



EMPLOYMENT TRIBUNALS

Claimant: Miss Afshan Siddique

Respondents: Nottingham University Hospitals NHS Trust

Record of a Preliminary Hearing heard at the Employment Tribunal

Heard at: Nottingham

On: 19 January 2023

Before: Employment Judge Hutchinson (sitting alone)

Representation

Claimant: Miss Camille Ibbotson of Counsel

Respondent: Miss Sarah Brewis of Counsel

JUDGMENT

Employment Judge gave Judgment as follows:

The Claimant's claims of discrimination, victimisation and harassment are struck out.

REASONS

Background to the First Claim

1. The Claimant first notified ACAS under the early conciliation procedure in respect of these matters on 6 January 2021. She made her first claim to the Tribunal on 19 March 2021 and was represented by Thompsons Solicitors. They have continued to represent the claimant in the proceedings throughout.

2. She had been employed by the Respondents since 1 September 2016 and was employed as a Telecommunications Receptionist.
3. She said that she had suffered discrimination on grounds of her:
 - 3.1. Race.
 - 3.2. Disability.
 - 3.3. Religion or Belief.
4. She claimed that she had suffered harassment and been victimised.
5. The Claimant describes herself as British Pakistani who is Muslim. She said that her disability was that she suffered from anxiety.
6. The particulars of claim extended to 74 paragraphs.
7. The Respondents responded to that claim on 21 April 2021. The Claimant had raised a grievance with the Respondent on 20 January 2021 which was ongoing at that time and the Respondents asked for the proceedings to be stayed pending the outcome of that.
8. They pointed out that the Claimant had inadequately particularised the claims and informed the Tribunal that they would be seeking further and better particulars.
9. The claim was then stayed.

The second claim

10. On 19 October 2021 the Claimant presented a further claim to the Tribunal. As before she was advised by the same Solicitors and made further claims of discrimination arising out of matters that she said had occurred on 9 and 10 June 2021.
11. The second claim was also stayed pending the outcome of the grievance procedure.

Events leading to this hearing

12. On 1 April 2022 the Respondents solicitors wrote to the Claimant and to the Tribunal seeking further and better particulars of the Claimant's claims. In response to this Employment Judge Camp ordered that in relation to the disability issue the Claimant should provide details of the impairments that she has suffered from and how they affect her normal day to day activities. The Claimant was also ordered to provide her GP records.
13. The matter was listed for a Telephone Case Management Preliminary Hearing which would be conducted on 11 May 2022.
14. On 14 April 2022 the Claimant's solicitor wrote to the Tribunal to say:

“Both we, but more particularly our colleagues UNISON have been trying, without success, to illicit a response from the Claimant to emails, letters and telephone calls such that our colleagues have serious concerns about the Claimant’s current state of health”.

15. They asked for the orders made by Employment Judge Camp to be deferred by 14 days. My colleague Employment Judge Michael Butler granted that extension of time and ordered that the Preliminary Hearing be postponed and relisted as soon as possible.
16. On 25 April 2022 the Respondents provided amended grounds of resistance in respect of the first claim and the grounds of resistance and ET3 in respect of the second claim.
17. In their response to the second claim, they invited the Tribunal to strike out the Claimant’s claims on the grounds that the claims were misconceived and that it was not reasonable for the Claimant to be allowed to pursue that claim.
18. There was then a Case Management Preliminary Hearing conducted by telephone by my colleague Employment Judge Victoria Butler on 14 June 2022. Both parties were represented by solicitors at that hearing.
19. Employment Judge Butler’s Case Management Record indicates the background to that hearing at which Mr Berriman (solicitor for the Claimant) explained his predicament namely that whilst he had received correspondence from two individuals on the Claimant’s behalf, he had not heard from her directly and had therefore been unable to take instructions on her behalf without her consent. He believed that the Claimant was severely ill.
20. He said that he was hopeful that he would be able to establish a channel of communication with the Claimant in the next few weeks and that he would be able to provide the further and better particulars of her claim and other information relating to the disability issue.
21. Employment Judge Butler agreed to allow Mr Berriman that extra time but said that if she was not able to comply with the orders the Claimant must provide medical evidence to explain why not and when it was anticipated that she would be able to do so.
22. The final hearing had up until that point been listed for 21 to 23 November 2022 but in the circumstances that hearing was vacated.
23. It can be seen from the Case Management Summary that Employment Judge Butler then went on to make various orders and in particular:
 - 23.1. By 12 July 2022 the Claimant’s solicitor would update the Tribunal as to whether the Claimant would be able to comply with the orders and if not when she would be likely to do so.
 - 23.2. If the Claimant was not able to comply with the orders, she would provide medical evidence by 9 August 2022 which would confirm why she could not

comply with them and when she would be able to do so.

23.3. She would provide further and better particulars of her claim by 9 August 2022.

23.4. She would provide details of her disability i.e., an impact statement by 30 August 2022.

23.5. She would also provide her GP records by 30 August 2022.

24. Mr Berriman updated the Tribunal on 12 July 2022 in accordance with the order saying that the tasks involved complying with the Case Management Orders were manageable although the Claimant could not be completely certain of her ability to comply or assist Mr Berriman in achieving compliance. He said that if the current outlook changes ahead of the first due date namely 9 August 2022 he would inform the Tribunal and the Respondent accordingly.

25. On 10 August 2022 Mr Berriman wrote to the Tribunal to say simply:

“With reference to the Case Management Orders in this matter we regret to say that we are currently without effective instructions”

26. On 22 August 2022 the Respondents applied for the Claimant’s first and second claims to be struck out under the provisions of Rules 37(1)(c) and (d) of the Employment Tribunal Rules of Procedure 2013 as the Claimant had failed to comply with orders of the Tribunal and was not actively pursuing her case.

27. They pointed out that the Respondent would suffer unfair prejudice if the Claimant were allowed to continue with the claims which had not been properly pleaded and where the Claimant had given no indication of when she may be able to provide any further particulars despite ample opportunity.

28. My colleague Employment Judge Ahmed agreed that the matter should be listed for hearing and an Open Preliminary Hearing was listed for 4 October 2022 to consider whether the claims should be struck out.

29. On 22 September 2022 the Claimant’s solicitor wrote again to the Tribunal.

30. The reason for the email was to apply to postpone the Preliminary Hearing on 4 October 2022. The reason for the request to postpone was that she had two medical appointments on that day.

31. In that correspondence Mr Berriman informed the Tribunal that there had been:

“Significant positive developments in terms of the Claimant’s ability to engage with us and provide instructions”.

32. He described a meeting that had taken place on 20 September 2022 at which the Claimant had been able to engage with all the matters in hand. He went on to say:

“This meeting was a breakthrough for the Claimant and for the writer and was monumentally

important in terms of continuing to develop a trusting relationship between client and advisors. It was apparent the Claimant was acutely aware that her varying state of health has meant she has not been able to meet the requirements of the outstanding Case Management Orders and she finds it difficult to overcome a sense of embarrassment even shame that her health has been so debilitating in this respect. The writer can also state his sense that her fundamental resolve, not only to rectify matters but see her case through to conclusion is undiminished”.

33. The Claimant requested that the postponed hearing should be in person and other adjustments made to accommodate her including that the hearing should start on or after 11.00am.
34. The Respondents did not object to the application and my colleague Employment Judge Broughton adjourned the hearing and listed the matter for an attended in person hearing to commence at 11.00am and the notice of hearing was sent to the parties on 8 October 2022.
35. Mr Berriman then wrote to the Tribunal on 10 October sending two letters from the Claimant’s GP, Dr Chowdrey. These letters were produced to support the adjustments for the Preliminary Hearing which had been requested.
36. We heard nothing further from the Claimant or her representative until 12 January 2023 when an email was sent by the Claimant which included a statement of evidence from the Claimant for the immediate attention of the Tribunal. A copy of the statement was sent to her solicitor but it was apparent that the statement had been prepared entirely by herself. In that statement she complained that she was extremely distressed and concerned that she had received no response or communication from her representative Mr Berriman. The Claimant in the letter referred to examples of what she described as a lack of response or contact from Mr Berriman and blamed him for her failure to comply with the orders of the Tribunal. She said in the letter that she was not aware of the orders made on 14 June 2022 and that the case summary document had not been communicated to her either by Mr Berriman or her UNISON representative Dave Ratchford.
37. The statement consisted of a document that was 26 pages long and contained 89 numbered paragraphs.
38. Yesterday the Claimant then requested that rather than there being an attended hearing she should be allowed to attend by CVP and the Tribunal accommodated that request.

Today’s hearing

39. At the hearing today the Claimant was represented by Counsel, Miss Ibbotson. She described a long conference that she had had with the Claimant yesterday afternoon. Miss Ibbotson told me that the Claimant wanted to progress the case and provide the details that had been requested by the Tribunal.
40. It was Miss Ibbotson’s submission that a fair hearing was still possible and that the delays had partly been caused by the stay. The stay though was lifted 10 months

ago and the case had still not progressed at all in that time.

41. Miss Ibbotson said that the key witnesses were still employed by the Respondents and that it was not in line with the overriding objective for the claim to be struck out.
42. She said that the Claimant suffered from serious and chronic health conditions in particularly mental health conditions which had prevented her from engaging and contributed to her not providing instructions.
43. Miss Ibbotson sought to reassure me that the Claimant was now in a position where she would engage with her advisors and would be able to provide the information that had been requested indeed ordered 9 months ago.
44. I have seen no medical evidence produced to me as to the Claimant's current condition other than the notes provided from her GP in October.
45. According to the Claimant's own statement the Claimant has a long list of medical conditions and there is no evidence of anything other than a deterioration of her mental and physical health over the last 12 months. There is no reason for me to consider that this is likely to improve in the foreseeable future as it would need to do if the Claimant was to be able to provide instructions to her solicitors or for her to comply with the requirements of the Tribunal.

The Law

46. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides:

"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:

- (c) For non-compliance with any of these rules or with an order of the Tribunal;*
- (d) It is not being actively pursued"*

47. Rule 2 of those rules referred to the:

"Overriding objective" as follows:

"The overriding objective of these rules to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes so far as is practicable:

- (a) Ensuring the parties are on an equal footing;*
- (b) Dealing with cases in a way which are proportionate and complex in the importance of the issues;*
- (c) Avoiding unnecessary formality in seeking flexibility in the proceedings;*
- (d) Avoiding delay, so far as compatible with proper consideration of the issues and*
- (e) Saving expense*

(f) A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by these rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal”.

48. In their application the Respondents referred to the case of ***Johnson v Oldham Metropolitan Borough Council [2013] UKEAT/0095/13.***

49. I acknowledge that in considering a strike out in these circumstances I must consider whether a strike out is a proportionate response to the non-compliance. It is a Draconian step to take. I must consider whether there is a less drastic means of addressing the Claimant's failures and achieving a fair trial for the parties. The obvious alternative I have considered is whether I should give the Claimant one last chance and make an Unless Order. I need to consider not only the reason for the default but also the seriousness of the default. I also need to consider whether as a result of the delay there is a substantial risk that a fair hearing becomes impossible or that serious prejudice is caused to the Respondent.

My Conclusions

50. There can be no doubt that the Claimant has in this case:

50.1. Completely failed to comply with the orders to provide further and better particulars, the medical evidence or an impact statement.

50.2. Similarly, that the Claimant has not been actively pursuing her case. Her first claim was presented in March 2021 and is still not particularised.

50.3. Had opportunities to provide medical evidence as to her failures but has failed to do so. The only medical evidence that she has provided at any time is to do with her adjustment for attending a hearing. No medical evidence has been produced to me today or at any time that explains her failure to comply with orders or pursue the case.

50.4. Known since September that an application has been made to strike out her claim and 4 months later at this hearing today, she has still not provided the information or evidence that is required to proceed with this case.

51. Whilst I do not doubt Miss Ibbotson's assertion that her meeting yesterday with the Claimant over Zoom has marked a breakthrough, we have had false dawns before and I particularly refer to the comments made by Mr Berriman in his letter of 22 September 2022. There is no medical evidence produced to me which supports any such contention that there is going to be a change in the Claimant's condition which means she will be able to prosecute her case and comply with orders in the future.

52. The Claimant asserts that the reason that she has not pursued the case or comply with the orders of the tribunal is because of her medical condition but she has not provided me with any medical evidence of her current condition or a prognosis about her condition in the future.

53. It is incumbent upon the Claimant to pursue her case and to comply with the orders made by the Tribunal and in this case, there has been a complete failure by the Claimant to either pursue her claim or comply with the orders. This is even though she has been represented throughout by a union and by solicitors.

54. In the meantime, the Respondents, a publicly financed authority, have no doubt incurred huge expense in defending this case already and if the claim was allowed to proceed would incur further expense in defending the case.

55. I am also satisfied that the Respondent would suffer unfair prejudice if the Claimant were allowed to continue with the claims which have not been properly pleaded and there is still no indication of when she may be able to provide particulars despite being given plenty of opportunity in the last 10 months to do so.

56. I am satisfied that there is no evidence that if I gave the Claimant any further opportunities, she would be able to grasp them. A line needs to be drawn somewhere and the line should be drawn now.

57. I am satisfied that it would not be appropriate to make any further orders in this case and the claim should be struck out because:

57.1. The Claimant has not complied with orders of this Tribunal despite being given many opportunities to do so and,

57.2. She has not actively pursued her claims.

Employment Judge Hutchinson

Date: 23 March 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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