EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100419/2021 Preliminary Hearing by Cloud Video Platform on 21 July 2021

Employment Judge: M A Macleod

Andrew Spinks — Claimant
Not Present and
Not Represented

KPPES Ltd — Respondent
Represented by
Ms K Irvine
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims are struck out under Rule 37(1) on the grounds that they have no reasonable prospect of success.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 29 January 2021 in which he complained that he had been discriminated against on the grounds of age by the respondent, and unlawfully deprived of "other payments".

2. The respondent submitted an ET3 response in which they resisted the claimant's claims, and observed that the basis for each of those claims was unclear and required further specification.

3. Following 2 Preliminary Hearings for the purposes of case management and further correspondence between the parties the case was listed for a Preliminary Hearing (Open) on 21 July 2021 to determine the respondent's application for strike out of the claimant's claims on the grounds that they have no reasonable prospect of success.

4. The claimant did not appear at the Preliminary Hearing on 21 July. The respondent was represented by Ms Irvine, solicitor. She presented a bundle of productions which was available electronically to the Tribunal and relied upon during the course of the hearing.

The Claimant's Non-Attendance

5. The claimant did not appear at the Preliminary Hearing on 21 July 2021. On 19 July 2021, he submitted an application for postponement of this hearing, on the basis that he wished to seek independent legal aid (which I understood to mean legal advice) from the Citizens Advice Bureau. He indicated that he would be on holiday from next week and would have time to ascertain properly his legal rights. He also indicated that he wished to investigate the conduct of the respondent's solicitor who "has taken this opportunity to personally attack my character to turn me from the victim into the villain". He went on to say that he found the "whole system prejudicial and not conducive to a fair and just hearing."

6. That application was opposed by the respondent, and following consideration, it was refused by the Employment Judge Gall on the basis that the hearing had been fixed on 9 June 2021, and there was no contact from the claimant after that date until his email of 19 July seeking a postponement. There was no explanation of why no earlier approach was made or what steps, if any, had been taken to obtain legal advice since 9 June.

7. It was confirmed that the application was refused but that it could be renewed at the outset of the hearing if different or fuller grounds for the application were advanced.

8. It was therefore confirmed to parties that the Preliminary Hearing listed to take place on 21 July 202.1 would remain in place.

9. At 12.58pm on 20 July, the claimant emailed the Employment Tribunal CVP clerk to advise, in response to an invitation to participate in a test of the CVP system, that he had asked for a postponement, but that in any event he had now been asked to "cover a school trip tomorrow and cannot attend anyway as work comes first".

10. At 7.57am on 21 July, the claimant, having been advised that the application for postponement had been refused, emailed the CVP clerk to confirm that "I have work commitments today which mean that I am unable to attend the hearing".

11. At the outset of the hearing, Ms Irvine noted the terms of the claimant's correspondence. I also drew her attention to the provisions of Rule 47 of the Employment Tribunals Rules of Procedure 2013:

"If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence. "

12. Ms Irvine made no application to the Tribunal. I determined that in the circumstances it would be appropriate to proceed with the hearing in the claimant's absence, based on the information which was available to me at that time.

13. In particular, I took into account that the claimant had intimated in advance of the hearing that he would not be attending, having accepted a work commitment instead; that he had applied for a postponement two days prior to the hearing, but which was refused; and that in that application for

postponement he made no reference to any work commitment which would prevent him from attending the hearing. Further, it was clear from the terms of the Tribunal's letter of 20 July that should he wish to renew his application to postpone the hearing to seek legal advice, he could do so by providing fuller or different grounds. He did not do so.

14. As a result, it was plain that the claimant had chosen not to attend the hearing of his own claim, at which he was aware the Tribunal would determine the respondent's application to strike out his claims on the grounds that they had no reasonable prospect of success. In that light it seemed to me to be pointless to adjourn or postpone the hearing, or to make any further inquiries of the claimant in light of his stated determination not to attend, and accordingly I directed that the hearing should proceed in the claimant's absence, as is provided for in Rule 47.

The Respondent's Application and Submission

15. The respondent's solicitor submitted an application by letter dated 26 May 2021 for the claims to be struck out for want of jurisdiction and/or because they had no reasonable prospect of success (57).

16. The application set out the history of the proceedings, referring in particular to the Order of Employment Judge Doherty (30ff) requiring the claimant to provide further specification of his claim.

17. In particular, the claimant was required to identify the statutory basis of the age discrimination claim in terms of the Equality Act 2010, and to identify the dates when he complained that he should have been put on furlough, and if he alleged that he had a contractual right to be furloughed, the term of the contract upon which he relied. To the date of the application, it was asserted, the claimant had not provided any of the required information.

18. The respondent's agent then referred to the claimant's email of 9 May 2021 in which he had made a number of general assertions about his assumption that he would be protected by employment law, and that "there are very strong moral and ethical arguments for me thinking that companies like this

absolved their responsibilities to workers because of the government's intransigence over the furlough scheme."

19. The letter went on to set out the various items of correspondence which followed, and particularly referred to the claimant's amended agenda document which contained a number of statements at paragraph 2.7 setting out the basis of his claims.

20. Those statements were set out in the respondent's letter, and may be summarised, in 9 paragraphs as articulated by the claimant, as follows:

    1. As he was furloughed to September 2020 he "should have reasonably expected to be protected under employment law".

    2. He was, at the age of 60, high risk, and could not reasonably be expected to find alternative employment.

    3. He had to support a wife and daughter and had incurred £10,000 in debt due to not working.

    4. He was in a high risk category.

    5. He was not offered redundancy.

    6. He sought to suggest that he was claiming indirect discrimination on the basis that solicitors were openly advising their clients not to furlough their staff, a reference to material found on "various websites". He suggested that they (and as an aside, it is entirely unclear who "they" are meant to identify - solicitors, employers, the government, or the respondent) have interpreted government guidance that companies do not have to furlough employees as an open invitation to pick and choose which employees to furlough. He went on: "If this is not a case of indirect discrimination against certain employees then I don't know what is!"

    7. He then said that companies had access to various loan schemes through the government which negated the excuse of not furloughing employees.

8. He compared the approach taken by a teaching agency to that taken by the respondent, a payroll agency supplying teachers on zero hours contracts, and suggested that he had been told by the teaching agency that they were surprised and disappointed at the payroll agency's decision, describing it as "immoral and unethical practice".

9. Finally, he complained about the stance of the government stating that it was a matter for companies to decide whether or not to furlough employees, which gave the green light for companies to discriminate against the claimant and similar employees. He asserted that "When the govt acts against the interests of its citizens it is the job of the courts to step in and rectify any injustice. When they attempted to end parliament early, the supreme court stepped in to declare their actions as illegal. I trust in the legal system in this country and the mechanisms for gaining justice."

21. As a result of the content of this document, the respondent submitted that the claimant had had several opportunities to seek legal advice or conduct his own research into the legal basis for the claim. They went on to say that the claimant had failed to provide a legal basis for his claims.

22. They made a number of observations about the points raised by the claimant.

1. The claimant was in fact 59, and not 60, but did not set out any basis for his assertion that his age made him high risk, or how he was at higher risk than any other age group, or why this formed the grounds for a claim against the respondent Further, they said that although he said he could not find alternative employment he was in fact able to work from September 2020 onwards when schools reopened until January 2021 when they closed again.

2. He was not offered redundancy because he was not redundant, nor did he have sufficient qualifying service on which to be entitled to a redundancy payment.

3. The claimant's reference to indirect discrimination does not provide any specification of such a claim under section 19 of the 2010 Act. While the claimant is evidently frustrated about the operation of the furlough scheme, the respondent asserted that he had not alleged that the respondent did anything unlawful or in breach of contract.

23. The claimant's response was set out in his email of 9 May 2021 , attaching a "Statement of Truth" (38). He explained the circumstances in which he had been advised by the respondent that the furlough scheme was coming to an end in August 2020, citing prohibitive costs in its administration. He complained that for this first time in 30 years he found himself unable to support his family, and it was impossible to find alternative employment. He required to borrow £10,000 to keep his daughter in school and to allow his family to live.

24. He suggested that he was wrong when he had understood the respondent to be a reputable company who would protect its employees. He assumed that he would be protected under employment law as an employee of the company, and was unaware that the advice given to companies was to take decisions which were best to ensure their long term survival.

25. He said that he hoped that the court uphold his complaint against the respondent because the pandemic had placed him in an impossible situation. He went on: "At my age, I should reasonably expect that my employer would have supported me and continued my furlough payments. There are very strong moral and ethical arguments for me thinking that companies like this absolved their responsibilities to workers because of the government's intransigence over the furlough scheme.''

26. The respondent concludes their application by pointing out that the Tribunal does not have jurisdiction to hear the claimant's moral and ethical arguments about the operation of the furlough scheme. Accordingly, they submitted that the claims should be struck out for want of jurisdiction and/or because they had no reasonable prospect of success.

27. In the alternative, the respondent made reference to a deposit to be paid by the claimant to allow him to continue with these proceedings.

28. In her submission before me, Ms Irvine summarised the background correspondence. She referred to the claimant's contract of employment (64) in which there was no obligation to furlough an employee. She also pointed to the terms of the Furlough Agreement issued by the respondent (72ff at 74) in which the respondent made clear that this was a matter of discretion. The claimant signed the Furlough Agreement on 9 April 2020. Further, the claimant was notified of the termination of furlough on 21 August 2020 (79).

29. Ms Irvine pointed out that the respondent made numerous efforts thereafter to explain to the claimant their reasoning (83/4 and 81/2), making clear the application of the furlough scheme was discretionary and pointing to the financial difficulties arising as part of the reason for ending that arrangement in the business supplying teachers to schools. The financial reasons were, she submitted, nothing to do with the claimant's age.

30. The claimant was invited by the respondent to set out the information and basis upon which he asserted to them that they had discriminated against him on the grounds of age, but he did not do so.

31. With regard to the decision on whether or not to strike out the claim, the Tribunal requires to go through a two stage process: firstly to decide whether the claim has no reasonable prospect of success; and secondly, if so, whether to strike the claim out.

32. In this case, Ms Irvine submitted that the claim should indeed be struck out.

Discussion and Decision

33. Rule 37(1)(a) and (b) of the Employment Tribunals Rules of Procedure 2013 provides:

"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..."

34. Rule 37(2) provides:

"A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing. "

35. Striking out a claim on the grounds that it has no reasonable prospect of success is a draconian measure which should only be taken by the Tribunal in rare cases.

36. The respondent has applied to have the claim struck out on the basis that it has no reasonable prospect of success. In order to assess this, the Tribunal requires to consider the claimant's claim at its highest, assuming that the assertions made in it are all correct and accurate.

37. It is not entirely clear whether the claimant is making one claim or two in this case. The respondent plainly approaches the matter on the basis that it is one claim, of discrimination on the grounds of age, and that any reference to unpaid wages simply refer to the remedy which the claimant is seeking.

38. The difficulty for the claimant in this case is that he has struggled to articulate any unlawful or discriminatory act which the respondent has carried out against him. The claimant plainly feels a sense of very strong injustice about the manner in which the furlough scheme was operated, both by the respondent and by the UK Government - his email to the Chancellor of the Exchequer dated 6 February 2021 (96) is in vivid and highly critical terms. The effect of the pandemic upon the claimant, consequent upon the respondent's decision to cease its reliance upon the furlough scheme, has been financially punitive and clearly highly distressing. It is impossible not to feel sympathy for a professional who has,

through circumstances entirely outwith his control, been placed in such a precarious position.

39. However, the Tribunal cannot merely deal with what a party perceives to be an injustice. The claimant's assertion that it is the role of courts to step in where governments exceed their authority or disobey the law misunderstands the role of the Employment Tribunal in this case, and possibly the wider role of courts. The example given, in which the Supreme Court declared the prorogation of Parliament to have been unlawful, was a decision not taken spontaneously by the Supreme Court but one based upon an application made by a UK citizen who was able to persuade the Court that her complaints had both a jurisdictional and a substantive basis.

40. In this case, the Employment Tribunal is only empowered to act in response to a claim made by a claimant in which a coherent, clear basis for a complaint over which the Tribunal has jurisdiction is placed before it.

41. The claimant's basis for his claim, that he was discriminated against on the grounds of age, has not been properly set out in this case, in my judgment, despite the claimant having been given the opportunity on more than one occasion to do so.

42. He seems to suggest that he was in a high risk category, but it is unclear in what respect he says that. It appears to relate to the fact that at the age of 60 (or, more accurately, 59) he believed that if he were to lose his employment, he would be more likely than a younger person to find it difficult to find alternative employment. He clearly thinks this to be self-evidently true, but there is no basis in his claim upon which he provides any foundation for such an assertion. In any event, that assertion - that older employees find it more difficult to resume employment after a break than younger employees - does not amount in itself to an allegation of discriminatory conduct.

43. The claimant has not, in my judgment, identified any act of the respondent which could remotely be described as unlawful. He has not pointed in his claim to any statutory provision which the respondent has breached; he has

not directed the Tribunal to any provision in his contract of employment which would be breached by their decision to terminate the furlough arrangement. By contrast, he has on a number of occasions pointed in frustration to the Government guidance that furloughing employees is a matter within the discretion of employers, depending on their circumstances. He has not sought to introduce the UK Government as a party to these proceedings, but his own language clearly states that the respondent was simply following the Government guidance, and it is that guidance with which he takes issue.

44. He repeatedly asserts that he expected the "protection of employment law" in these circumstances, but he has not explained what he means by this. It is unfortunate that the claimant, as an unqualified and unrepresented party, has persisted in making this assertion without any clear understanding of what he means. Employees are, in general terms, entitled to the protection of the law. This is no more than a general statement of the purpose of employment law in the United Kingdom. However, employees are only entitled to the protection of the law insofar as the circumstances in which they find themselves are such as to afford them any specific protection.

45. The claimant has not identified any basis for a claim that he was treated less favourably than a younger employee would have been, under section 13 of the Equality Act 2010. There is no indication that any younger employee employed by the respondent was not furloughed at the same time as he was. As a result, there can be no basis in his claim for an assertion that he was treated less favourably than a younger employee if both were treated the same.

46. Despite the best efforts of Employment Judge Doherty in her very clear and specific Note following Preliminary Hearing, the claimant has not grasped the meaning of indirect discrimination. I discern the claimant's meaning of indirect discrimination as being that he believes that if the respondent were advised by a third party, such as a solicitor or the Government, to cease the furlough scheme, that amounted to "indirect" discrimination, in the sense

that its source was not directly the employer but another body influencing the employer.

47. When the claimant states, at paragraph 6 on his amended agenda, that "If this is not a case of indirect discrimination against certain employees then I don't know what is", it is clear that, very unfortunately, he is indeed betraying a lack of understanding of the concept of indirect discrimination. The Tribunal does not criticise a lay person for such a lack of understanding of what is a complex legal concept which troubles many experienced practitioners in employment law, but it is most unfortunate that the claimant has continued to make strong assertions of wrongdoing against the respondent without availing himself of the advice or research which would have helped him to understand this concept.

48. In the absence of any allegation which provides a basis for a finding that the respondent has acted unlawfully, in a discriminatory manner or in breach of the contract of employment towards the claimant, the Tribunal is drawn inexorably to the conclusion that the claimant's claims have no reasonable prospect of success and must therefore be struck out.

49. It is important to point out that Rule 37(2) provides that a decision of this seriousness cannot be made without the claimant having a reasonable opportunity to make representations to the Tribunal. In this case, the claimant had that reasonable opportunity, but chose not to avail himself of it.

50. The claimant's attitude to this Hearing was incomprehensible. He sought a postponement of the Hearing at a very late stage, when he must have understood that there was little prospect that it would be granted, having failed to communicate with the Tribunal for many weeks prior to that. When it was refused, he then simply intimated that he had a work commitment and would not be attending. It is hard to avoid the conclusion that the claimant simply did not wish to engage with the respondent's application or the Tribunal, and the fact that he did not mention a work commitment in his application for postponement is very puzzling.

51. In addition, the claimant's conduct of these proceedings has been unhelpful on occasions. Even taking into account the fact that he is an unqualified and unrepresented party, his repeated assertions of wrongdoing on the part of the respondent's solicitors are, so far as the Tribunal has been able to see, baseless and unfair. A solicitor practising before the Tribunal has an obligation to represent her client and is restricted in the steps that she can take in defending herself against personal and professional allegations such as those directed at her by the claimant in this case. It is appropriate for the Tribunal to step in to protect the solicitor from baseless allegations in these circumstances. From the correspondence which I have seen, the respondent's solicitor has done no more than act professionally to defend the interests of her client. That she has sought to strike out the claimant's claim does not mean she has acted improperly. It is understandable that the claimant would consider this to be a hostile and unfair act, but in my judgment in this case it is neither.

52. The reality is that the claimant has been given every reasonable opportunity to articulate his claim, but has failed to do so.

53. In any event, it is my judgment that the claimant's claim should be struck out on the basis that it has no reasonable prospect of success.

Employment Judge: M Macleod
Date of Judgment: 23 July 2021
Entered in register: 27 July 2021
and copied to parties