



EMPLOYMENT TRIBUNALS

Claimant
Ms S Mohammed

v

Respondent
Tesco Stores Limited

PRELIMINARY HEARING

Heard at: Watford (by CVP)
Before: Employment Judge Bloch QC (sitting alone)

On: 16 June 2021

Appearances:

For the Claimant: In person
For the Respondents: Mr C Kelly, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by video (CVP). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers and no objection was taken to this course. A bundle of over 200 pages was provided for the purposes of the hearing.

JUDGMENT

1. The respondent's application under Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("The Rules") to strike out the claimant's complaint of unfair dismissal on the basis that it has no reasonable prospect of success is refused.
2. The respondent's application under Rule 39 of the Rules of Procedure that the claimant pays a deposit, as a condition of continuing to advance the complaint of unfair dismissal, is upheld and the claimant is ordered to pay the sum of £75 no later than 11 August 2021 as a condition for continuing to advance the complaint of unfair dismissal.

REASONS

1. At a preliminary hearing (case management) on 4 March 2021, the Employment Judge recorded the background which was that the claimant was employed by the respondent as a Team Manager between 29 August 2015 and her dismissal for gross misconduct on 5 December 2019. After conciliation between 22

January and 26 February 2020 the claimant brought these proceedings on 26 March 2020 claiming unfair dismissal, race discrimination, sex discrimination, detriment and dismissal for making protected disclosures (whistleblowing) breach of contract (notice pay), holiday pay and unpaid wages. Although the claimant had earlier been represented by the Employment Law Service, she was no longer represented at the preliminary hearing and that was the position today.

2. The Judge referred to the respondent's intended application at the open preliminary hearing to consider whether the claimant's claims of unfair dismissal should be struck out. The respondent said that it had a recording of the claimant saying on the telephone to an IT helpdesk operative "fucking Indian bitch". The respondent said that its phone records show that the phone call was made using the claimant's mobile telephone. That was the proffered reason for dismissal. On that basis the Employment Judge ordered the strike out application that I heard today.
3. Although the respondent's solicitors were keen that I should hear two recordings of phone calls made by the claimant to a helpdesk in India on 14 October 2019 (in the second of which the alleged objectionable language was used) it was not possible for me to hear the recordings because of incompatibility of IT equipment. Several attempts were made to download the MP4 files provided but to no avail. Nonetheless, the respondent made powerful submissions regarding the weakness of the unfair dismissal claim based on matters extrinsic to the actual content of the audio files. In particular, given that the claimant was unrepresented, Mr Kelly, who appeared on behalf of the respondent and who diligently and fairly (in the best traditions of the bar) tried to put matters fairly on behalf of both parties, relied on three particular matters supporting the respondent's belief that the claimant made the particular calls with the alleged content:
 - 3.1 the call centre confirmed that calls came from the claimant's personal mobile number;
 - 3.2 each call began with the caller (at the request of the helpdesk) confirming an employee number and that number was the claimant's employee number;
 - 3.3 the respondent's personnel involved at the investigation disciplinary and appeal stage were of the view that, having regard to tone and mode of presentation, the voice they heard on the voice file was that of the claimant.
4. Mr Kelly made the point that the claimant had accepted in the course the disciplinary investigation and disciplinary process that both calls began with the helpdesk operative asking for the caller's employee number and that on both calls the number given by the caller was that of the claimant.
5. Mr Kelly also referred to a call on 20 October 2019 which was agreed by the parties to be a call by the claimant to the call centre. The disciplinary manager listened to the 20 October call and concluded that it was the same person

referring to the same employee number and making the same request of the IT desk as on the two disputed calls of 14 October 2019.

6. This undoubtedly presented a very powerful case on the part of the respondent ie that it reasonably believed having made proper investigation that it was the claimant who had made the disputed calls and used the objectionable language.
7. On the other hand, the claimant denied that the voice on the calls on 14 October was hers. This was a point which she made during the disciplinary process and, in particular, she said that on 14 October it was her first day in the new centre where she had been promoted to be a Team Leader, namely the Battersea branch of Tesco. She maintained that she had not made any calls at all on her first day. She also pointed out that she had asked the respondent to provide CCTV footage of the area where she worked on the relevant day. Mr Kelly told me that that video footage had been deleted by the time a search was instituted for it, but in his submission, it was in any event irrelevant to identify the voice on the particular recorded calls.
8. I should say that I had some considerable difficulty throughout the hearing in always understanding every word that the claimant uttered and on several occasions, I had to slow her down in order to understand her precise point. It was never precisely clear to me exactly what the relevance of the video footage was but I could see that she regarded it of significance in refuting the claim that she was party to the two calls on 14 October 2019.
9. The claimant had not produced a witness statement for the hearing (and neither had the respondent) as envisaged by paragraph 16 of the orders made on 4 March 2020 at the preliminary hearing. That said, I was conscious at the hearing today of the difficulties which the claimant appeared to labour under in understanding the proceedings, what needed to be done and why.
10. On the face of it, it would be a very drastic decision to strike out a claimant who denies that she was the person who was involved in the alleged misconduct. This is of course an unfair dismissal claim and not a breach of contract claim so the focus of the tribunal would be on management's reason for dismissal and whether it acted reasonably in treating that reason as a sufficient reason for dismissal. In other words, the totality of the conduct of management investigating the alleged misconduct and in coming to the conclusions which they did, in particular, the decision to dismiss, are all under the spotlight. In this connection Mr Kelly very fairly referred me to the claimant's appeal against dismissal (bundle page 163). She appealed on the following grounds:
 - 10.1 Failure to conduct a fair and full investigation into her alleged misconduct;
 - 10.2 relying on fabricated evidence to support her dismissal;
 - 10.3 not producing relevant CCTV footage that would benefit all parties to ascertain the real facts behind the alleged misconduct leading to her dismissal;

- 10.4 the real reason behind her dismissal was for blowing the whistle on her physical and verbal abuse by a senior line manager;
 - 10.5 a failure by the business to conduct a full investigation into her multiple grievances;
 - 10.6 using persons tainted to take part in her dismissal who held a grudge against her;
 - 10.7 failure to consider options short of dismissal;
 - 10.8 her race had been a factor behind her poor treatment.
11. While Mr Kelly assured me (and I am minded based on what I have seen and read to accept that this is likely) that there are answers to each of these points, however, two particular points emerged:
- 11.1 The unfair dismissal complaint is interlinked with the other complaints which will be going to trial, in particular the whistleblowing complaint and the race discrimination complaint;
 - 11.2 that the unfair dismissal claim involves a number of evidential matters in relation to the reasonableness of the decision to dismiss which would be pursued at trial, even if the claim were not struck out.

I am also particularly struck by the fact that the claimant is unrepresented and that she told me has been unable to obtain assistance in relation to today's hearing from any free sources of legal advice as she cannot afford to pay for any such advice.

12. In all the circumstances and not without some reluctance, I decided it would be too draconian a decision to strike out the unfair dismissal claim.
13. The position however in relation to the deposit order complaint is somewhat different. Under Rule 39 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 to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
14. From what I have set out above, I have no doubt at all that the unfair dismissal claim has little reasonable prospect of success, having come very close to resulting in a strike out.
15. Although the case management orders referred to a deposit order application being made in relation to the discrimination and whistleblowing detriment claims (which were not pursued today) I considered that the claimant was given sufficient notice of the possibility of what is a lesser order than strike out being made and that no unfairness arises out of the wording of the previous case management order. In any event, Rule 54 (as recently amended) has no specific requirement for any specific period of notice to be given of an application for a

deposit order, so that I consider that it is within my power to grant an order in the circumstances of today.

16. Rule 39 (2) of the Rules of Procedures states that in deciding whether to make a deposit order the tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and to have regard to any such information when deciding the amount of the deposit
17. It is obvious that the claimant's financial position is very weak indeed. She told me on oath (and was cross examined) that she is in receipt of Universal Credit of £833 per month. After deduction of her rent, council tax, electricity and gas, it seems that there is very little left over for food and usual bills, namely something in the nature of £150 per month or slightly less.
18. In all the circumstances it is clear that I cannot make an order anything like £1,000 as referred to in Rule 39. Nonetheless, it seems to me that given the weakness of the unfair dismissal claim it would be unfair to the respondent to allow it to proceed without anything at all being ordered in respect of a deposit order.
19. Doing the best I could, I have ordered the sum of £75 to be paid by the claimant but for that not to have to be paid until the schedule of loss is due (as set out in the directions which I have made today) – 11 August 2021.

Employment Judge Bloch QC

1 July 2021

Sent to the parties on:

27 July 2021

For the Tribunal:

S. Bhudia