EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 6/1/2023

Claimant: Ms D Dubow

Respondent: The Royal Marsden NHS Foundation Trust

Before: Employment Judge Mr J S Burns

Representation
Claimant: No appearance
Respondent: Mr S Nicholls (Counsel)

JUDGMENT

1. The section 15 Equality Act 2010 claim is struck out.
2. The section 47B Employment Rights Act 1996 claim is struck out insofar as it refers to the Claimant's suspension on 29/7/2021 as a detriment, but not otherwise.
3. The section 103A Employment Rights Act 1996 claim is struck out.

REASONS

Refusal of adjournment application

1. Clamant had applied on 15/12/2022 for a postponement of the OPH today "*for the next three months"*. The Claimant renewed her application on 3/1/23 attaching a GP letter. This application was refused by EJ E Burns on 4/1/23 on the basis that in the circumstances the medical evidence supplied was inadequate to justify a further postponement, and the Claimant was told that, if she wished to pursue the application further, she should do so at the start of the hearing today. The Claimant has copied to the Tribunal an email of 5/1/23 to her GP seeking further evidence, but there is no response from the GP to hand, and the Claimant has not attended the hearing today to renew her application in person.

2. I note from her documents throughout and from her recent correspondence that she is evidently fit enough at least to express herself in lengthy and detailed written compositions.

3. The Claimant has known about the Respondent's applications since mid-2022 and, as shown by her application of 15/12/22, has been well-aware since then, at the latest, of the need to provide proper and timely medical evidence to support any further postponements, which however she has not done.

4. The Claimant raised her Claim in August 2021 and, on account primarily of the manner in which the proceedings have been conducted by the Claimant, the original full merits hearing

(scheduled for September 2022) had to be vacated and the case remains at a preliminary stage with no case management dates or final hearing date scheduled.

5. The proceedings have already, following the Claimant's application, been stayed since mid-September 22. As such, the impact of the Claimant's latest application, if it were granted, would be a 6-month stay in proceedings (still at a preliminary stage) which would not see matters progressing until April 2023 at the earliest, therefore about 1 year and 8 months after the Claim was raised with a final hearing being unlikely to take place until late 2023/early 2024.

6. Further delay in the proceedings will impact upon the ability to have a fair hearing. The ET, in its letter to the parties dated 29.09.22, has already identified that due to the delay in the progression of the Claim there may come a point where due to the delay, the tribunal will need to consider if it is possible to have a fair hearing;

7. In the circumstances it is not reasonable or in accordance with the overriding objective (namely to deal with matters proportionately, avoid delay and save expense) to postpone further. Hence I have proceeded with the OPH in the Claimant's absence.

Introduction

8. The matters for consideration today are the Respondent's applications (i) to strike out the section 15 EA 2010 and to strike out or subject to a deposit order the (ii) claims for detriment under section 47B ERA 1996 and (iii) automatic unfair dismissal under section 103A Employment Rights Act.

9. (The Claimant has other claims which are not the subject of today's applications).

10. I considered an OPH bundle of 815 pages and a skeleton argument drafted by Mr Nicholls and a witness statement dated 31/5/22 from Ms N Percival, the Respondent's Divisional Nurse Director for Clinical Services .

11. I also referred to the previous interim-relief judgment of EJ Davidson signed on 12/9/22.

The law on striking-out

12. The principles applicable to strike out claims for no reasonable prospects of success are as follows (r37(a)):

13. Cases should not be struck out where central facts are in dispute (Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 and discrimination claims should not be struck out except in the very clearest circumstances (Anyanwu v South Bank Students' Union [2001] IRLR 305) but equally the "time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail" (Anyanwu per Lord Hope at [39]).

14. Where there is a dispute about the inferences to be drawn in discrimination cases caution needs to be exercised before exercising the power to strike out (Zeb v Xerox (UK) Ltd UKEAT/0091/15).

15. Tribunals should not be deterred from striking out a case at a preliminary stage on the ground of no reasonable prospect of success, even where a dispute of fact is involved, "if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching a conclusion in circumstances where the full evidence has not been heard and explored perhaps particularly in a discrimination context" (Ahir v British Airways plc [2017] EWCA Civ 1392: "[I]n a case of this kind, where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced." (per Underhill LJ at [24]).

16. Example of exceptions to the general principle are: (a) where "it is instantly demonstrable that the central facts in the claim are untrue" (Tayside Public Transport Co Ltd (t/a Travel Dundee v Reilly [2012] IRLR 755 (b) or where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents (ED&F Man Liquid Products v Patel [2003] EWCA Civ 472 (c) or where the facts sort to be established by the claimant were "totally and inexplicably inconsistent with the undisputed contemporaneous documentation" (Ezsias: Maurice Kay LJ [29]).

17. The correct approach is to take the claimant's case at its highest – unless contradicted by plainly inconsistent documents (Ukegheson v London Borough of Haringey [2015] ICR 1285 (Langstaff J at [4]).

Conclusions - The Section 15 claim

18. The Section 15 claim is set out in paragraph 6 of a list of issues compiled by EJ Stout following a case management PH on 7/12/21 which was attended by the Claimant (on video) during which (so I was informed today by Ms McLellan - the Respondent's solicitor- who attended both that hearing and the OPH today) the claims were identified and discussed at length between the EJ and Claimant.

19. The section 15 claim is that because of something arising (from her claimed disability), namely *"her need for reasonable adjustments because of her disability in relation to her chair*", the Claimant was treated unfavourably in 8 different ways namely (i) refusal of her flexible working application (ii) refusal of sepsis training (iii) bullying, harassing and mobbing (iv) refusal to provide clarification of payslips (iv) refusal to clarify a 3% pay rise, (v) suspension and (viii) dismissal.

20. On the face of it, the need for or issues around a chair has nothing to do with the matters complained of and in each case there is no obvious or likely causative link between the chair and the claimed unfavourable treatment.

21. Insofar as the suspension and dismissal are concerned, there is a substantial evidence from Ms Percival in her witness statement and in the detailed contemporaneous and corroborative suspension letter dated 3/7/21 and dismissal letter dated 19/8/21 written by her, that the suspension and dismissal had nothing to do with the Claimant's chair but was a reasonable response by Ms Percival to disruptive and negative interactions between the Claimant and numerous other employees and colleagues over a variety of topics.

22. Looking at the documents as a whole, it cannot be seriously in dispute that the interactions between the Claimant on the one hand and numerous colleagues on the other, had been poor.

23. Mr Nicholls' skeleton argument dated 31/5/22, which was served on the Claimant at the time, made the point about the lack of any pleaded or evident causative link in the section 15 claim, and the point was made again in a previous hearing before EJ Beyzade, but the lack remains today, despite the Claimant, following that hearing, having provided a further copious application to amend document on 15 June 22 and generally having had a lengthy opportunity to set out her case.

24. The section 15 claim as it stands is implausible and amounts to a series of bare assertions. It has no reasonable prospects of success as contemplated by Rule 37(1)(a). Further or alternatively, it remains unexplained and incomprehensible despite the extended procedural history; and hence it has been and is conducted unreasonably as contemplated by Rule 37(1)(b).

Conclusions - The section 47B and section 103A Employment Rights Act 1996 claims.

25. EJ Davison in her interim relief judgment on 20/9/22, (in which she applied a different legal test to that applicable to strike-out applications) stated as follows "*Having reviewed the alleged disclosures as a whole, there is evidence to suggest that the claimant did not, at the time, consider these as 'whistleblowing' and many of the matters now relied on are included in wider complaints relating to the claimant's personal situation. I also note that not all the disclosures relied on were made to the dismissing officer.*"

26. EJ Davison went on to examine each claimed PD and found in each case that it was unlikely that a tribunal would consider that it met the legal definition in section 43B ERA 1996.

27. Without contradicting EJ Davison, and in applying the different test applicable to strike-out applications, I have looked at the claimed PDS and note for example that several of them raised health and safety Issues at work. In my view it is possible or at least reasonably arguable that these fall within section 43B(1)(d).

28. It seems to me that whether or not all the claimed PD's fall within section 43B is a matter which should be determined after hearing the full evidence and is not something which I can safely reach a view on at this stage for purposes of either strike-out or deposit.

29. The same applies to the cause/s of all the claimed detriments in the section 47B claim (except for the suspension). Ms Percival does not deal with these in her witness statement and nor did EJ Davison in the interim relief judgment. I simply do not have sufficient insight into the underlying facts to dispose of those issues now.

30. EJ Davison judgment (based on a different test to the test I have applied) about the causes of suspension and dismissal was as follows: "*I have reviewed the contemporaneous documentation, including the suspension documents, the dismissal letter and the appeal outcome, which set out the basis of the dismissal as being the claimant's contribution to the breakdown in working relationships with her colleagues. This was clearly communicated to the claimant at the time. I also note that the dismissing officer was not the person to whom many of the alleged disclosures were made. I therefore find that it is not likely that a tribunal will conclude that any protected disclosures were the sole or principal reason for the claimant's dismissal.* "

31. The material before me, pertaining to the reason for the suspension and dismissal, is the same as that which was before EJ Davison, but I have applied to it the more stringent test applicable to strike-out applications. I regard Ms Percival's statement read with her letters of suspension and dismissal, in the context of the other material in the large bundle, as cogent evidence that the reason for the suspension and dismissal was simply the disruptive and negative interactions between the Claimant with other staff and colleagues, and that it was not any PDs that she may have made. The claims that the Claimant was suspended or dismissed because of her claimed whistleblowing is fanciful, implausible and it has no reasonable prospect of success.

J S Burns Employment Judge
London Central
6/01/2023
For Secretary of the Tribunals
09/01/2023