



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms. Juliet Davies

v

Ivory Cottage Limited

Heard at: Birmingham via CVP On: 4 October 2021

Before: Employment Judge Wedderspoon

Representation:

Claimant: No attendance

Respondents: Mr. Howson, Senior Litigation Consultant

JUDGMENT

1. The claimant's claim is struck out.

REASONS

1. Pursuant to Employment Judge Cookson's order dated 27 July 2021 the Tribunal is to determine the respondent's application dated 27 July 2021 namely whether :-
 - (a)the claim should be struck out pursuant to Rule 37 (1)(a) because it is scandalous or vexatious or has no reasonable prospect of success;
 - (b)the claim should be struck out pursuant tot Rule 37 (1)(b) because the manner in which proceedings conducted has been scandalous, unreasonable or vexatious;
 - (c)the claim should be struck out pursuant to Rule 37 (1)(e) because it is no longer possible to have a fair hearing;
 - (d)a deposit order should be made.
2. In addition, pursuant to the order of Employment Judge Dimbylow dated 29 September 2021 the Tribunal is also to determine the respondent's applications contained in letters dated 27 July, 16 August and 7 September 2021 namely to strike out the claim for a failure to actively pursue her claim (rule 37 (1)(d) of the Rules).
3. The respondent limited its applications today to striking out the claimant's claim for (i)failing to actively pursue her claim or (ii)the claim having no reasonable prospect of success.
4. The Tribunal was provided with a bundle of 66 pages. This had also been sent to the claimant.

5. The claimant did not attend the hearing. By email on 1 October 2021 the claimant informed the Employment Tribunal she would not attend the hearing listed for today. The Employment Tribunal has tried to contact the claimant today but she is not responding. The respondent applied to proceed with the hearing in the claimant's absence pursuant to Rule 47 of the Rules.
6. In the circumstances that the claimant was aware of today's hearing since 27 July 2021 and has deliberately absented herself, the Tribunal determined that pursuant to the overriding objective it was in the interests of justice to proceed with the hearing.

The Law

7. Pursuant to rule 37 of the Employment Tribunal Rules it states "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)it is scandalous or vexatious or has no reasonable prospect of success (c)for non-compliance with any of these rules or with an order of the tribunal (d)that it has not been actively pursued.
8. The President in the case of **Malik v Birmingham City Council (UKEAT/0027/19)** summarised the state of the law on strike out. Striking out a claim brought by a litigant in person is a draconian step and should be taken only in exceptional cases **Mbuisa v Cygnet Healthcare Limited (UKEAT/0119/18)** and strike out of discrimination claims should be limited to the most obvious cases as they are generally fact sensitive (**Anyanwu v South Bank Student Union 2001 ICR 391**). Prior to striking out all material should be considered **Balls v Downham Market High School & College UKEAT/0343/10** and the claimant's case should be taken at its highest by examining the pleaded facts and assuming the claimant's version of disputed facts is correct **Mechkarov v Citibank NA UKEAT/0041/16**. The test of no reasonable prospect of success is a lower test than the test of a claim having no prospect of success.
9. In respect of non-compliance **Essombe v Nandos Chickenland Limited (UKEAT/0550/06)** the EAT upheld a strike out where a party had deliberately refused to comply with the tribunal's order to disclose tape recordings on the basis that it was a deliberate decision to disobey the tribunal's order which prevented the tribunal from having the best evidence on which to base its findings of fact and as a matter of public policy orders are there to be obeyed otherwise cases cannot be properly case managed and fairness achieved between the parties.
10. A claim is not actively pursued where through intentional and contumelious default the claimant has failed to comply with an order and it has been made clear that their claim would be struck out unless they complied with the order within the time allowed or where there is inordinate and inexcusable delay on the part of the claimant or their representatives which has created a substantial risk that serious prejudice has been or will be suffered by the respondent or that it is no longer possible to have a fair trial of the issues (**Birkett v James 1978 AC 297**).

11. A deposit order may be made pursuant to Rule 39 where 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 £1000 as a condition of continuing to advance that allegation or argument. The discretionary power to make such an order should be exercised in accordance with the overriding objective having regard to all the circumstances of the case (**Hemdan v Ishmail UKEAT/0021/16**).
12. In exercising the Tribunal's discretion, it must take into account the overriding objective to deal with cases justly and fairly.
13. In respect of public interest disclosure claims, the first stage is to consider whether a qualifying disclosure has been made pursuant to section 43B of the Employment Rights Act 1996. In order to amount to a qualifying disclosure there must be a disclosure of information; this can be part of making an allegation; **Kilraine v London Borough of Wandsworth (2018) ICR 1850**. The disclosure must be of a "particular kind" including a criminal offence has been committed, is being committed or is likely to be committed or a person has failed, is failing or is likely to comply with any legal obligation to which he is subject or that the health or safety of any individual has been, is being or is likely to be endangered. In the reasonable belief of the worker making the disclosure the information must tend to show one of the particular kinds of category as set out above; **Chesterton Global Limited v Nurmohamed (2018) ICR 731**. A protected disclosure is one made in accordance with section 43A of the Employment Rights Act 1996.

History

14. From 6 January 2020 to 22 September 2020 the claimant was employed by the respondent as an administrative assistant. By claim form dated 14 February 2021 the claimant brought complaints of automatic unfair dismissal following allegedly making protected interest disclosures. The respondent's case is that the claimant was dismissed by reason of redundancy. It contends that the claimant has made wild and untrue allegations of officers of the respondent and her claims are scandalous and vexatious.
15. At a Preliminary Hearing before Employment Judge Cookson on 27 July 2021 (page 33) the claimant, who was in attendance, was ordered to provide by 13 August 2021 details of the disclosure of information that she says that she made by telephone and email to OFSTED; *"If the claimant says that the email covers everything that was said this may be satisfied that by providing a copy of the email and details of the disclosure of information that she says that she made to John Leachman"*.
16. The respondent wrote to the claimant on 9 August 2021 to remind the claimant to provide the particulars ordered by the Tribunal (page 54). The claimant did not provide the further and better particulars ordered by the Tribunal by 13 August 2021.

17. On 16 August 2021 (page 55) the respondent made a further application to strike out the claimant's claim on the basis that the claimant was not actively pursuing her claim. Alternatively, the respondent sought an unless order against the claimant. On 7 September 2021 the respondent applied to strike out the claimant on the basis that the claimant had repeatedly failed to comply with the court orders and was not actively pursuing her claim.

Submissions

18. The respondent submitted at the Preliminary Hearing on 27 July 2021 that both sides were ordered to provide disclosure. The respondent complied with the order by 5 August 2021 but the claimant failed to comply with the order to provide further and better particulars. This is despite the fact that the respondent reminded her to do so by its letter dated 9 August 2021. The respondent submitted that it does not know due to the failure to comply with the Tribunal orders the case it has to meet a trial. In addition, it was submitted that by order 29 September 2021 Judge Dimbylow directed the claimant to give a detailed explanation by return of email why she has failed to deal with correspondence sent to her by her respondents' representatives. The claimant did not reply to this either. The claimant has decided not to attend today by her email dated 1 October 2021 and has provided no reason at all.
19. The respondent submitted that the claim as pleaded has no merit because the claimant has failed to elaborate any details. It has no reasonable prospects of success. Alternatively, it was submitted that the claimant has not actively pursued her claim and failed to comply with various case management orders. She has been given a number of opportunities to comply and she has failed to do so. She even had the opportunity to attend today and explain her case and has decided not to attend. The claimant is not pursuing her claim. The respondent sought a strike out of the claim.

Conclusions

20. The claimant has failed to actively pursue her claim. At the Preliminary Hearing on 27 July 2020, she was given an opportunity to provide particulars of her claim by 13 August 2021. Those particulars should have set out the detail of her alleged qualifying disclosures. In the absence of that material the respondent is unaware of the case it has to meet at trial.
21. The claimant was reminded by the respondent by email dated 9 August 2021 to provide the further information by 13 August. The claimant failed to do so. The respondent wrote to the claimant on 16 August and 7 September seeking to strike out the claimant's claims by reason of failing to comply with the Tribunal orders and failing to actively pursue her claim. The claimant failed to respond to this correspondence. The Tribunal gave the claimant a further opportunity to respond to the respondent's applications by the Tribunal's letter dated 29 September. The claimant has failed to respond to this. The claimant by email dated 1 October 2021 stated that she is not attending today's hearing and has failed to give an explanation.
22. It is fundamental that a litigant sets out her case so that the other side knows the case it has to meet at trial. The claimant has been given numerous

opportunities to do so and without explanation has failed to do so. The claimant had an opportunity to attend today to provide further explanation of her claim but she had deliberately absented herself.

23. The Tribunal conclude that the claimant is not engaging in the litigation process and is not actively pursuing her claim. The respondent still does not know the case that it has to meet at trial and is severely prejudiced in its trial preparation. The Tribunal takes account that it is a draconian step to strike out a claim and to do so is an exceptional step when a litigant in person is bringing a claim. However, this is an obvious and plain case that the claimant is not engaging in the process. In the circumstances, the Tribunal strikes this claim out for failure to actively pursue it.
24. Alternatively, the Tribunal concludes on the present pleading that the claim has no reasonable prospects of success. The constituent parts of a public interest disclosure claim includes what was actually disclosed in order to establish whether that amounts to a qualifying and protected disclosure.
25. The claimant has failed to provide these details despite being given a number of opportunities to do so. A mere assertion that a qualifying and protected disclosure has been made is insufficient to establish such a claim. The tribunal is also mindful of the Equal Treatment Bench Book paragraph 26 of chapter 1 which highlights the difficulties litigants in person may face in pleading their cases. The Tribunal is satisfied that it has given assistance and leeway from the court to identify the type and nature of claim she brings but the claimant has still failed to set out the detail of the same. The Tribunal concludes that the claim has no reasonable prospect of success and is dismissed.

Employment Judge Wedderspoon

04 October 2021

Note - Reasons for the judgment having been given orally at the hearing, writ ten reasons are provided because the claimant failed to attend the hearing.

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