



EMPLOYMENT TRIBUNALS

Claimant

Mr P M Przychodzki

v

Respondents

Shell Energy

Heard at: Norwich

On: 10 June 2022

Before: Employment Judge S Moore

Appearances

For the Claimant: In person

For the Respondent: Ms Niaz-Dickinson, Counsel

JUDGMENT ON PRELIMINARY ISSUES

- (1) The claim of being subjected to a detriment for making a protected disclosure under s. 47B Employment Rights Act 1996 is struck out as having no reasonable prospect of success.
- (2) The claim for “other payments” is struck out as having no reasonable prospect of success.
- (3) The Claimant must pay a deposit order of £500 as a condition of continuing to advance his claim of direct sex discrimination.
- (4) The Claimant must pay a deposit order of £500 as a condition of continuing to advance his claim of direct race discrimination.
- (5) The Claimant must pay a deposit order of £500 as a condition of continuing to advance his claim of direct age discrimination.
- (6) The Claimant must pay a deposit order of £500 as a condition of continuing to advance his claim of automatic unfair dismissal under s. 103A Employment Rights Act 1996.
- (7) The application to strike out the claim for breach of contract and/or for the Claimant to pay a deposit order as a condition of continuing to advance that claim, is dismissed
- (8) The sums payable pursuant to the deposit order(s) must be paid by 1 July 2022.

- (9) The Claimant must provide the Respondent with the information requested in an email dated 18 January 2022 on or by 4pm on 17 June 2022. A separate Unless Order has been made to this effect.

REASONS

Introduction

1. This open preliminary hearing was listed to consider an application for strike out/deposit order by the Respondent.
2. The claims contained in the three (now joined) cases as currently pleaded are for:
 - (i) Direct discrimination pursuant to s. 13 Equality Act 2010 on grounds of sex, race and age, the alleged acts of less favourable treatment being:
 - (a) the Claimant was not afforded "full access" to the Respondent's systems in comparison to two "younger", "female" colleagues in the Claimant's team; and
 - (b) the Claimant was not granted a 3-month extension to his probation period but only a 1-month extension.
 - (ii) Automatic unfair dismissal under s. 103A Employment Rights Act 1996 (ERA);
 - (iii) Detriment for making a protected disclosure under s.47B ERA;
 - (iv) Breach of contract on the basis that the Claimant was not granted a 3-month extension to his probation period; and
 - (v) A claim for other payments.
3. Rule 37, Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 sets out the grounds on which a Tribunal may strike out a claim or part of a claim. The Respondent relies on rule 37(1)(a), that the claims have no reasonable prospect of success, rule 37(1)(c) for non-compliance with an order of the Tribunal, and rule 37(1)(d) that the claim has not been actively pursued. Alternatively, the Respondent seek a deposit order on grounds the claims have little reasonable prospect of success pursuant to rule 39.
4. Turning first to the argument that the claims should be struck out because the Claimant has failed to comply with tribunal orders, the Respondent submits that on 13 December 2021, it wrote to the Claimant with a draft list of issues in relation to the discrimination claims and "other payments"

claim and invited him to comment on specific questions it set out in that draft list of issues in advance of the forthcoming case management preliminary hearing, but the Claimant did not respond. At the case management preliminary hearing that took place on 11 January 2022, the Respondent was ordered to write to the Claimant by 18 January 2022 with its request for the further information and the Claimant was ordered to respond to that request by 22 February 2022. Although the Claimant did not attend the case management preliminary hearing, by email dated 18 January 2022 the Respondent informed the Claimant of the orders and sent the Request for Information to Claimant on 18 January 2022. Again, the Claimant did not respond.

5. The Respondent further submits it reminded the Claimant of the order by email on 22 February 2022, on 24 February 2022 and on 28 February 2022 but to date (now 10 June 2022) the Claimant has failed to respond or provide any reason for his non-compliance.
6. The Claimant did however provide the Respondent with a Schedule of Loss on 21 February 2022, which shows, the Respondent says, that the Claimant was picking and choosing what orders to comply with so that his non-compliance with the order made on 11 January 2022 should be regarded as deliberate.
7. Today the Claimant stated that he had a period of ill-health and been under tremendous stress due to going through a divorce, one of his daughters needing heart surgery and the other also requiring hospital treatment and the provision of the Schedule of Loss was the limit of his emotional and physical capability at the time. However, he would now be able to respond to the Respondent's Request for Information.
8. Although the Claimant has provided no medical evidence to support his assertions, I am prepared to give him the benefit of the doubt as regards his explanation and I decline to strike out the claims on this basis. While the delay has been substantial and the Respondent has been subject to prejudice and unnecessary expense, the delay has not been so extensive that a fair trial is no longer possible, and I consider that in all the circumstances the lesser sanction of an unless order is appropriate (at least in respect of the claims that are not struck out on another basis).
9. I come to the same conclusion in respect of the application to strike out on the grounds that the claim has not been actively pursued.
10. Turning to the application to strike out on the grounds the claims have no reasonable prospect of success, or for a deposit order on the grounds they have little prospect of success:
11. As regards the claim for whistleblowing detriment under s. 47B ERA and the unspecified claim for "other payments", the Claimant stated that these were both claims for the loss and personal injury he had suffered because

of his dismissal. However, dismissal cannot be a detriment for the purposes of a claim under s. 47B ERA (the relevant claim is that brought under s. 103A) and claims for loss and personal injury arising from dismissal and discrimination are not self-standing claims but arise (if at all) in the context of the Claimant's claims for automatic unfair dismissal and discrimination.

12. I therefore find the claims for whistleblowing detriment under s. 47B ERA and for "other payments" should both be struck out as having no reasonable prospect of success.
13. As regards the breach of contract claim, the R says it is clear from the contract that the Claimant didn't have a contractual right to a 3-month extension of his probation period. It points to the relevant provision which states: "The company may extend the probation period for a further three months or longer" and says it is therefore clear that the offer of a 3-month extension was a matter for R's discretion. The Claimant's argument is that according to the contract any extension had to be for a minimum period of three months and therefore being given a one-month extension was incompatible with the contract. I consider that argument is open to the Claimant on the wording of the contract, and while I foresee potential difficulties with his position, since the matter was not addressed in any detail by the Respondent, I decline to find the claim has no or little reasonable prospect of success.
14. As regards the discrimination claims, at the hearing today the Claimant appeared to accept the Respondent's position that level of access to the Respondent's systems depended upon the length of time an individual had been employed by the Respondent, but he then submitted this policy had unintended discriminatory consequences. Further, in respect of his allegation that being granted only a 1-month extension to his probation was an act of age, race and/or sex discrimination, the Claimant has still not identified any potential comparator or suggested any basis for his contention the decision was an act of discrimination. However, although, for these reasons, I have serious misgivings as to the prospects of success of these claims, I am mindful of the case-law which strongly cautions against striking out discrimination claims when, necessarily, the full facts are unknown, and I therefore decline to strike them out. Nevertheless, I am satisfied they have little reasonable prospect of success and consider it is appropriate to order the Claimant to pay a deposit order as a condition of continuing to advance them.
15. As regards the claim for automatic unfair dismissal, the Claimant accepts he was first informed of issues with his performance at his probation review meeting on 11 August 2020 and further that he had not made any disclosures to the Respondent by this date. He says however that he made a disclosure to a third party namely Ofgem, Ofcom and/or the

Information Commissioner's Office on or around 11 August 2020. The Respondent says it is unaware of any such disclosures to a third party.

16. Again, I do not consider it appropriate to strike out the claim in the absence of the full facts. However given the Respondent had already told the Claimant there were problems with his performance prior to any disclosures being made to it by the Claimant, and, further, that it is highly unlikely the Respondent could or would have been made aware of the alleged disclosures to a third party prior to telling the Claimant on 11 August 2020 that there were problems with his performance, I consider it appropriate to make a deposit order in respect of this head of claim also.
17. As regards the amount of the deposit orders, the Claimant has said he is currently earning £550 per day on his current contract which comes to an end in July 2022, by which point he is likely to have an offer of a full-time position at a similar salary. I therefore consider it appropriate to make a deposit order of £500 in respect of each head claim which the Claimant wishes to continue to advance (and in respect of which I have found that a deposit order should be made).

Employment Judge S Moore

Date: 10 June 2022

Sent to the parties on:

21 June 2022

For the Tribunal Office