THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**
sitting alone

BETWEEN:

Miss A Sobers

Claimant

and

Surrey & Sussex NHS Trust

Respondent

ON: **1 March 2021**

Appearances:
For the Claimant: **Mr F Ogunbiyi, Counsel**
For the Respondent: **Miss B Criddle, Counsel**

Preliminary Hearing held on 1 March 2021 at London South Employment Tribunal by video link

RESERVED JUDGMENT

1. The claims of sex discrimination, age discrimination, unpaid notice pay and wages are struck out as they have no reasonable prospects of success.

2. The claims of disability discrimination are limited to those based upon the matters contained in the paragraph in the particulars of claim served with the claim form identified below.

3. The remaining claims shall proceed to hearing as listed to commence 7 February 2022. A further case management preliminary hearing to be heard by video link will be listed as described below.

REASONS

1. The claim form in this matter was submitted on 4 October 2019. Prior to today's hearing the parties attended two preliminary hearings as well as submitting detailed correspondence to the Tribunal and receiving written Orders dated 1 July 2020. The relevant details of the previous case management Orders are set out below but at the last hearing on 28 January 2021, the 10-day final hearing that was due to commence today was vacated by Judge Hyde and a one-day preliminary hearing listed instead to consider whether the claims should be struck out on one or more of four grounds ('the Hyde Order'). Also, on 15 February 2021 the respondent applied for consideration to be given at this hearing for strike out and /or deposit orders to be granted on the basis of the lack of merit of the claims.

2. Both parties were represented by Counsel who made full submissions. The claimant was also present and had submitted a witness statement. Although it was not appropriate to hear formal evidence at this hearing the statement provided useful background information about the personal circumstances faced by the claimant since her resignation from the respondent, which I have fully considered. She also gave me information as to her present financial circumstances for the purposes of consideration of a deposit order. I also had the benefit of an agreed bundle of documents.

Relevant Law

3. In Chandhok v Tirkey ([2015] ICR 527) the then President of the EAT commented on the importance of clear and complete drafting of the claim form. He said:

> '[A] system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.'

4. Changes can of course subsequently be made to the claims brought, but only upon the granting of an application to amend at which point the familiar principles set out in Selkent Bus Co Ltd v Moore ([1996] IRLR 661) will be applied.

5. The power to strike out a claim is found at rule 37 of the Employment Tribunal Rules 2013 which states:

> (1) 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;
> (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).

6. It is exceptional for cases to be struck out where there are central facts in dispute (Ezsias v North Glamorgan NHS Trust [2007] IRLR 603) and it is well recognised that discrimination claims in particular should not be struck out summarily save in the most obvious and plainest of cases (Anyanwu v South Bank Students Union [2001] IRLR 305). Equally the Tribunal retains the discretion to do so (Jaffrey v Department of Environment [2002] IRLR 688).

7. However, where the claimant has deliberately and persistently disregarded the required procedural steps or a fair trial is impossible, the claim can be struck out if that is a proportionate response to the conduct (Blockbuster Entertainment Ltd v James [2006] IRLR 630). Also, if there has been intentional or contumelious delay or inordinate and inexcusable delay by the claimant which gives rise to a substantial risk that a fair hearing is impossible or which is likely to cause serious prejudice to the respondent, a strike out can be appropriate (Evans v Commissioner of Police of the Metropolis [1993] ICR 151).

Procedural History

8. When the claimant submitted her claim form in October 2019 she stated therein that she was represented by Mr Ogunbiyi. I accept that that was not in fact the case – although she expected/hoped to be – and the form together with its lengthy narrative attachment was drafted by the claimant personally (apparently at an airport whilst waiting for a flight). In the form she ticked the boxes at section 8 to indicate that she was bringing claims of unfair dismissal, age/race/sex & disability discrimination, notice pay, arrears of pay and other payments.

9. By the time of the first case management preliminary hearing on 30 March 2020, however, Mr Ogunbiyi clearly had been instructed as he represented the claimant on that occasion. Judge Siddall's Order made at that hearing ('the Siddall Order') included the following provision:

> '1.1 The claimant is ordered to provide further particulars of her claims so as to arrive with the Tribunal and the respondent on or before 20 April 2020. In relation to the claims for discrimination the claimant shall identify each of her complaints and whether it is a complaint of race or sex or disability discrimination (or a combination). The claimant should also identify which section of the Equality Act 2010 she relies upon in each case.'

I agree with the respondent that that requirement was in the nature of labelling the claims of discrimination brought. The Order then set out a series of subsequent timetabled case management orders (CMOs) of the usual sort to ensure the matter would be ready for the final hearing.

10. On the same day, Mr Ogunbiyi wrote to the respondent's solicitors repeating an earlier request for a copy of the claimant's contract of employment and requesting access to her work email account which, not surprisingly, had been blocked upon her departure from employment. He said that the claimant needed access to that account as all correspondence and documents relevant to her claim were transmitted through it and that given the timetable set at the hearing they expected immediate access.

11. Detailed correspondence then followed between the parties as to this request – which the respondent refused – which led to agreed variations of the timetable of the CMOs as well as the respondent offering to consider any specific requests for voluntary disclosure the claimant wished to make and providing what they had regarding the claimant's contract of employment (including a template). The claimant made an application for specific discovery of that email account.

12. On 15 June 2020, in compliance with the timetable set by Judge Siddall for disclosure, the respondent's solicitors sent an email to Mr Ogunbiyi which contained a number of password protected links. One was to a list of documents and the other 3 were to volumes of disclosure. In that email they stated that they looked forward to receipt of the claimant's documents by return as well as the particulars ordered at paragraph 1.1. of the Siddall Order and the schedule of loss, the deadlines for both having passed.

13. At today's hearing Mr Ogunbiyi first said that he had only received a list of documents from the respondent's solicitors but when I referred him to that email he said that he had been unable to open the links. I accept Miss Criddle's statement that at no time had Mr Ogunbiyi communicated to the respondent's solicitors any difficulty with opening the links. They were therefore entitled to assume that they had complied with their obligation regarding disclosure.

14. The claimant's application for access to her email account was determined by Judge Wright on 1 July 2020 ('the Wright Order') when she wrote:

> 'The claimant was not directed [by Judge Siddall] to further particularise her claims. She was directed to confirm which protected characteristic is relied upon and which form of prohibited conduct she is referring to, as per the Equality Act 2010. The claimant's emails are not going to assist this task of cross-referring to the legislation by reference (and strictly by reference) to her pleaded ET1.
>
> The claimant is directed to provide this information within 14 days.
>
> The respondent then has a further 28 days to provide an amended response if so advised.
>
> The claimant's application for specific disclosure is refused. As set out above, the emails are not going to assist the claimant in respect of the task in hand. Furthermore, at the time of the application, disclosure had not then taken place.'

15. It is clear that until that point the claimant was not deliberately refusing to comply with the Siddall Order as such, and certainly was not ignoring it but was saying – even if mistakenly – that she needed access to that email account to comply. It was very clear however upon receipt of the Wright

Order that that argument had failed and she was then required to comply with paragraph 1.1 of the Siddall Order by 15 July 2021.

16. On 16 July 2021 Mr Ogunbiyi wrote to both the Tribunal and the respondent's solicitors purporting to enclose further and better particulars 'pursuant to the Tribunal's order'. The attachment was some 18 pages long comprising more than 63 paragraphs (not all the paragraphs are numbered). It plainly is a rewrite of the claim. It does not simply identify – as was ordered by Judge Siddall – each of her complaints and what sort of discrimination they are alleged to be. It is also clear that the scope of this document is in places much wider than the original claim form e.g. it specifically refers to breach of the duty to make reasonable adjustments with 13 suggested such adjustments. There is no express reference in the claim form to such a claim or to the underlying factual matters relevant to the suggested adjustments (there is however a reference to a failure by the respondent to postpone a capability hearing which the claimant says should have been postponed because of her alleged disability – this is not referred to in the 18-page document.) Further, it comments on matters raised in the ET3.

17. Mr Ogunbiyi says that at this stage he thought it best to re-plead the claimant's case as she had drafted the first version herself. He referred to the fact that leave was given to the respondent to file an amended response by Judge Siddall as supporting this approach. I do not accept that argument. It was clear what was required from the claimant (a labelling exercise) and no permission had been given for a 're-plead'. Mr Ogunbiyi acknowledged today that leave to amend is required if a claimant wants to pursue claims not contained – no matter how inexpertly expressed by a lay person – in the claim form.

18. On 10 August 2020 (within the time given to file an amended response) the respondent brought to the Tribunal's attention what they saw as the defects in the further particulars and also applied for an unless order in respect of the claimant's alleged failure to comply with the CMOs regarding disclosure. This application was copied to Mr Ogunbiyi yet no reply or comment was received from the claimant until 16 October 2020 when he replied to a specific request for an update from the Tribunal. In that reply he stated that the claimant had complied with the outstanding order regarding particulars and with regard to other matters simply acknowledged that 'the timetable slipped'.

19. On 17 November, 1 & 17 December 2021 the respondent again wrote to the Tribunal setting out what they saw as the claimant's failures to comply with the CMOs and ultimately requesting an urgent preliminary hearing given the rapidly approaching final hearing in March 2021. The failures they referred to were – in summary – late disclosure of medical evidence, a failure to disclose documents relevant to liability and remedy, and a failure to provide a disability impact statement (which had not been ordered but had been requested).

20. The telephone preliminary hearing then took place which led to the Hyde Order which stated:

'1. The Claimant is to cut and paste the text of the details of her complaint in her claim form and to add paragraph numbers to them, and she is to send that document with the further clarification of her claim to the Tribunal and the Respondent at the same time.

2. The Claimant is to provide the summary clarification of her claim as previously ordered by Employment Judge Siddall and clarified by Employment Judge Wright so that the Tribunal understands exactly which statutory provisions she relies on, in respect of any treatment complained of as unlawful discrimination. The Claimant is specifically referred to paragraphs 18-22 of the Respondent's draft list of issues and the contents of the Respondent's grounds of resistance.

3. The Claimant is also to provide clarification of her claim in respect of her constructive dismissal by identifying exactly which treatment in her original claim she relies on as constituting breach of contract by the Respondent.

4. The clarification of the claim as set out above in respect of both the discrimination allegations and disability status are to be provided by 11 February 2021.

5. The Claimant is further to provide a disability impact statement as previously ordered, by 11 February 2021.

6. Another thing that the Claimant can do to persuade the Tribunal not to strike out her claim on 1 March 2021 is to comply by 22 February 2021 with the provision of disclosure relating to remedy to the Respondent which the Respondent had previously asked for.'

and

'8. At the open preliminary hearing on 1 March 2021 the Tribunal (Judge sitting alone) will consider whether to strike out the claims on any of the following grounds, namely that:-

i. There has been unreasonable conduct of the proceedings by or on behalf of the Claimant;
ii. That the Claimant has failed to comply with the Tribunal's orders;
iii. That the Claimant has not actively pursued her claims;
iv. That it would not be possible to have a fair hearing.

9. The grounds for this consideration are set out in the emails sent by the Respondent to the Claimant and copied to the Tribunal on 17 November and 1 December 2020.

10. The Respondent is at liberty to give the Claimant and the Tribunal notice of any further grounds on which it wishes to rely at the hearing on 1 March 2021, either for an application to strike out or for an application for an order requiring the Claimant to pay a deposit, by giving notice to the Claimant and the Tribunal by 15 February 2021 in writing (email).'

and under case management discussion:

'1. The objective of the Tribunal in making the orders above is to allow the Claimant one last opportunity to demonstrate that she is serious about pursuing her case and serious about complying with the directions of the Tribunal and putting the Tribunal and the Respondent in a position that they can properly assess her complaints. Clearly, the Tribunal will take into account at the next hearing any steps that the Claimant has taken up to now and between the hearing on 28 January and 1 March 2021 to prepare her case for a final hearing. Miss Sobers attended the hearing.

2. The Tribunal advised the Claimant and her representative to review the previous Tribunal Orders and correspondence about preparation (Order of Employment Judge Siddall and the letter at Employment Judge Wright's instruction sent on 1 July 2020) in particular and also the text of the grounds of resistance and the draft list of issues, and the letters from the solicitors for the Respondent of 17 November and 1 December 2020.'

21. It was therefore perfectly clear to the claimant what was required and the possible consequences of not complying.

22. Following that hearing by an email dated 11 February 2021, Mr Ogunbiyi served and filed:

    a. a disability impact statement (which referred to significantly earlier relevant hospital treatment than that shown by the medical evidence already disclosed);

    b. a 'Consolidated Claim as Ordered by Employment Judge Hyde' (which was a copy and paste of the contents of the claim form, in numbered paragraphs);

    c. a table with the following headings:

        - Item Allegation of Discrimination (Direct) / Disability
        - Who Carried Out the Act
        - Brief Description of Discriminatory Act/Disability Constructive Dismissal
        - Where This Is Pleaded in ET1 And Attachment; And

    d. comments on the respondent's then draft list of issues.

23. As stated above on 15 February 2021 the respondent applied for consideration to be given at this hearing for strike out and /or deposit orders to be granted on the basis of the lack of merit of the claims.

24. On 22 February 2021 the claimant provided a schedule of loss and mitigation documents.

25. As at today's date, the claimant has not provided any general liability disclosure despite accepting that she had emailed to herself whilst employed a number of documents relevant to her various disciplinary processes.

Conclusions

26. Taking each of the bases upon which I am being asked to strike out the claims my conclusions are as follows.

27. I take the first two questions together. Has there has been unreasonable conduct of the proceedings by or on behalf of the claimant and has she failed to comply with the Tribunal's orders? I have to conclude that the answer to both is yes. As of today the claimant has failed outright to comply with the order requiring disclosure of documents relating to liability. There is no good reason for this failure. She has also only very belatedly complied – and even then arguably not properly - with paragraph 1.1 of the Siddall Order by the documents submitted on 11 February 2021. From 1 July 2020 it was perfectly clear that her argument that she needed access to her email account in order to do this exercise had failed.

28. However, should these failures result in a strike out of her claim? To do so would clearly cause the claimant significant prejudice. She would be denied the opportunity to prosecute claims that she clearly falls strongly about and has – again very belatedly – now made a serious attempt to properly describe. There are also strong public policy reasons why discrimination claims should be allowed to proceed where possible. Set against that is the impact on the respondent – a publicly funded body already under extreme pressure – in having to defend these claims (the age of the claims is dealt with below) as well as the equally strong public policy reasons why Orders of Courts and Tribunals are to be respected and complied with. I conclude that the exercise of balancing those competing interests comes down in favour – just – of the claimant. However, I would expect that any future orders in respect of her compliance with certain steps (e.g. disclosure and remedying any remaining defects in the description of her claims) will be expressed in strong terms, probably as unless orders. It may also be that the respondent will seek a remedy against the claimant in the future with regard to its costs incurred by these failures.

29. Turning to whether the claimant has failed to actively pursue her claims, I am not persuaded of that. Whilst she – or her representative – may have acted unreasonably at times in how they have been pursued together with some periods of silence/inactivity, it is clear that the claims were overall being pursued.

30. As to the possibility of a fair hearing, it is clear that very significant periods of time have already elapsed since the dates of the earliest acts complained of and a further year will now elapse - entirely because of the fault of the claimant. Miss Criddle quite rightly refers to the particular impact delay can have in cases of discrimination given the burden of proof provisions, but Tribunals are very used to assessing evidence where there has been a delay and well understand the difficulties this can present to witnesses. It seems in this case however that there is a wealth of contemporaneous documentary evidence which will undoubtedly assist in jogging their memories. Overall I do not conclude that a fair trial is impossible although it will undoubtedly be made harder by the claimant's conduct.

31. Do the claims have no reasonable prospects of success? This assessment is made on the basis of the pleaded matters – which on these facts is the contents of the claim form and the further particulars/clarification given in the consolidated claim document and supporting table served on 11 February 2021 ('the 11 February 2021 particulars').

32. Those documents do not give particulars of or identify any claims of sex and/or age discrimination, unpaid notice pay or wages. When I asked Mr Ogunbiyi about lack of detail of a sex discrimination claim he referred to Mr Parker being a man and the claimant being a woman. As is well established a simple difference in protected characteristic is not enough. Given the complete absence of particulars (and the many opportunities given to the claimant to provide them) this must be one of those very rare cases where it is appropriate to strike out claims of discrimination as they have no reasonable prospects of success. Accordingly the claims of sex

discrimination, age discrimination, unpaid notice pay and unpaid wages are struck out.

33. As for the claim of disability discrimination, the 11 February 2021 particulars only refer to a claim of the breach of the duty to make reasonable adjustments which as already indicated does not expressly appear in the claim form although there are references to the failure to postpone the capability hearing which the claimant could not attend because of her alleged disability and to the circumstances of a telephone call om 14 August 2019 which could arguably be describing a reasonable adjustments claim and claims of direct or indirect disability discrimination (paragraph 116 of the claimant's consolidated claim document).

34. Accordingly, the only claims of disability discrimination that are pleaded and can proceed are any that are founded upon the factual scenarios appearing in that paragraph.

35. The claims of race discrimination and unfair constructive dismissal, as now particularised, cannot be said to have no reasonable prospects of success.

36. As for the respondent's alternative application for a deposit for both those claims, I make no deposit in respect of the claim of race discrimination. Miss Criddle has identified that the claimant may well face difficulty in respect of lengthy periods of time between the less favourable treatment she alleges and in particular an apparent lengthy gap between the date of the last act complained of and the claim form being submitted. Given the nature of the discretion afforded to Tribunals when assessing whether to extend relevant time limits in discrimination cases, this is a matter that can only be properly be assessed having heard relevant evidence. In this case in particular given what I understand to be a complex underlying factual scenario with the claimant's ill health and the ongoing workplace procedures, I cannot say that she has little reasonable prospects of success.

37. Similarly with the unfair constructive dismissal claim, Miss Criddle has identified likely difficulties the claimant may well have in making out her claim due to the timescale of events and delays between some of the events that she complains about and her resignation in August 2019. However given that there was, on the respondent's case, a disciplinary process that ran from June 2018 to April 2019 which overlapped with a capability process from January 2019 to August 2019 and the claimant's case is based upon the internal processes being conducted unfairly and inappropriately, I cannot say before hearing evidence that the claimant has little reasonable prospects of success. Accordingly it is not appropriate to make a deposit order.

Next Preliminary Hearing

38. A further 2-hour case management preliminary hearing shall now be listed. The parties are invited to submit any dates to avoid within 7 days of the date this Judgment is sent.

39. The parties are reminded that ACAS's conciliation services can be used at any time and are encouraged, as per rule 3 of the Employment Tribunal Rules of Procedure 2013, to use alternative dispute resolution.

_____
Employment Judge K Andrews
Date: 2 March 2021