



EMPLOYMENT TRIBUNALS

Claimant: Miss M Silva

Respondent: Sentrex Services UK Ltd

Heard at: Manchester

On: 12 May 2022

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: Ms Y Silva (the claimant's daughter)

Respondent: Ms J Galvin (Paralegal)

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The claim for breach of contract regarding notice is dismissed upon withdrawal by the claimant;
2. The claim for unfair dismissal is struck out under rule 37(1)(a) as it has no reasonable prospect of success; and
3. The claims for race discrimination (direct and indirect) are not struck out under rule 37(1)(a), (c) or (d). Those claims will proceed to hearing.

REASONS

Introduction

1. The claimant was employed by the respondent from 22 February 2019 as a cleaner or cleaning operative. On 26 March 2020 the claimant's work at a client site was ended. The claimant contended that she was dismissed on that date, the dismissal was unfair, and that the reason for her dismissal was her race. Alternatively, she alleged that she had suffered unlawful indirect discrimination on grounds of race arising from the alleged provision criterion or practice of: providing inadequate training for someone who did not speak English; or a requirement to

speak English to a particular standard. The respondent denied that the claimant had been dismissed on that date, contended that the reason for the end of the work at that site was performance and/or the client's request, and denied unlawful discrimination (direct or indirect).

Issues

2. The respondent made an application on 18 February 2022 that the claimant's claims should be struck out (105). The application was made on three alternative grounds:
 - a. Under rule 37(1)(a) that the claim had no reasonable prospect of success;
 - b. Under rule 37(1)(c) for non-compliance with the Tribunal's orders dated 25 January 2022, made following a preliminary hearing on 19 January 2022; and/or
 - c. Under rule 37(1)(d) as the claim was not being actively pursued.

Procedure

3. At the start of this preliminary hearing the claimant chose to represent herself. However, during the hearing the claimant felt unable to continue to do so, and her daughter represented her as a result. The respondent (quite appropriately) made no objection to the change in representation. The claimant's daughter represented the claimant ably and effectively during the hearing. The respondent was represented by Ms Galvin, paralegal.

4. The claims being brought were confirmed before the application was considered. The claims were: unfair dismissal, alleged to be on 26 March 2020; direct race discrimination arising from the alleged dismissal on 26 March 2020; indirect race discrimination; and breach of contract regarding notice.

5. The claimant agreed that she had received payment for the amount she claimed she should have received as notice pay and which she had claimed in her breach of contract claim (albeit it had been received much later than she said she should have received it). As a result, she confirmed that the claim for breach of contract (only) was withdrawn. The claim for breach of contract (only) is accordingly dismissed on withdrawal in this Judgment.

6. A bundle was provided by the respondent for the hearing, which ran to 118 pages. Where a number is included in brackets in this Judgment, it refers to the page number in that bundle.

7. A Portuguese interpreter attended the hearing and interpreted throughout for the benefit of the claimant and her daughter.

8. Ms Galvin made submissions. The claimant's daughter made submissions on the claimant's behalf. The Employment Judge asked questions of both representatives and asked about the key issues which he needed to determine during the submissions.

9. The submissions on the strike out application and deposit application made by the respondent were heard together. This Judgment concerns the strike out application only; the decision in the deposit application (and the reasons for it) are addressed separately in the case management order.

10. The decision and reasons were provided to the parties orally during the preliminary hearing. As the claimant requested that written reasons be provided at the hearing, these written reasons are provided at the same time as the Judgment.

Facts

11. The claimant was employed from 22 February 2019. The claimant claims that she was dismissed on 26 March 2020. The claimant's representative confirmed that was the last date upon which it was alleged that an act of discrimination occurred.

12. The claim was entered at the Tribunal on 2 November 2020, following a period of ACAS Early Conciliation between 21 September and 21 October 2020. The claimant entered the claim herself. The claimant does not speak very much English and cannot read English. A letter was written by her to the respondent (or at least on her behalf) on 3 July 2020 (59) saying that she had been dismissed. The claimant did seek advice from somebody who provided advice at some point around about that time and her representative attributed the delay, at least in part, to the time required to take such advice and the possibility of speaking to ACAS/claiming at the Tribunal being identified. Save for the reasons explained, there was no other explanation provided at this hearing for the delay in entering the claim.

13. At the preliminary hearing on 19 January 2022 the claimant was represented by a solicitor (83). That solicitor had never gone on the record with the Tribunal. The claimant had been ordered to set out the particulars of her claim by 16 February 2022 (86) but had not done so. She had been required to provide a schedule of loss by the same date; but had not done so. She had also been required to provide information and documentation in support of a disability discrimination claim (regarding her alleged disability) by 9 March 2022, but as the claimant had not in fact pursued an application to amend her claim to include one for disability discrimination, the fact that she had not done so had no impact upon her existing claims.

14. The claimant had not contacted the respondent at all regarding the progress of her claims at all between the previous preliminary hearing and this one (albeit the respondent explained that there had been contact via ACAS).

15. The claimant's explanation for her non-compliance with the orders was because she had been unable to contact the solicitor who had represented her after the previous hearing. She had now decided to seek advice from someone else and would be looking for a new advisor. It was also very clear during the hearing that neither the claimant nor her representative, had read and understood the order made following the previous hearing.

16. The claim is listed for a final hearing over three days in October 2022. There are a number of case management orders which will need to be complied with prior to that hearing. The respondent had been unable to provide an amended grounds of response, or a counter-schedule of loss, as previously ordered, as a result of the claimant's non-compliance with the orders made.

17. The claimant's representative emphasised that the claimant did wish to pursue her claims and have them determined.

The law

18. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure provides that the Tribunal may strike out all or part of a claim on the grounds that it has no reasonable prospect of success.

19. Rule 37(1)(c) provides that the Tribunal may strike out all or part of a claim for non-compliance with any of the rules or with an order of the Tribunal.

20. Rule 37(1)(d) provides that the Tribunal may strike out all or part of a claim on the grounds that it has not been actively pursued.

21. Section 108 of the Employment Rights Act 1996 provides that section 94 (the right not to be unfairly dismissed) does not apply to the dismissal of an employee unless she has been continuously employed for a period of not less than two years ending with the effective date of termination.

22. Section 123 of the Equality Act 2010 contains the provisions regarding the time in which a discrimination claim must be entered at the Tribunal. In summary, the claim must be entered within three months of the act complained of (or ACAS Early Conciliation commenced) or where a course of conduct ends (if it is alleged to have been a course of conduct). However, section 123(1)(b) provides that the Tribunal has jurisdiction to consider a discrimination claim if it is brought within such other period as the Tribunal thinks just and equitable.

23. Neither party relied upon any specific case law in the preliminary hearing. However, the Tribunal considered the basic propositions set out in the Employment Appeal Tribunal Judgment in **Cox v Adecco UKEAT/0339/19** as detailed below (to the extent relevant to the hearing).

Applying the law to the facts

24. The Tribunal dealt with each of the types of claim separately. The first claim was for breach of contract in respect of notice, and that was withdrawn.

25. The second claim was for unfair dismissal. The Tribunal started by considering whether that claim should be struck out on the basis that it had no reasonable prospect of success.

26. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure applies where the claim has no reasonable prospect of success. Where that applies, the respondent needs to persuade the Tribunal to exercise its discretion to strike out the complaint.

27. The basic propositions that the Tribunal must apply, come from a case called **Cox v Adecco**, in which the Employment Appeal Tribunal said the following:

- (1) No-one gains by truly hopeless cases being pursued to a hearing;
- (2) Strike out is not prohibited in discrimination cases; but especial care must be taken in such cases as it is very rarely appropriate;

- (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate; and
- (4) The claimant's case must ordinarily be taken at its highest.

28. Taking the claimant's unfair dismissal case at its highest, the claimant was not employed for two years. If she was dismissed on 26 March 2020 she was only employed from 22 February 2019. As a result, she cannot succeed in an unfair dismissal claim relying upon that dismissal, because of the provisions of section 108 of the Employment Rights Act 1996 which are described above (and there was no argument that the unfair dismissal claim was one which came within the exceptional categories where two years service was not required).

29. On that basis, the Tribunal found that the claimant's unfair dismissal claim had no reasonable prospect of success. It was struck out. The Tribunal did not need to consider the other grounds upon which the application to strike out the unfair dismissal claim was made, having reached that decision.

30. For the race discrimination, the Tribunal first considered whether the discrimination claims should be struck out on the same basis. That is under rule 37(1)(a) on the basis that it had no reasonable prospect of success and applying the test in **Cox v Adecco**.

31. The argument in the preliminary hearing was focussed upon the fact that the claimant's claim was not entered within the primary time required. The last alleged date of discrimination was 26 March 2020, and therefore either a claim or ACAS early conciliation should have commenced by 25 June 2020. It had not been, and therefore the claim was entered out of time. At the final hearing it will be for the claimant to persuade the Tribunal that it is just and equitable to extend time.

32. The Tribunal considered the arguments heard. It was required to take the claimant's case at its highest. It must consider the just and equitable test. The test to decide whether time should be extended on a just and equitable basis is a balance. One important element of that exercise is considering the balance of prejudice between the parties. It may be the case that the Tribunal who finally hears this matter could decide that it is not just and equitable to extend time. However this Tribunal found that it could not be said that the claimant had no reasonable prospect of success in arguing for a just and equitable extension, where the balance would take account of the significant prejudice to the claimant of not extending time (being that she is unable to have a potentially meritorious claim determined). The Tribunal found that it could not be said that the claim has no reasonable prospect of success. The just and equitable test is a balance, and there is certainly some prospect that time might be extended on a just and equitable basis by the Tribunal who hears the case.

33. The Tribunal considered the question of strike out for non-compliance with orders (rule 37(1)(b)). For a case to be struck out on this basis, non-compliance needs to be deliberate and persistent or have the effect of making a fair hearing impossible. Even then, the Tribunal must be persuaded that striking out the claim is a proportionate sanction. The Tribunal must consider all the circumstances, including: the magnitude of the default; whether it is the responsibility of the party or

her representative; what disruption, unfairness or prejudice has been caused; and whether a fair hearing remains possible.

34. The Tribunal found that there was a clear failure to comply with the orders made in this case. However, it understood that non-compliance arose (at least in part) from issues the claimant had with her previous representative and in contacting him following the preliminary hearing. It was also obvious that language had been part of the reason for non-compliance. The Tribunal found that non-compliance was not deliberate, albeit it was persistent. The non-compliance had not made a fair hearing impossible, as there was still five months (or thereabouts) until the final hearing, and there is time for the case to be prepared. Accordingly, the Tribunal determined that it would not strike out the discrimination claim on that basis. In any event, strike out of a discrimination claim would not be a proportionate sanction.

35. However, the Tribunal did emphasise its wish to make something very very clear when delivering this Judgment. The claimant must ensure that she complies with future steps required to prepare the case for hearing. She must do all she can to comply with and understand the Tribunal's orders. She cannot rely on a representative, or the lack of a representative, in the future, as explaining any failure to do what is required on the dates ordered.

36. The final ground of application was that the claim should be struck out because it has not been actively pursued. The Tribunal accepted the claimant's reassurance that the case was being actively pursued.

Employment Judge Phil Allen
Date: 13 May 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
16 May 2022

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