EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Ms E Ghirmai		Flight Centre (UK) Limited

Heard at: London South Employment Tribunal **On:** 9 April 2021

Before: Employment Judge Hyams-Parish (sitting alone)

Representation:
For the Claimant: In person
For the Respondent: Mr M Blitz (Counsel)

JUDGMENT

(a) The claims of religion and belief discrimination are struck out as having no reasonable prospects of success.

(b) The claim of unfair dismissal pursuant to s.98 ERA is struck out as having no reasonable prospects of success.

REASONS

Background and claims

1. The following facts are alleged by the Respondent and set out in the response form. They are *not* findings of fact made by this Tribunal. I acknowledge that they may be disputed by the Claimant. They are simply stated to provide some background.

2. The Respondent is a subsidiary of Flight Centre Travel Group Ltd, an Australian travel agency operator with global operations. The Claimant

was employed as a Management Information Analyst in the Customer Information Team. Her employment commenced on 19 September 2018. It was terminated with immediate effect on 16 April 2020 for what the Respondent says is some other substantial reason.

3. The travel industry was hit unduly hard by the COVID-19 pandemic. The Respondent's business is reliant on global travel, which was severely limited at the height of the worldwide pandemic. At the relevant time of this dispute, the Respondent's revenue had reduced to approximately 5% of pre-pandemic revenue.

4. In response to the global pandemic, the Respondent needed to make drastic cost savings and implemented a number of cost saving initiatives across the business. In particular, the Respondent sought to take advantage of the UK Government's Coronavirus Job Retention Scheme (CJRS).

5. The Respondent considered that "furlough" was akin to "lay-off", in that employees would be sent home with no work and no pay, save that a portion of their wages could be reclaimed from the UK Government. Accordingly, on 27 March 2020, the Respondent sent an email to those employees who they were intending to furlough (having spoken to them on a Zoom call earlier that day) and outlining a proposed change in terms and conditions. The email explained that the contractual change was required in order for the Respondent to be able to designate those individuals as furloughed employees and requested employee's agreement.

6. The Claimant rejected the proposed contractual change, which she did by way of email dated 30 March 2020. The Respondent therefore sought to enter into a formal consultation process with the Claimant with regards to changing her terms and conditions of employment.

7. During a conversation with Mr Jesse Braid (Company Solicitor) on 31 March 2020, the reasons for the proposals were discussed. The Claimant informed Mr Braid of her belief that she had been selected for furlough on discriminatory grounds, and Mr Braid replied that she should raise a grievance if she so desired. He further informed the Claimant that he would commence an individual consultation process in the hope that they could reach agreement on a contractual variation that the Claimant would find acceptable but warned that if agreement could not be reached then termination of the Claimant's employment may be a possibility.

8. The Claimant's employment was subsequently terminated on 16 April 2020 as she continued to refuse to sign the contract variation which would have allowed the Claimant to have been furloughed.

9. The Claimant subsequently presented two claims in the Employment

Tribunal: the first on 12 May 2020 ("the first claim") and a subsequent claim on 16 August 2020 ("the second claim").

10. In the first claim the Claimant brought claims of:

    10.1. Unfair dismissal (s.98 Employment Rights Act 1996)
    10.2. Whistleblowing dismissal (s.103A ERA)
    10.3. Whistleblowing detriment (s.47B ERA)
    10.4. Victimisation (s.27 EQA)

    10.5. Sex discrimination
    10.6. Failure to consult as required by s.188 Trade Union and Labour Relations Act 1992 ("TULR(C)A")
    10.7. Holiday pay
    10.8. Notice pay
    10.9. Other payments (not particularised)

11. In the second claim, the Claimant brought the following claims:

    11.1. Direct and or indirect discrimination (race, religion and belief, disability, sex and age)
    11.2. Harassment
    11.3. Victimisation
    11.4. Failure to consult as required by s.188 TULR(C)A 1992
    11.5. Breach of contract and wrongful dismissal
    11.6. Whistleblowing detriment
    11.7. Whistleblowing dismissal
    11.8. Unfair dismissal pursuant to s.98 ERA

12. This case was listed for an interim relief application on 23 September 2020. That application was refused by Employment Judge Martin.

13. By an application dated 5 October 2020 the Claimant applied for reconsideration of Employment Judge Martin's above decision. That application was refused.

14. In subsequent weeks there followed detailed requests for further and better particulars of the claims by the Respondent.

15. A case management discussion was listed before me on 27 January 2021. By this date an application had been received from the Respondent to strike out the claims and/or make a deposit order. The Claimant also made an application to strike out the response and/or make a deposit order. I could not make progress at the above hearing as there were too many questions about the claims which needed to be clarified before any consideration could be given to strike out or deposit orders.

16. The Claimant was sent a Scott Schedule template and asked to complete it so that the Respondent and the Employment Tribunal could be very clear as to the claims being brought.

17. The case was relisted for an Open Preliminary Hearing on 9 April 2021, with a time estimate of one day, the purpose of which was to:

    17.1. Consider the claims being brought by the Claimant so as to fully understand them and identify what the legal issues were.

    17.2. To consider whether any parts of the claim or response should be struck out as having no reasonable prospects of success.

    17.3. To consider whether a deposit order should be made if the Tribunal considered any of the claims to have little prospects of success.

    17.4. To make such case management orders as were necessary to prepare the case for final hearing.

18. The Tribunal heard submissions from the Respondent on the above which took longer than usual. At the conclusion, the Claimant said that she was at a disadvantage, not being legally trained, and as a litigant in person whose first language was not English, by being required to respond to the submissions. I therefore asked the Claimant whether she wanted to consider the submissions further and provide her response in writing. She said that she would. Mr Blitz had not provided written submissions, but to assist the Claimant, he kindly offered to prepare a written summary of his submissions and send them to the Claimant.

19. The Claimant was ordered to prepare a written response to the Respondent's submissions and at the same time to prepare written submissions in support of her own application to strike out the response. These were sent to the Respondent and Employment Tribunal in accordance with the order. The Respondent also sent in a response to the application to strike out the response.

20. The basis of the Respondent's application for a strike out order is that (i) all/some of the claims have no reasonable prospect of success (rule 37(1)(a)); and/or (b) the manner in which the Claimant has conducted the proceedings to date has been scandalous, unreasonable or vexatious (rule 37(1)(b)). The basis of the Claimant's application appeared to based on grounds pursuant to rule 37(1)(a)-(c).

21. In reaching a decision on the above applications, I considered both sets of submissions, the information contained in the Scott Schedule (which included the Respondent’s responses) and I also returned to the

pleadings.

Relevant law

22. The power of the Employment Tribunal to strike out is provided under Rule 37 of the ***Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013/1237*** which states:

> ***37. Striking out***
>
> ***(1) 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) that it is scandalous or vexatious or has no reasonable prospect of success;***
>
> ***(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;***
>
> ***(c) for non-compliance with any of these Rules or with an order of the Tribunal;***
>
> ***(d) that it has not been actively pursued;***
>
> ***(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).***
>
> ***(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.***

23. The EAT in ***Hasan v Tesco Stores Ltd UKEAT/0098/16*** said that when considering whether to strike out, a tribunal must (a) consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established (first stage); and (b) having identified any established ground(s), the tribunal must then decide whether to exercise its discretion to strike out, given the permissive nature of the rule (second stage).

24. The EAT gave guidance on the tribunal's duties in relation to strike-out applications against litigants in person in ***Cox v Adecco and ors EAT 0339/19***. There the EAT stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are: '*Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is'*. Thus, there has to be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit

order.

25. On the other hand, my attention was drawn to the case ***Chankok v Tirkey [2015] IRLR 195***, which held that the striking out of discrimination claims is appropriate where the allegation is simply of a difference in treatment and a difference of protected characteristic.

Conclusions

Religion and belief discrimination

26. As much as I tried to search for the slightest hint of a religion and belief claim, I could not. There is not even reference to the religion or belief because of which the Respondent is alleged to have treated her less favourably. The claim is completely absent detail, as is the Scott Schedule, despite the Claimant having been given various opportunities to explain this claim. The Claimant weakens her case considerably by alleging at various points during her claim that her selection for furlough was not only because of her disability but also because of her sex, race, religion/belief and age. She defends this by saying she later realized that her selection was impacted by other forms of discrimination.

27. For the above reason, I conclude that the religion and belief discrimination claims have no reasonable prospect of success and are stuck out.

Unfair dismissal

28. It is not entirely clear whether there is a claim of ordinary unfair dismissal pursuant to s.98 ERA, in addition to the claim under s.103A. In any event, the Claimant does not have sufficient length of service to bring such a claim. It is therefore struck out.

Manner in which proceedings are conducted

29. I do not accept that the conduct of either party, or the manner in which they have conducted these proceedings, has reached a stage whereby I should exercise my powers to strike out either the claim of response for that reason. I recognise that communications between the parties may have become protracted, and at times heated. To some extent, this is to be expected during litigation where issues are hotly disputed, and the parties wish to push forward their own respective positions. I very much hope that the parties will work together from this point to ensure that the case can be prepared for hearing and that the more unnecessary characteristics of this litigation may diminish.

Strike out applications against the Respondent

30. Having considered the Claimant's application to strike out the response, I could see no basis for doing so. I do not accept that their response has no reasonable prospects of success. Neither do I accept that they have conducted the proceedings in a scandalous, unreasonable or vexatious way (for the reasons provided at paragraph 29 above). Finally, I do not accept that the Respondent has failed to comply with orders of the Tribunal.

.....
Employment Judge Hyams-Parish
11 June 2021