EMPLOYMENT TRIBUNALS

Claimant: Ms S Messi

Respondents: (1) Cordant People Limited
(2) Lucy Goring
(3) Hinduja Global Solutions UK Limited

Heard at: London Central **On:** **18 January 2022**

Before: Employment Judge Joffe

Appearances
For the claimant: No appearance or representation
For the first and second respondent: Mr P Brill, solicitor
For the third respondent: Mr C Khan, counsel

JUDGMENT

1. The following claims have no reasonable prospects of success and are struck out:
   a) All claims against the second respondent;
   b) The claimant's claim for ordinary unfair dismissal (section 98 Employment Rights Act 1996);
   c) The claimant's claims of race discrimination;
   d) The claimant's claims of sex discrimination;
   e) The claimant's claim to have suffered a detriment due to public interest disclosures (section 47B Employment Rights Act 1996);
   f) The claimant's claim against the third respondent for notice pay. That claim is not struck out against the first respondent;
   g) The claimant's claim against the third respondent for pension payments. That claim is not struck out against the first respondent.

2. The claimant's claims that the first and third respondents were in breach of a duty to make reasonable adjustments and for direct disability discrimination are not struck out.
3. There was no application to strike out the claim under section 103A Employment Rights Act 1996 in Case Number 2204154/2021 and that claim is not struck out.

REASONS

Claims and issues

1. This was an open preliminary hearing to consider the respondents' applications to strike out the claimant's claims or for deposit orders.

2. The respondents primarily sought to strike out the claims on the basis that they had no reasonable prospects of success, alternatively that they were vexatious. In oral submissions, all of the respondents focussed on the argument that the claims had no reasonable prospects and that was the basis in which I considered the applications.

Reconsideration

3. At the hearing, I announced my decision on the applications but said I would reserve the detailed reasons, due to lack of time. I also made a direction that the claimant provide information relevant to the deposit order applications, since I had no information about the claimant's means. Whilst preparing the detailed reasons, I became aware of circumstances which caused me to decide that I might need to reconsider my decision. Those circumstances are explained in the letter sent to the parties on 20 January 2020 and are as follows:

   Employment Judge Joffe is of the view of her own initiative that in the interests of justice the judgment should be reconsidered.

   The grounds for the proposed reconsideration are that:

   On 18 January 2022, I heard the respondents' applications for strike out and deposit orders in the above case number and made a judgment on strike out and some orders, reserving the reasons. Whilst drafting the reasons, it has become apparent to me that so far as the first respondent is concerned, the proceedings in Case Number 2204302/2021 were consolidated with those in Case Number 2204154/2021. In order to decide the strike out applications in particular, I had to consider carefully the contents of the claim form in Case Number 2204302/2021. The bundle did not include the claim form in Case Number 2204154/2021 and I had not seen this claim form at the time I made my judgment. It is not clear from the first and second respondents'*

submissions whether they were in fact seeking strike out of the claims in Case Number 2204154/2021 also.
I am proposing to reconsider my judgment and whether to vary my orders because it seems to me that I was obliged to consider the contents of both claim forms in assessing what the claimant's claims were about and whether they had reasonable prospects of success.

If you think the judgment should not be reconsidered, you must write to us, giving reasons, by ***3 February 2022****. In any event, you are asked to write to us by that date setting out your views on whether the reconsideration can proceed without a hearing.*

The orders made orally and recorded below are suspended pending consideration of whether the judgment should be reconsidered.

4. The third respondent made written submissions to the effect that reconsideration would not be appropriate in relation to the causes of action which concerned the third respondent. The claims under Case Number 220415/2021 were not accepted against the third respondent; the third respondent had not been 'formally served' with any documents in those proceedings.

5. The first and second respondents said the following;
   - The strike out application had been in respect of the '8 discernible claims' in case number 2204302/2021 and not the claim in 2204154/2021.
   - The substance of the claims in 2204302/2021 replicated the claims in 2204154/2021. The claims brought in 2204302/2021 were those rejected in 2204154/2021[1]
   - The second respondent was not a party to the claims in 2204154/2021;
   - Given the level of duplication, looking at the first claim form would make no difference to consideration of strike out of the claims in 2204302/2021.

6. The claimant said the following;
   Email of 1 February 2022: *I will write to the ET and explain within the appropriate time given why the judgement should be reconsidered in the public interest and provide evidence as such*

   Email of 8 February 2022: *My existing claims should not be strike out because the judge did NOT establish the facts of the claims and I was not able to provide evidence and to give oral evidence to support my claims and I would like an opportunity for a hearing to determine the issue.*

[1] The claimant's first claim included a claim for interim relief (section 103A ERA 1996 dismissal). All claims were rejected apart from the section 103A complaint against the first respondent as the claimant had not complied with Early Conciliation requirements.

A deposit order should not be granted as a condition to pursue my claims because my claims was striked out before given the opportunity to a fair hearing in which all parties should have

7. I concluded that it was appropriate for me to reconsider my decision without a hearing. Given that strike out is a draconian step and given the claimant's absence from the hearing, it seemed to me that it was in the interests of justice to look at all of the material she had provided which might assist in understanding the nature of her claims, including the contents of her claim form in Case Number 2204154/2021.

8. I accordingly bore in mind the contents of that claim form when reconsidering each of the strike out and deposit orders. My conclusions remained the same.

9. I must apologise to the parties for the length of time this Judgment has taken to be promulgated.

Findings

The hearing

10. This hearing had been postponed from November 2021 after an application by the claimant, made on the grounds of ill health. The Tribunal also had a lack of judicial resource on the previous hearing date.

11. The claimant did not attend the CVP hearing. She had previously been sent a notice of hearing and was emailed joining instructions for the video hearing on 17 January 2022. The Tribunal clerk emailed her and made several attempts to telephone her at the number on the Tribunal file. The calls went to voicemail.

12. I was satisfied that the claimant had had the opportunity to attend the hearing but had not done so. The respondents had expended resources attending the hearing and it was in no one's interests that there be further delay, particularly since the claimant's claims were poorly particularised. I therefore decided to proceed with the hearing in the claimant's absence.

13. I was provided with a bundle of 212 pages, which I understood included documents disclosed by the claimant. I had a skeleton argument from the third respondent and a detailed application from the first and second respondents. I heard detailed oral submissions for the respondents.

Findings

14. I did not hear any evidence and it was no part of the Tribunal's function at this stage to make findings of fact on disputed issues. It is relevant however to summarise the chronology of uncontroversial matters and documentary evidence.

15. The first respondent is a temporary work agency which provided temporary workers to the third respondent and other clients. The second respondent is an employee of the first respondent. The third respondent is a company which provides outsourced customer services and at relevant times had a contract with the NHS to provide such services for the Covid-19 vaccination programme.

16. In order to fulfil its contract with the NHS, the third respondent required call handlers to work from home to take calls from members of the public about Covid passports. It entered into an agreement with the first respondent to recruit call handlers.

17. In about May 2021, the first respondent advertised the roles:

Job Role:

Responding to incoming calls as a Customer Sen/ice Agent.
Training will be provided.
You will be required to work any 5 days out of 7.
You must be able to work between the hours of 7am - 11pm.
You will receive a weekly rota based on this.
£8.91 p/h.

18. The claimant applied for this role on about 8 May 2021.

19. On about 11 May 2021, Patrick MacDonald of the first respondent contacted the claimant. The claimant was offered the role and on 11 May 2021 received a contract from the first respondent, which included these provisions:

2.3 The Agency Worker is engaged and supplied as a worker, and as such is entitled to certain statutory rights, however nothing in this Contract shall be construed as giving the Agency Worker rights in addition to those provided by statute for workers unless where expressly stated.

3 Assignments and Information to be Provided
3.1 The Employment Business will endeavour to obtain suitable Assignments for the Agency Worker to perform the agreed Type of Work. The Agency Worker shall not be obliged to accept any Assignment offered by the Employment Business.
3.2 The Agency Worker acknowledges that the nature of temporary work means that there may be periods when no suitable work is available and agrees that the suitability of the work to be offered shall be determined solely by the Employment Business, and the Employment Business shall incur no

liability to the Agency Worker should it fail to offer Assignments of the Type of Work or any other work to the Agency Worker.
4 Agency Workers' Obligations
4.1 The Agency Worker is not obliged to accept any Assignment offered by the Employment Business but if the Agency Worker does accept an Assignment, during every Assignment and afterwards where appropriate, s/he will:

4.1.4 Not behave in a way which could be detrimental to the interests of the Employment Business and/or client which includes any conduct which could bring the Employment Business and/or the Client into disrepute and/or which results in the loss
of custom or business by either the Employment Business or the Client.
…
9 Termination
9.1 Any of the Employment Business, the Agency Worker or the Client may terminate the Agency Workers Assignment at any time without prior notice or liability. However, each of the Employment Business and the Agency Worker shall endeavour (wherever possible) to provide at least one week's written notice to end an Assignment.
…
12 Data Protection and Disclosure of Confidential Information to a Third Party
…
12.1 To provide the Agency Worker with work under this contract, the Employment Business will process personal information about the Agency Worker. The ways in which this personal information is used is governed by the General Data Protection Directive and associated data privacy laws (or GDPR for short). This includes a range of information including (but not only) the name, address, date of birth, bank details, tax information, employment records and information about when, how and where the Agency Worker has worked for the Employment Business, it's clients, and information connected to the Agency Workers' safety, health and wellbeing in connection with the employment...

12.2 To allow the Employment business to continue to provide the Agency Worker with work, the Employment Business may share personal data with customers (e.g. for security reasons for customers whose premises the Agency Worker works at, or to manage the allocation of shifts) and their representatives (such as auditors), and with others in our group of companies (e.g. to find the Agency Worker new assignments or to process pay).

20. On 12 May 2021, the claimant filled in a screening form, which included this section:

Do you require any reasonable adjustments at work?

21. The claimant indicated that she required ‘back support’.

22. On 13 May 2021, the claimant emailed Mr MacDonald:

> *In regards to reasonable adjustments you asked me will I be provided a back rest or should I purchased one myself?*

23. On 17 May 2021, the claimant started work; she was contracted to work 37.5 hours over 5 days scheduled between 7 am and 11 pm.

24. On 20 May 2021 the claimant emailed Alex Beavis of the third respondent:

> *Reasonable Adjustments to my disability:*
> *I mentioned when asked for reasonable adjustments at my interview if possible a back rest and because of medication I take I requested hours preferably after 10 pm because of the medication I take.*

25. The claimant continued to email both the first and third respondents on a variety of topics and there were a number of such emails in the bundle. I refer to those which seem relevant to the causes of action in the claim form.

26. On 24 May 2021, the claimant emailed Mr MacDonald:

> *Due to medication I take for my disability, I also requested reasonable adjustments and preferably hours after 10-10am preferably and back rest, when asked, and again just requesting an update. I also emailed 2 different TM in regards to this but not reflecting in to my Rota.*

27. On 31 May 2021, the claimant emailed Mr MacDonald:

> *After speaking to Acas, I was advised to request my hours to be amended to late hours because of the medication that I take due to my disability. This is a reasonable adjustments request as I have disclosed my disability at the interview. Preferably after 10am. As discussed I will also buy the back rest so that I can refunded by cordant my employer.*

28. There was an email in the bundle dated 1 June 2021 which appeared to be an internal email of the third respondent. Names of the sender and recipient were redacted. A number of concerns were raised about the claimant and the comment is made: 'From all of the above, needing set shifts, flexible breaks and refusing verbal conversation I am not confident that she is suitable for our campaign.'

29. On 2 June 2021, the claimant ordered her own back rest and forwarded Mr Macdonald evidence of her purchase.

30. That day, Mr MacDonald emailed the claimant an account of a discussion they had had. Part of that email read:

> *1) Request for starts after 10am only :*
> *Sandra explained that she has requested this as she takes medication for her back and would be a preference to start later in the day, if possible.*
> *I explained that we had put the request to HGS but unfortunately this would not be possible. HGS are unable to accommodate a set shift request as all*

advisors will need to remain fully flexible from 7am - 11pm Monday to Sunday, as previously discussed and agreed on screening.
I asked Sandra if this was ok and she confirmed it was fine to proceed with the role based on this.
2) Backrest request :
I said to Sandra - as previously agreed - we are happy to purchase / reimburse her for the backrest. I reminded her on Friday 28 May I spoke to her about the backrest request and she was going to send me a new link (the previous link was not available for purchase).
Sandra agreed to send a new link today, which I would then confirm ok to purchase or purchase for her.

31. The claimant replied to Mr MacDonald also on 2 June 2021

I also mentioned that my GP advised me to ask about changing my hours as a reasonable adjustments to my disability because of my disability due to my medication that I take as they can make me feel dizzy sometimes but this request is being refused by the client therefore I mentioned I will speak to my GP again to perhaps request a lower dosage. (this was not in the summary)

32. On 3 June 2021, the claimant sent a fit certificate to Mr MacDonald which said that the claimant had mixed anxiety and depressive disorder, back pain, migraines and said 'Please consider altered hours and workplace alterations due to the above'.

33. The claimant suggested in her covering email that the failure to provide the adjustment 'could be classed as disability discrimination'.

34. On 4 June 2021, the claimant said in an email to Mr M Ingham of the first respondent:
You can do so but Patrick mentioned to me yesterday verbally and in writing that both cordant and Hgs refused to make reasonable adjustments to my disability hence why I went to seek advice. I also had to pay for my own adjustments and was told cordant will reimburse next week and it should of been my employer. (sent invoice to Patrick also) I have also forwarded it yesterday to hr in cc I hope this can be resolved soon also and I will not suffer from any retaliation as a result of raising these concerns

35. On 7 June 2021, the claimant emailed Mr Ingham:

I am feeling a bit dizzy this morning after taking my medication for my disability and I wanted to find out if I can work a bit later today and what is the update in relations to my concerns especially after raising them at my interview on around 10.5.2021 after being asked about reasonable adjustments.

I am also very anxious that this is causing me a financial detriment also due to no fault of mine when I was off sick on 25th and 26th may 2021.
As I mentioned my disability has no impact on me performing my role but I just need reasonable adjustments by my employer and the end client

36. Ms J Cihlar of the first respondent then wrote to the claimant

Your emails have been passed on to me in order to support the business and yourself in the matter of your request for workplace adjustments.

My understanding of the situation so far is that you suffer with back pain (confirmed on the GP fit note submitted last week) and this means you require a little help in order to carry out your role safely and productively. Given the content of your emails I interpret that your back pain is the disability you are referring to and would, therefore, like to cover the 2 main issues relating to this:
The purchase of specialist equipment
You had conversations with Patrick around Cordant People purchasing this for you but he needed to get some guidance on how that would work. Please be reassured that Cordant have never insisted you purchase anything yourself for the business to then reimburse you and we had no issues at all with supplying the backrest you needed once you had sourced the right available rest.

Amended hours
The other adjustment required is that of reduced hours where you have requested to start no earlier than 10:00 due to the medication you take for your back. Whilst the client has initially declined the request, you have now submitted a fit note where your GP has recommended "altered hours", although there are no specifics about what this should be. There are a number of conditions cited on the fit note but again, I am under the impression that the requirement for adjustments is based on back pain? Cordant will do what we can to help on this point but please could you help the business to fully understand the reason a 10:00 start time is required?

- What medication are you currently taking?
- Why does this prevent you from being available from 07:00?
- What is the cause of your back pain?
- How does the back pain affect you?
- How long have you suffered with back pain?
- How often does this flare up?
This will help us get a better idea of how we can move forward with this

37. The claimant responded:

The requirements for hours is for me to ask after 10am because my medication I take for my back (sciatica), can sometimes make me feel dizzy as I have mentioned before.
I take codeine/ codemol and naproxen for my back pain and sciatica.
I take propranolol/ setraline on a daily basis for my anxiety, panic attack and depression.
My fit note does not speculate "reduced hours" and I never mentioned that I want reduced hours, I am still capable to do my job and hours I agreed at the interview, just want them to start later from 10am.

I have suffered from back pain since 2016, and recently had an injection on 24.5.2021 for the pain when I mentioned to my TM I had a medical appointment and since working from home, if I sit for a longer period of time and not with the correct equipment and adjustments it flares up and I did mention my sciatica to Patrick.
Patrick did mention to me first equipment is not something they provide, and when I reiterate and seek advice from Acas, he later mentioned that I should purchased myself and cordant will provide after I send him the link from Amazon.
In regards to pay, can you please let me know if I will be paid for this because as a result of my disability and the client refusing to make reasonable adjustments, I suffered from no fault of mine and this is unfair.
I am not a difficult person and I just want to do my job and be comfortable doing so and I don't want me asking for reasonable adjustments to be a barrier in comparison to non disable employees

38. Ms Cihlar then replied to the claimant

Thanks so much for getting back to me and answering the questions and I'm happy to say I can provide you with an update.
After receiving medical confirmation that you require an alteration to your working hours, this has been discussed with the client and it has been agreed that they can accommodate a start time of no earlier than 10:00.
The relevant people will be updated so they are aware as will resources planning so they can book shifts accordingly.

39. Thereafter there were emails in the bundle on a variety of topics. The claimant complained during June 2021 of being micro managed, about sick pay, about being contacted by a manager whilst off sick, about her sensitive information being disclosed, about issues with the technology she worked with. She suggested she was being discriminated against because of her disability. She said she was seeking advice from Acas. She said that she was being harassed and victimised.

40. Later in June there was also correspondence about the claimant needing to start work after 10:30 am; this was also agreed by the first and third respondents on 22 June 2021.

41. On 29 June 2021 there was an advertisement from the first respondent on the Total Jobs website offering £9 per hour for a call handling role relating to the track and trace scheme.

42. On 30 June 2021, there was an email internal to the third respondent:

As discussed on the phone, Sandra has been having Issues with her calls saying callers cannot hear her, I told her to reload and I would check again in 30 Minutes to see if this has been resolved.

*On the call I have just listened to the call was silent for the first 4 minutes or so but then it goes in to This is my f***ing life man Jesus. How do i hang up*

*this F***ing B**ch why is she still there. If somebody doesn't answer your call why is she still there. F***ing hell.*

It then goes into a conversation with a male which I cannot make out.
The caller can obviously hear this as well as she gasps as this is taking place.

43. An audio recording of this call was played at the interim relief hearing in front of Employment Judge E Burns on 4 October 2021 in Case Number 2204514/2021, a claim against the first respondent only. Mr Brill offered to play the recording at today's hearing but, in the absence of the claimant, I was not sure what utility my hearing the recording would have. I am not making any findings of fact and it is unclear from the documents I have seen whether the claimant admits or denies that it is her voice in the recording.

44. The third respondent informed the first respondent about the call and said: 'The below is not acceptable and for this reason can you please go ahead and separate Sandra with immediate effect.'

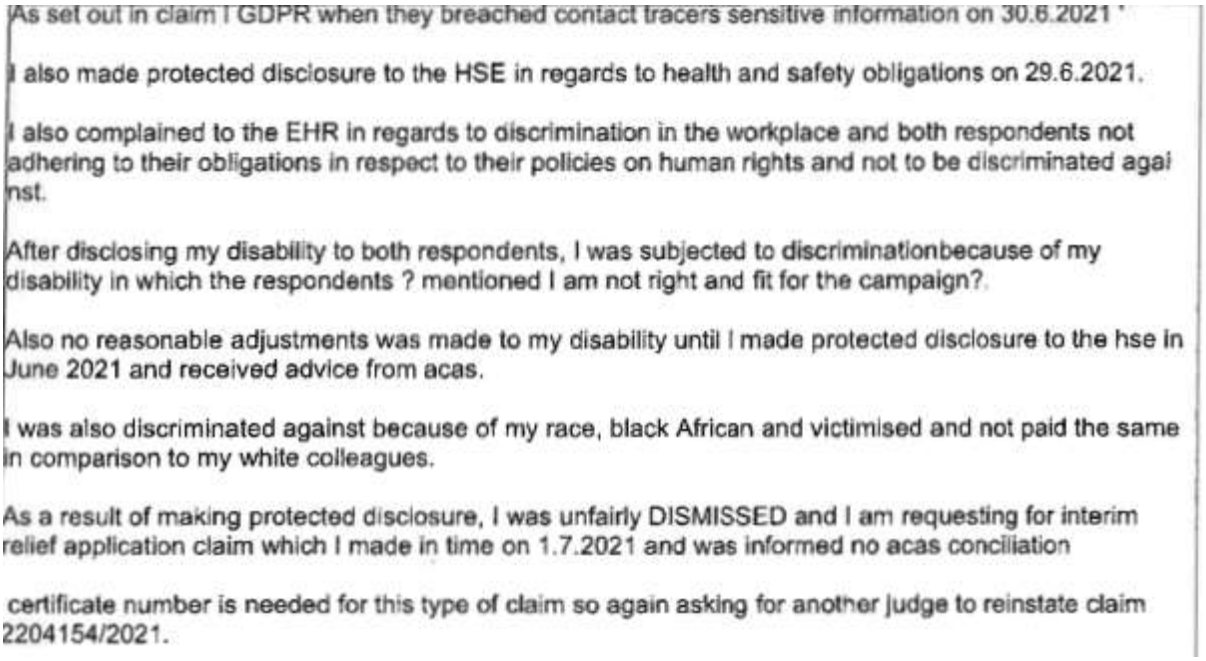
45. The claimant's assignment was terminated. She wrote on 30 June 2021 to say: *I have just been informed that my contract has indeed and I believe is due to retaliation. victimisation and now you have made false allegations against me that you can hear me use abusive language and that there are some silent calls.*
As part of my sensitive information, I am requesting a recording of these calls and transcripts

46. She also wrote to a number of people at the first and third respondents:
Make sure I am paid with
1. Notice I am entitled as per my contract
2. Pay for this week
3. And pay I would of been entitled if you did not breached my contract to the 11.08.2021 at a minimum and or until November 2021 as other colleagues (will disclose soon)
In the event that this is not honoured by 02.7.2021, I will add to my claims along with the interim relief order application I will make by then and will apply for reinstatement. compensation.

47. On 1 July 2021, the claimant presented a claim (Case Number 2204154/2021) against the three respondents to this claim. It was a claim for automatically unfair dismissal (section 103A ERA 1996) and interim relief. Employment Judge E Burns rejected the claim for interim relief by a reserved judgment sent to the parties on 1 November 2021. She also consolidated that claim with the proceedings in Case Number 2204302/2021.

48. On 16 July 2021, the claimant submitted the claim form in Case Number 2204302/2021. At section 8, she ticked the boxes for unfair dismissal and discrimination on the ground of race, disability and sex. She also ticked the boxes for 'notice pay' and 'other payments.

49. In the narrative portions of the claim form, the claimant complained about the dismissal of her interim relief application. There follows this narrative:



As set out in claim I GDPR when they breached contact tracers sensitive information on 30.6.2021 '

I also made protected disclosure to the HSE in regards to health and safety obligations on 29.6.2021.

I also complained to the EHR in regards to discrimination in the workplace and both respondents not adhering to their obligations in respect to their policies on human rights and not to be discriminated agai nst.

After disclosing my disability to both respondents, I was subjected to discriminationbecause of my disability in which the respondents ? mentioned I am not right and fit for the campaign?

Also no reasonable adjustments was made to my disability until I made protected disclosure to the hse in June 2021 and received advice from acas.

I was also discriminated against because of my race, black African and victimised and not paid the same in comparison to my white colleagues.

As a result of making protected disclosure, I was unfairly DISMISSED and I am requesting for interim relief application claim which I made in time on 1.7.2021 and was informed no acas conciliation

certificate number is needed for this type of claim so again asking for another judge to reinstate claim 2204154/2021.

50. In Box 15, she adds: *These claims is for race discrimination. disability discrimination, harassment and victimisation and breach of contract. Owed notice pay amongst other claims and didn't get pensions.*

51. The narrative portions of the claim form in Case Number 2204154/2021 are as follows:
My employer was Cordant People Limited. Client is Hinduja Global Solutions. I have an employment contract demonstrating it. I was asked about my health during interview which I stated to Patrick is discrimination and I then disclose after being asked about reasonable adjustments which I was told my employer and client will not do and I had to pay for it. After making protected disclosure by seeking advice to acas, I send them a link of the advice given and a fit note from GP recommending adjustments and only by June 2021, they complied. A campaign of victimisation began on a weekly basis, retaliation discrimination, by all respondents in which I experienced harassment. My former TM and all respondents shared my sensitive information on many occasions without my consent as per their policies and compliance and I blew the whistle to the ICO with evidence by raising this wrongdoing on 28.06.2021. 30.6.2021- my employment was terminated and made false allegations that I had silent calls allegedly and they could hear me using abusive language and no policies were followed. No meeting arranged to put my case forward. The phone call was shared to my agency with transcripts and not to me and again consent of the caller was not obtained and this another breach of confidentiality and data breach. Some of my colleagues who are white and male also getting paid more and their contract already extended until November 2021, and this was communicated to them by cordant and not myself. I was not given my statutory right to appeal it, no

disciplinary action policy followed as per acas guidelines and nothing on my contract stipulates that they can dismiss you with immediate effect and without notice. I am owed salary until November 2021, notice pay which they breached under my employment of contract. Seeking reinstatement and compensation until final hearing.

Law

Striking out

52. Under rule 37 of the Employment Tribunals Rules of Procedure 2013, a claim or response may be struck out on various grounds including that it is scandalous and vexatious or has no reasonable prospects of success: rule 37(1)(a).

53. In heavily fact-sensitive cases, such as those involving whistleblowing or discrimination, the circumstances in which strike out is appropriate are likely to be rare: Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT.

54. The test is not whether the claim is likely to fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test: Balls v Downham Market High School and College 2011 IRLR 217, EAT.

55. It is crucial when considering strike out to take the claimant's case at its highest; where there are core issues of fact which turn to any extent on oral evidence, these should not be decided without an oral hearing: Mechkarov v Citibank NA [2016] ICR 1121.49.

56. The following helpful summary was given by Linden J in Twist DX Limited v Armes UKEAT/0030/20/JOJ(V):

> *43. The relevant principles relating to the application of this provision for present purposes can be summarised as follows:*
>
> *a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, Tayside Public Transport Company Limited v Reilly [2012] IRLR 755 at paragraph 30.*
>
> *b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention "has a realistic as opposed to a fanciful prospect of success": see, for example, paragraph 26 of the Judgment of the Court of Appeal in the Ezsias case (supra).*

c. The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of Ezsias.

d. Subject to this point, the court or tribunal must take the case of the respondent to the application to strike out at its highest in terms of its factual basis and ask whether, even on that basis, it cannot succeed in law.

e. The court or tribunal generally should not seek to resolve novel issues of law which may not arise on the facts, particularly in the context of a developing area of the law: see, for example, Campbell v Frisbee [2003] ICR 141 CA.

f. The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it "may" do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed. In my view, this last point is important in the context of litigation in the employment tribunals, where the approach to pleading is generally less strict than in the courts and where the parties are often not legally represented. Indeed, even in the courts, where a pleaded contention is found to be defective, consideration should be given to whether the defect might be corrected by amendment and, if so, the claim or defence should not be struck out without first giving the party which is responding to the application to strike out an opportunity to apply to amend: see Soo Kim v Yong [2011] EWHC 1781.

g. Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (see the discussion in Hassan v Tesco Stores Limited UKEAT/0098/16 and Mbuisa v Cygnet Healthcare Limited UKEAT/0109/18), but these principles are applicable where, as here, the parties are legally represented, albeit less latitude may be given by the court or tribunal.

Deposit orders

57. A tribunal may make a deposit order where a claim has little reasonable prospect of success, pursuant to rule 39 of the Tribunal Rules 2013. The purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim fails. Their purpose is not to make it difficult to access justice or to effect a strike out through the back door. Even where a claim has little reasonable prospect, there is a discretion as to whether to make a deposit order, which must be exercised in accordance with the overriding objective: Hemdan v Ishmail and anor [2017] ICR 486, EAT.

Conclusions

Second respondent

58. There were simply no facts pleaded which supported any cause of action against the second respondent. All such claims were accordingly struck out.

Ordinary unfair dismissal claim

59. On the basis of undisputed facts, the claimant did not have two years continuous service with the first respondent and therefore this claim could not succeed and I struck it out.

Race discrimination

60. The pleaded claim appeared to relate to an alleged difference in pay between the claimant and some white colleagues but there was a paucity of facts pleaded. The contemporaneous documents showed that there were set rates for particular roles and that the claimant was paid in accordance with the set rate for her role. I concluded that this claim had no reasonable prospects of success and struck it out against all respondents.

Sex discrimination

61. There were simply no facts pleaded in the claim form which were said to give rise to a claim of sex discrimination. Any such claim therefore had no reasonable prospects of success and I struck it out as against all respondents.

Public interest disclosure detriment

62. Doing my best with the material available and taking the claimant's claims at their highest, there was no information as to the contents of any alleged disclosures to the HSE or EHRC and there was no assertion in the claim form and no evidence that the respondents were aware of these alleged disclosures.

63. I concluded that these claims had no reasonable prospects of success and that it was appropriate to strike them out.

Disability discrimination

64. In respect of the claim of a failure to make reasonable adjustments, the contemporaneous documents showed that there may have been a period of delay (although a narrow one) before adjustments were made to the claimant's hours. It seemed to me that I could not say the claimant had no or even little reasonable prospect of succeeding in this claim – it was a fact sensitive issue to be decided on detailed findings of fact.

65. I did not strike out this claim or make a deposit order.

66. There was also what appeared to be a direct discrimination claim, although the ambit of it needed some clarification. The claimant said that the respondents said that she was not right and fit for the campaign because of disability.

67. The claimant did not attend to further explain this claim and the contemporaneous documentation suggests no particular action was taken and that the claimant's employment was terminated for other reasons. Nonetheless the existence of the email of 1 June 2021 described above meant that I could not conclude that this claim had no reasonable prospects but I did conclude that it had little reasonable prospect and that it was appropriate to make a deposit order.

68. The claimant was given the opportunity to explain her means so that I could take those into account in determining the level of deposit required. She did not do so. Bearing in mind her limited engagement with her own claims, it seemed to me that it was appropriate for me to make a deposit order nonetheless and to set it at a level where a person of moderate means would think carefully about the merits of their claim. I accordingly make a deposit order in the sum of £50.

Notice pay

69. This was a claim against the first respondent as the asserted employer. The issue of whether the claimant was entitled to a week's notice pursuant to section 86 of the Employment Rights Act 1996 depends in part on whether she was an employee within the meaning of that Act. That was a fact sensitive issue and I could not properly conclude the claimant had no reasonable prospect of establishing that she was an employee. The Tribunal would also have to decide whether the claimant had been in repudiatory breach of her contract entitling the first respondent to dismiss her without notice.

70. Looking at the contemporaneous documentation and the written contacts, it seemed to me that this claim had little reasonable prospect of success and that it was appropriate to make a deposit order in the sum of £50.

Pension payments

71. Mr Brill was not clear as to whether the claimant had an entitlement to be auto enrolled in a pension scheme and what arrangements had been made or what communications had taken place between the first respondent and the claimant on this issue. I made a direction that the first respondent set out the position by **15 February 2022** and the first respondent provided the following information on that date:
I represent the First and Second Respondent and am replying to Paragraph 4 of the letter from the Tribunal dated 20th January 2020, in respect to the position regarding the Claimant's pension entitlements.

All employers in the UK have been required to offer access to a pension scheme, by way of auto-enrolment, since February 2018.

An employer can elect to operate a waiting period of up to 3 months before a jobholder becomes entitled to be automatically enrolled into a pension scheme (section 4 Pensions Act 2008). This option is referred to as "postponement". An employer must provide a postponement notice and such notice must be provided within 6 weeks of the employee's start date of employment (Regulation 24(3) Automatic Enrolment Regulations 2010).

It is agreed that the Claimant's employment started, as stated in section 5.1 of the ET1 Claim Form, on the 17th May 2021.
A copy of the Claimant's Postponement notice is attached - it was sent to the claimant, by email to her personal email address, on the 4th June 2021.

The letter advises employees that they can elect to opt-in to the pension scheme, NEST, if they provide written confirmation that they wish to do so - in which case there is no postponement. The Claimant did not make any such request.

Section 4(6) of the Pensions Act 2008 provides that the date on which auto-enrolment can be deferred may be any date within 3 months of the start date of employment. The deferral date for the Claimant's auto-enrolment was the 2nd August 2021. It is agreed that the Claimant's employment ended on the 30th June 2021.
I hope that this provides sufficient clarity on the issue of the Claimant's pension but if any further information is required, the Tribunal should not hesitate to contact me.

72. The claimant also wrote to the Tribunal on that date:
Paul sent you the generic letter that was sent to me and furthermore did not send the original letter in which states I will be provided with workplace pension.
This is also being investigated by the pension ombudsman and nest and I can provide these documents to support my whistleblowing complaints that was not examined properly by the judge

73. The claimant did not attach any documents.

74. I in any event made no orders in relation to this claim.

Further orders

75. At the hearing on 18 January 2022, I made an order that the claimant show cause why her remaining claims should not be struck as not having been actively pursued. That order was suspended pending my reconsideration of the strike out and deposit orders although as a matter of fact both the claimant and the first respondent have sent in submissions pursuant to the orders originally made and then suspended.

76. It is nonetheless appropriate to make those orders again so that the claimant has a fair opportunity to show causes why her claims should not be struck out (including the claim for automatically unfair dismissal in Case Number 2204154/2021).

77. Those orders are as follows:

1 By 4 pm on **30 March 2022**, the claimant must write to the Tribunal and the respondent explaining why her remaining claims should not be struck out on the basis that they have not been actively pursued or ask for a hearing to determine the issue.

2 By 4 pm on **6 April 2022**, the respondents must write to the claimant and the Tribunal setting out their position on whether and why the claims should be struck out as not having been actively pursued.

Employment Judge Joffe
16th March 2022

Sent to the parties on:

16th March 2022.
For the Tribunal Office: