



# EMPLOYMENT TRIBUNALS

**Claimant:** **v** **Respondent**

**Ms K Murfin**

**Costa Limited**

**Heard:** **Birmingham via CVP** **On: 1 October 2021**

**Before** **Employment Judge Wedderspoon**

**Representation:**

**Claimant:** **No Attendance**

**Respondents:** **Miss. S. Bagues**

## Judgment

1. The claimant's claim is struck out.

## REASONS

1. By notice dated 4 February 2021 the Tribunal gave notice it would consider the claimant's application to amend her claim and give further directions as appropriate. By further notice dated 31 March 2021 the Tribunal gave notice it would also decide whether the claim should be struck out because (i) it has not been actively pursued and/or (ii) there has been failure to comply with the tribunals order dated 4 February 2021. In the alternative the respondent has sought a deposit order. By letter dated 31 July

2021 the Tribunal confirmed all issues would be dealt with at the hearing (in the context of the respondent's strike out application).

### **The hearing**

2. Today's hearing has been listed since 4 February 2021. The claimant failed to attend. The Tribunal clerk made attempts to contact the claimant to remind her to join the hearing but did not receive any response from the claimant. The respondent applied to continue with the hearing in the absence of the claimant pursuant to Rule 47 of the Employment Tribunal rules.

3. The Tribunal determined that it should proceed with the hearing despite the fact that the claimant had not attended because clarification of the claimant's claims had been outstanding since June 2020, the claimant was aware of the hearing today; the claimant had been provided with a bundle of documents for the hearing on 16 September 2021 and the respondent's skeleton argument on 27 September 2021 and pursuant to the overriding objective it was in the interests of justice taking account of the delay and the need for the parties to be placed on an equal footing (which includes the nature of the case to meet at trial), for the matters to be dealt with.

4. The Tribunal was provided with an agreed bundle of 59 pages. The respondent relied upon a skeleton argument and referred to legal authorities.

### **The pleadings**

5. By claim form dated 18 April 2020 the claimant brought a complaint of unfair dismissal and/or "automatically unfair dismissal".

6. The claimant's pleaded case is that she was employed by the respondent from 17 January 2020 to 1 March 2020 as a barista in its store at Maybird Retail store, Stratford upon Avon. Her claim is that the manager, B allocated her shifts which were difficult for her to work knowing that the claimant cared for a daughter; she claims to have worked late shifts and then had to attend work the next day at 5.30 a.m. Her case is that she suffered a bereavement and B did not give the claimant any shifts and requested the claimant to return the store keys. The claimant says she sought a reason for her termination but did not receive a response. The respondent told the claimant it was a mutually agreed termination and the claimant disputes this.

7. The respondent defends the claim. The respondent's case is that the claimant was employed from 19 January 2020 to 27 February 2020. Due to attending training the claimant did not commence work with the respondent until 14 February 2020. In the short period the claimant worked at the store she was subject to various complaints about her

behaviour from customers and work colleagues. On 26 February 2020 the claimant and a colleague E had a dispute and E submitted a written complaint to the store manager B alleging she was bullied by the claimant. Once informed about the complaint the claimant attended the store to informally discuss it. The claimant became angry and stated she no longer was prepared to work at the store and "I'm gone". The claimant left the store and her manager B attempted to contact her but she did not reply. The claimant later sent a text message to her manager apologised for swearing and being rude. The manager did not consider it was appropriate that the claimant should return to store. The respondent states that the claimant resigned and was not dismissed. It took issues with jurisdiction on the basis that the claimant had inadequate service to make an unfair dismissal claim.

### **Correspondence& Tribunal communications**

8. By emails dated 3 and 8 June 2020 sent to the Tribunal, the claimant sought to amend her claim to include a claim of wrongful dismissal and discrimination by way of association. On 25 June 2020 and 27 July 2020 the respondent sought further details from the claimant about her complaints of wrongful dismissal and discrimination. On 27 July 2020 the claimant refused to provide the information to the respondent's solicitors on the basis they did not represent her. ACAS confirmed to the claimant on the same date it was usual to exchange documents/evidence with the other side. On 12 November 2020 the claimant urgently requested a copy of her ET1 to see if her information had been updated on the claim.

9. By letter dated 4 February 2021 the Employment Tribunal noted that the claimant had brought a complaint of unfair dismissal with no mention of discrimination. The claimant was requested to send her amended grounds of claim to the Tribunal and respondent and explain who is disabled and how she alleged she was a victim of disability discrimination by association

Case Number:1305479/20203 by 16 February 2021. A hearing was listed for 1 October 2021 for an open preliminary hearing to consider the claimant's application to amend her case. The claimant failed to provide any further details of her proposed amendment.

10. By letter dated 18 February 2021 the respondent sought an application to strike out the claim or sought a deposit. Its case is that the claim had no reasonable prospect of success; the claimant had failed to comply with the Tribunal order to provide details of her disability claim; and the claimant had failed to actively pursue the claim. Alternatively, it argued that the claim had little reasonable prospect of success on the basis that the claimant had inadequate service to bring a complaint of unfair dismissal; there was insufficient particulars to establish an

automatic dismissal; there were time issues with the discrimination amendment application and there was no evidence that the EC process had been complied with. The claimant acknowledged receipt of this application and sought a hearing so that “all factual information can be disclosed.”

11. By letter dated 25 March 2021 Employment Judge Dimbylow gave notice that the Tribunal was considering striking out the claim because (i) it had not been actively pursued (ii) failure to comply with Tribunal’s order dated 4 February 2021. The claimant did not object to this proposal within the timeframe of 1 April 2021.

12. On 2 April 2021 the claimant emailed the respondent to stage she had sought a zoom meeting with the Tribunal to submit evidence; there had been an emergency situation in the family household that included social services and the police.

13. By notice dated 13 July 2021 the Tribunal confirmed to the parties that all issues will be dealt with at the hearing.

### **The Law**

14. The Tribunal having directed it will consider all issues at the hearing (page 58) the Tribunal considers strike out on the basis of the notice dated 31 March 2021 (page 53) and the respondent’s application dated 18 February 2021 namely no reasonable prospect of success.

15. 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.

16. 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.

17. In respect of non-compliance **Essombe v Nandos Chickenland Limited (UKEAT/0550/06)** the EAT upheld a strike out where a party had

Case Number: 1305479/2020 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.

18. 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**).

19. 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**).

20. In exercising the Tribunal's discretion, it must take into account the overriding objective to deal with cases justly and fairly.

### **The respondent's submissions**

21. The respondent provided a skeleton argument and supplemented this with oral submissions. The respondent submitted that the claimant was aware of today's hearing and understood its purpose. Further she was aware and understood the need to provide further and better particulars. She has failed to attend and failed to provide the further and better particulars required for the respondent to know the case it has to meet at trial. There can be no suggestion that the claimant is unable to engage in correspondence; she has actively chosen not to comply with the Tribunal's order and clarify her claims. This has caused substantial delay and does not put the parties on an equal footing. The Tribunal should strike out the claim for failure to comply with the orders of the Tribunal.

22. In any event the presently pleaded claims have no reasonable prospect of success or alternatively little reasonable prospect of success. The claimant has inadequate service to make a claim for ordinary unfair dismissal. She has failed to clarify any claim of automatic unfair dismissal or discrimination. A claimant cannot simply assert discrimination; there must be a factual context to the claim and clarification how the claim is pleaded. This has not been provided. She failed to provide sufficient particulars to the respondent so it can respond to the claims. It is unclear whether the claimant has complied with the EC process. There is also a time point in permitting any discrimination claim to go forward; to date no such claim has been particularised by the claimant. The respondent considers the claims have been pursued vexatiously by the claimant.

23. Further the claimant has failed to actively pursue her claims; she has been given a number of opportunities to clarify her discrimination claims and has failed to do so.

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### **Conclusions**

24. The claimant was aware of today's hearing and she understood by virtue of the correspondence sent to her from the Tribunal of her need to particularise her discrimination claim; that the Tribunal was considering striking out her claim; she did not provide particulars and she did not respond to the notice of a potential strike out. The Tribunal do take account of the fact that the claimant is a litigant in person and that such litigants are unlikely to be familiar with the processes and procedures of the Tribunal. However, the claimant had in fact participated in correspondence suggesting that she wished a zoom meeting to take place and that she had the relevant evidence to adduce. The Tribunal concludes that the claimant is aware that she should be engaging in the process and has intentionally not so engaged and has failed to comply with the orders dated 4 February 2021 and 25 March 2021.

25. Discrimination claims are fact sensitive and should be heard as soon as possible. A respondent party who has not been given information as to the basis of a discrimination claim cannot prepare its defence or investigate allegations with witnesses and is significantly disadvantaged by the passage of time. The claim was brought some 18 months ago and the basis of the claim has still not been clarified by the claimant despite the opportunities provided by the Tribunal for her to do so.

26. In the circumstances, taking into account the intentional default of the claimant, the Tribunal concludes that the claimant has not actively pursued her claims. The Tribunal also takes into account the overriding objective and the disadvantage suffered by the respondent by its inability

to prepare for trial and concludes in the interests of justice that the claim should be struck out.

27. Alternatively, the Tribunal concludes that there has been noncompliance with a Tribunal order. The claimant was aware by virtue of the order dated 4 February 2021 that she should set out her claim of discrimination by 16 February. She failed to do so. She was given a further opportunity by notice dated 31 March 2021 that the Tribunal was considering striking out the claim. The claimant failed to respond to this and provide details of her claim. On the basis that the claimant is able to participate in correspondence when she chooses to do so, the Tribunal reaches the conclusion that the claimant has deliberately failed to comply with a Tribunal order to provide the particulars of claim. In exercising its discretion, the Tribunal takes into account the overriding objective and the disadvantage suffered by the respondent by its inability to prepare for trial and concludes in the interests of justice that the claim should be struck out.

28. In the further alternative, as the case is presently pleaded as an unfair dismissal claim with no particulars as how this claim could be an automatically unfair dismissal, the claimant has inadequate service to bring an unfair dismissal claim. The case has no reasonable prospect of success.

29. In the circumstances, it is not necessary for the Tribunal to consider the application for a deposit order.

30. The claim is struck out.

### **Employment Judge Wedderspoon**

**4<sup>th</sup> October 2021**

Note -Reasons for the judgment having been given orally at the hearing, these are the written reasons.

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