalously, vexatiously and unreasonably.

6. The respondent also relies upon the claimant's non compliance with the rules in accordance with rule 37(1)(c) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The list of documents was due on 2 April 2020 and in fact this did not take place until two months later. The respondent states it has acted in a measured and proportionate manner. The respondent acknowledges that the claimant is a litigant in person and states it did attempt to explain to the claimant why documents were not relevant. The respondent complains that despite this the claimant has generated an inordinate amount of cost and expense and has conducted a fishing expedition, which means the bundle now totals some 500 pages rather than 200 pages.

7. The respondent also relies on the fact that the claimant refused to exchange witness statements on the date provided by the Tribunal. The respondent states that the claimant has attempted to ambush the respondent by submitting over 28 documents just prior to the start of the final hearing. The respondent is also concerned that the claimant has sought to amend her statement following disclosure of the respondent's statements.

8. The respondent also contends that it is no longer possible for the Tribunal to have a fair hearing in accordance with rule 37(1)(e) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The respondent submits that the additional evidence has widely broadened the List of Issues and the claimant will not be focussed in the giving of evidence. It is the respondent's contention that the claimant was involved in the sign-off of the production of documentation and she has acted unreasonably and unjustly.

9. Finally, the respondent relies upon rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and contends that the claims have no reasonable prospects of success. It is the respondent's case that a detailed List of Issues has yet to be agreed and this is because the claimant is unable to accurately pinpoint her case. The respondent submits that an assertion of difference in treatment is not enough and a remedy of costs would not be fair in all the circumstances.

10. In the alternative, the respondent seeks costs on the grounds that the claimant has acted improperly, unreasonably and negligently.

Claimant's Response

11. The claimant's representative apologised for his behaviour and said it was the stress of the proceedings that caused him to react in such a way. The claimant's representative apologised for the way he had conducted himself.

12. It is the claimant's case that the respondent has manipulated the evidence. The claimant could not afford legal representation and pursued claims because she did not have a proper legal understanding. The claimant contends that there are additional witness statements because the respondent had asked for more evidence and it was not there to disadvantage the respondent. The claimant conceded that there had not been mutual exchange because the respondent had manipulated evidence and she did not trust them.

13. The claimant admits that she did read the Case Management Order and tried to conduct herself correctly. The claimant points out that the respondent has not complied with every part of the Case Management Order either. The claimant feels that there are documents not included in the bundle.

Relevant Legal Principles

14. The power to strike out arises under what is now rule 37 of the Employment Tribunals Rules of Procedure 2013. Rule 37 so far as material provides as follows:

> **"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 has been scandalous, unreasonable or 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)."**

15. In **Anyanwu and another v South Bank Student Union and another 2001 ICR 391, HL,** the House of Lords determined that discrimination cases are fact sensitive and should usually only be decided after the Tribunal has heard all of the evidence.

16. In paragraph 30 of **Tayside Public Transport Co Ltd v Reilly** [2012] CSIH 46, a decision of the Inner House of the Court of Session:

> **"Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (*Balls* v *Downham Market High School and College* [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore 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 on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (*ED & F Mann Liquid Products Ltd* v *Patel* [2003] CP Rep 51,**

> **Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Mann Liquid Products Ltd* v *Patel*, supra; *Ezsias* v *North Glamorgan NHS Trust* [[2007] ICR 1126]). But in the normal case 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 (*Ezsias* v *North Glamorgan NHS Trust*, supra, Maurice Kay LJ, at para 29)."**

17. There is no blanket ban against there being a strike-out, for instance in particular classes of cases such as discrimination, although in **Lockey v East North East Homes Leeds** UKEAT/0511/10/DM, a decision of 14 June 2011 before HHJ Richardson sitting alone, the EAT said at paragraph 19:

> **"…In cases of discrimination and whistleblowing there is a particular public interest in examining claims on their merits which should cause a Tribunal to consider with special care whether a claim is truly one where there are no reasonable prospects of success: see *Ezsias* at paragraph 32, applying *Anyanwu v South Bank Student's Union* [2001] IRLR 305. …..The Tribunal is in no position to conduct a mini-trial; issues which depend on disputed facts will not be capable of resolution unless it is clear that there is no real substance in factual assertions made, as it may be if they are contradicted by contemporaneous documents."**

Discussion and Conclusions

A. Conduct of Proceedings

18. The Tribunal determines that the claimant's representative acted unreasonably as a result of his naivety in the process. The Tribunal's case Management Order sets out that only relevant documentation should be exchanged, and therefore the respondent was entitled to question the relevance of the documents, and did so in an appropriate manner. The claimant's response was unreasonable i.e. not to engage further.

19. Despite this finding, the Tribunal is of the view that a fair hearing is still possible. The majority of documents submitted by the claimant just prior to the start of the final hearing are not relevant, and the respondent can deal with those relevant issues in supplemental questions to the respondent witnesses once the claimant has identified those which fit with the issues as agreed.

20. The evidence put forward at the start of the hearing can be clarified by the panel as to how it fits with the issues and agreed before live evidence is given. To this end the panel will agree the List of Issues before the start of live evidence.

21. The Tribunal acknowledges that the respondent will need to take instructions once clarity has been given by the claimant, and if the only way a fair hearing can progress is to postpone today and reconvene, then the Tribunal will be prepared to do that.

B. Non-compliance with Case Management Orders

22. The claimant failed to provide further and better particulars of the indirect discrimination claim, but no longer pursues this and therefore the issue is not relevant.

23. The respondent was not prejudiced by the delay in the claimant sending her list of documents because it was disclosed on 12 June 2020 and the respondent has been able to consider it and agree the bundle. Both parties had a bundle by 27 July 2020 and neither were at a disadvantage.

24. The Tribunal will disregard those witness statements that are not relevant and the respondent will be allowed to ask supplemental questions. The panel is of the view that a fair hearing is still possible.

C. Fair Hearing

25. For the reasons outlined above, the Tribunal considers that a fair hearing is still possible.

D. Prospects of Success

26. Strike out in discrimination cases is a draconian step and only taken in exceptional cases. The claimant is a litigant in person and English is not her first language. The claimant is not familiar with putting legal arguments in complex form. Considering the case of **Anyanwu**, this is not an obvious case: it is fact sensitive and requires full examination. Taking the case at its highest, there may be a claim.

Costs

27. The issue of costs will be considered at the conclusion of any final hearing once the respondent has put in a schedule of costs and the claimant has submitted evidence of ability to pay.

Employment Judge Ainscough

Date: 8 March 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 March 2021

FOR THE TRIBUNAL OFFICE