



EMPLOYMENT TRIBUNALS

Claimant: Mrs Denyse Schwartzel

Respondent: GXO Logistics UK Limited (formerly XPO Supply Chain Services UK Ltd)

Heard at: Cambridge

On: 17 October 2022

Before: Employment Judge Tynan

Appearances

For the Claimants: In person

For the Respondent: Mr Paul Sands, Solicitor

JUDGMENT

1. The Claimant's complaint that she was unfairly dismissed by the Respondent and further complaint, if any, that the Respondent made unlawful deductions from her wages, are struck out on the basis that they are vexatious and have no reasonable prospects of success.
2. The Claimant's complaint that she was unfairly dismissed is totally without merit.
3. The Claimant's disability discrimination complaint and further complaint that she was subjected to detriment on grounds that she made a protected disclosure are struck out on the basis that they have no reasonable prospects of success.

REASONS

- (1) The parties did not request written reasons for my Judgment. However, as the Claimant stated at the conclusion of the hearing on 17 October 2022

- that she intended to appeal against the Tribunal's decision, I think it potentially helpful to the parties to provide written reasons for my decision.
- (2) In 2019 the Claimant brought a Claim against the Respondent in the Employment Tribunals, under case number 33000387/2019. The record of the preliminary hearing in respect of that Claim held on 27 September 2019 confirms that she was complaining of unfair dismissal and unauthorised deductions from her wages. Her unfair dismissal complaint was originally pursued by reference to her dismissal from the Respondent's employment in 2015, that dismissal having been reversed on appeal in December 2015. At the preliminary hearing on 27 September 2019 she was given permission to amend the Claim to enable her to pursue her unfair dismissal complaint by reference instead to her subsequent dismissal in June 2019. In the event, her complaints failed at a full merits hearing on 13 February 2020 and were dismissed in a Reserved Judgment of Employment Judge Warren that was sent to the parties on 1 June 2020.
 - (3) There was discussion at the preliminary hearing on 27 September 2019 as to whether the Claimant was pursuing any other complaints. Paragraph (13) of the case management summary records that the Claimant withdrew an age discrimination complaint. There is further discussion at paragraphs (16) and (17) as to whether there was a disability discrimination complaint. Employment Judge Foxwell (as he then was) concluded that there was no such complaint (including any victimisation complaint). It is notable in light of that discussion that neither during the hearing itself nor in the months prior to the final hearing did the Claimant seek to amend her claim to include a disability discrimination complaint. The discussion at the preliminary hearing was to identify what claims were before the Tribunal and the fact the Claimant sought and was granted permission on 27 September 2019 to amend her claim to pursue her unfair dismissal complaint with reference to the 2019 dismissal evidences to me that she gave active thought at the time to her potential claims and made an immediate and timely application to amend her Claim to ensure this further aspect was considered by the Tribunal. There is nothing to suggest that she put down any form of marker at the time or otherwise sought to reserve her future ability to bring a further Claim in respect of other matters that had by then arisen. There is no obvious reason why the Claimant might have filed a Claim that was limited to certain complaints. She did not suggest to the Tribunal today that she had any reason to withhold pursuing a disability discrimination complaint.
 - (4) The Claimant told me that she was advised in 2019 by the GMB Union (against whom she has unsuccessfully pursued claims) and that in or around 2020 she also had advice from the Citizen's Advice Bureau and from an organisation called Age Care. In terms of her disability discrimination and whistleblowing detriment complaints, what I think is relevant is that between January 2019 and February 2020 the Claimant was being professionally advised and was evidently well enough that she was able to pursue Tribunal proceedings, including representing herself against Counsel at a final hearing on 13 February 2020. Over that entire period, but specifically in light of the discussion with Employment Judge Foxwell on 27

September 2019, she had not seen fit to apply to amend her Claim or to bring a new Claim.

- (5) The Claimant indicated to me that she may have appealed against Employment Judge Warren's Judgment. However, there is no evidence before me in the matter and Mr Sands stated that he was unaware of any appeal. I am satisfied that Employment Judge Warren's Judgment stands.
- (6) The Claimant suggested that she had been given permission by Regional Employment Judge Foxwell to pursue the current Claim against the Respondent. I explored this carefully with her, particularly when she referred to reconsideration. The only documents she took me to were two Notices in respect of today's hearing, neither of which grants permission to the Claimant to bring the current Claim or can remotely be construed as varying or overturning any previous Judgments, Orders or record of discussions. On the contrary, the Notices merely serve as formal notice to the parties that the Tribunal was giving consideration to striking out the Claim, including whether it is totally without merit.
- (7) I am satisfied that the Claimant has not been granted permission to pursue the current Claim and that my ability to determine whether the Claim (or any part of it) should be struck out, alternatively whether a Deposit Order should be made, is unfettered by any other Order or direction in the proceedings. Instead, the question of strike out and the making of a Deposit Order falls to be determined in accordance with Rules 37 and 39 of the Tribunals Rules of Procedure.
- (8) Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides,
 - (1) At any stage of the proceedings, either on its own initiative or on the application of a party, the 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...
- (9) Rule 39 of the Employment Tribunals Rules of Procedure 2013 provides,
 - (1) Where, at a Preliminary Hearing (under Rule 53) 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 ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."
- (10) The power to strike out should only be exercised in rare circumstances (Tayside Public Transport Company Limited (t/a Travel Dundee) v Reilly [2012] IRLR 755; cases should not, as a general principle, be struck out where the central facts are in dispute (Tayside and North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330); and, as a general principle,

discrimination and public interest disclosure cases should not be struck out except in very clear circumstances (Anyanwu v South Banks Student Union [2001] UK HL14).

- (11) In Anyanwu Lord Steyn underlined the importance of not striking out discrimination claims except in the most obvious and plainest cases. He noted that discrimination cases are generally fact sensitive, and spoke of a high public interest in cases being determined following a full examination of the merits.
- (12) In Ezsias, the Court of Appeal said that the same or a similar approach should generally inform whistleblowing cases.
- (13) As regards the making of Deposit Orders, a Tribunal can have regard to the likelihood of a party being able to establish the facts essential to their case and may reach a provisional view as to the credibility of the assertions being put forward, though the Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.
- (14) The hurdle for a strike out is higher than the hurdle for a Deposit Order, which depends on the claim having little reasonable prospect of success as opposed to no reasonable prospect of success. Nevertheless, a Deposit Order may well serve as a significant deterrent to a party in continuing with their claim. I approach the issues today having careful and proper regard to the public interest considerations that apply in discrimination and whistleblowing claims.
- (15) The Claimant's unfair dismissal complaint is an abuse of process and has no reasonable prospect of success, since her complaint has previously been heard and determined by Employment Judge Warren. He dismissed her claim. Her attempt therefore to re-litigate the matter is totally without merit.
- (16) The Claimant was unclear before me whether she is seeking to pursue a claim of unauthorised deductions from wages and paragraph 3) of her Claim Form is equally unclear in this regard. However, in so far as she intends to pursue such a complaint, likewise it is potentially an abuse of process and has no reasonable prospects of success in so far as Employment Judge Warren heard and determined her wages claim in 2020. If, which is not clear, she has in mind a new, different wages claim in respect of the reduction in her pay in 2016 and 2017 whilst she was absent from work due to a foot injury, any such claim is very significantly out of time, with no explanation by the Claimant why she did not pursue the matter at the very latest as part of her 2019 Claim or, indeed, much earlier in 2017, namely within 3 months of the last payment of the reduced pay about which complaint is made. She has the burden of establishing that it was not reasonably practicable for her to present any wages claim in time and, putting aside that it is not even clear that she intends to pursue such a claim, she has certainly failed to identify why it may not have been

reasonably practicable to present a claim in the matter in 2017 or even in 2019 when she was being advised and was able to embark upon litigation with the Respondent and see it through to a conclusion.

- (17) Given the case management summary of 27 September 2019, I am not satisfied that the disability discrimination and whistleblowing detriment complaints are an abuse of process since they do not appear to be complaints that have previously been brought by the Claimant against the Respondent. I can see that further Claims in November and December 2021 by the Claimant against the Respondent were rejected by Employment Judge Lewis as an abuse of the Tribunal's process, but in the absence of any Judgment I cannot be satisfied that these complaints give rise to an issue estoppel or are evidence of abuse of process. Nevertheless, I do consider that the complaints have no reasonable prospect of success. Each complaint is poorly articulated in the Claim Form. As regards the whistleblowing detriment complaint, the Claimant merely refers to "Suspension whistleblowing by claiming Gross Misconduct". She has not identified the disclosure relied upon by her or why it is said to qualify for protection under section 43B(1) of the Employment Rights Act 1996. Nor does she identify the suspension in question, when it took place or who took the decision to suspend her. And she does not identify why she believes any suspension was on grounds that she made a protected disclosure.
- (18) I can see from paragraph 34 of Employment Judge Warren's Judgment that the Claimant was suspended in September 2015, subsequently dismissed and then re-instated on appeal on 15 December 2015. That essentially accords with the sometimes difficult to follow account provided by the Claimant on 17 October 2022, which I had to tease out of her. If she is complaining about an alleged detriment in 2015, that means the whistleblowing detriment claim has been brought approximately 6 years out of time.
- (19) The Claimant clarified that her disability discrimination complaint concerns an alleged breach by the Respondent of its duty to make adjustments to her workplace arrangements. She was less clear as to when this was and paragraph 3) of section 8.2 of her Claim Form provides no further clarity in this regard. There is some suggestion at paragraph (16) of the case management summary from the hearing on 27 January 2021 that this may have been in the period leading up to the Claimant's dismissal on 20 June 2019. Given that the Claimant presented her current Claim Form on 7 February 2022, this would mean the claim is just over two and a half years out of time.
- (20) The Claimant has not set out in her Claim Form why she should be permitted to pursue either complaint out of time. The time limits in relation to any whistleblowing detriment complaint are applied more strictly than in discrimination complaints. By virtue of section 48(3) of the Employment Rights Act 1996, the Claimant must establish that it was not reasonably practicable for her to pursue her complaint in time before the Tribunal will go on to consider whether it was presented within such further time as it

considers reasonable. The Claimant's mother died in 2015 and the Claimant states that she has never got over her death. She refers in her Claim Form, as she did in 2019, to having PTSD. There is no medical evidence available to the Tribunal to substantiate any diagnosis, when the Claimant was diagnosed, how severely the Claimant is impacted and how she manages the condition, or whether and, if so, in what respects it may have impeded her ability to pursue legal proceedings. I note in this regard that in the 2019 proceedings the Claimant was directed to provide medical evidence in support of an application in October 2019 to postpone the final hearing but that she either failed to do so since the hearing went ahead or was in fact well enough to continue. As I have observed already, the Claimant was evidently sufficiently well that she was able to represent herself throughout the Tribunal proceedings, including at the preliminary hearing on 27 September 2019 and final hearing in February 2020. In my judgement the Claimant has failed to satisfy me the Tribunal that it was not reasonably practicable for her to pursue a complaint in respect of her 2015 suspension within three months of her suspension, but in any event, even had she satisfied me in this regard I would have said that she could reasonably have pursued a whistleblowing detriment complaint as part of her Claim presented on 10 January 2019, or at the absolute very latest by way of an application to Employment Judge Foxwell to amend the Claim at the case management preliminary hearing on 27 September 2019 when they discussed in some detail what complaints she was bringing. In these circumstances the Tribunal has no jurisdiction to consider the complaint and it should be struck out as having no reasonable prospect of success.

- (21) I turn then to the disability discrimination complaint. I note that the Claimant described the foot condition to Employment Judge Foxwell as a "temporary disability", which calls into question the merits of any claim if the Claimant did not have an impairment that lasted or was likely to last 12 months or more (or was likely to recur). The Claimant told me the condition was corrected after approximately 9 months following surgery. Putting aside the merits or otherwise of the Claim, it is approximately 6 years out of time. The Claimant has not put forward a clear or coherent explanation as to why it might be just and equitable to allow the complaint to be pursued out of time after so long, not least when the matter was discussed on 27 September 2019 and it was explicitly identified and documented in the case management summary that there was no disability discrimination claim before the Tribunal. The Claimant might have made an application to Employment Judge Foxwell at the hearing or have followed the matter up, in particular once the record of the hearing was sent to the parties on 12 October 2019. She did not do so. It is not just and equitable that she should be permitted to pursue a claim now. I have weighed in the balance that the Claimant presents as someone with underlying mental health issues, even if there is no medical evidence in this regard. I also have regard to the stated ongoing impact of the Claimant's mother's death. The Claimant told the Tribunal that she is being treated for cancer and is due to undergo surgery next year. She has also referred to having had a scan for a mini stroke scare, as well as various financial difficulties. These are potentially weighty considerations. Likewise, I am mindful of the challenges

that have been posed by the Coronavirus pandemic, particular for those who are clinically vulnerable and/or with existing mental health issues. However, notwithstanding the lack of medical evidence, even taking what the Claimant says at its highest, there was a period between January 2019 and February 2020 when the Claimant was receiving professional advice and able to represent herself in Tribunal proceedings. I have to weigh in the balance the impact upon the Respondent of having to defend a claim over 6 years after the alleged events in question and the potentially significant adverse impact such a delay can have on the quality of any evidence and the Respondent's ability to respond to the Claim, not least in circumstances where it would reasonably have understood in 2019 and 2020 that the Claimant had brought all matters of concern to the Tribunal's attention. Justice and equity involves finality to litigation between parties and, in the case of the unfair dismissal and wages claims, means not permitting a party 'further bites of the cherry'. In my Judgment, the Claimant is seeking to re-visit issues that either were fully aired before the Tribunal in 2019 and 2020 or which she might have, but failed to, pursue at that time without good reason. It is reasonable to infer that, as with her age discrimination complaint, she decided against pursuing any complaints other than those identified during her discussion of the issues with Employment Judge Foxwell. As with her other complaints, the disability discrimination complaint is out of time and, in circumstances where a just and equitable extension is not warranted, the complaint has no reasonable prospect of success and will therefore be struck out.

Employment Judge Tynan

Date: 19 October 2022

Sent to the parties on: 9 November 2022

For the Tribunal Office.