



THE EMPLOYMENT TRIBUNALS

Claimant: Mr Paul Oakshott
Respondent: The Felixstowe Dock and Railway Company
On: 19 April 2023
Heard at: Norwich
Before: Employment Judge M Warren

Representation

For the Claimant: Mr Marsh, Friend
For the Respondent: Ms Robinson, Counsel

PUBLIC PRELIMINARY HEARING

JUDGMENT

1. The Claimant's claim of harassment related to disability is struck out on the grounds that he has no reasonable prospects of successfully arguing that his allegations in respect of the same formed part of a continuing course of conduct culminating in allegations which are in time, nor of persuading the Tribunal at trial that it is just and equitable to extend time.

REASONS

Background

1. Mr Oakshott was employed by the Respondent as a Process Controller / Vessel Controller between 27 June 1997 and 18 August 2022. After Early Conciliation between 11 August 2022 and 22 September 2022, he issued these proceedings claiming unfair dismissal and disability discrimination on 14 October 2022.
2. This Open Preliminary Hearing was arranged because in its Grounds of Resistance and in a subsequent letter dated 16 January 2023, the Respondent applies that out of time elements of the disability discrimination claim should be struck out. I clarified at the outset of the

Hearing with Ms Robinson that the basis of the Strike Out Application was that Mr Oakshott has no reasonable prospects of succeeding in persuading the Tribunal that ultimately hears this case, that his allegations that are out of time, are either brought into time because they form part of a continuing act, or that it would be just and equitable to extend time.

3. For the purposes of today's Hearing, I had a Bundle prepared for me by the Respondent which included within it, a draft List of Issues from each side.
4. At the outset of the Hearing I clarified with Mr Marsh that although he has a Law Degree, he is not qualified in any formal sense and does not practice professionally.
5. We agreed that before I considered the Strike Out Application, we needed to understand the Claimant's case as he would like to put it forward, if it is permitted to proceed. We therefore spent some time identifying the issues. After identifying the issues, Ms Robinson refined and put her Strike Out Application. The decision which I made was to strike out the harassment element of the complaint. The observations which I make with regard to the List of Issues in the separate case management summary therefore excludes the harassment part of the claim.
6. I should record that during our discussions, Mr Marsh confirmed on behalf of Mr Oakshott that he is not pursuing a protected interest disclosure, (whistle blowing) claim nor does he intend to complain of failure to make reasonable adjustments.

Strike Out Application

7. As I have indicated, Ms Robinson focused her Strike Out Application on the harassment complaint. Arising out of our discussions, we clarified with Mr Marsh and Mr Oakshott that the allegations of disability related harassment were as follows:
 - 7.1. That during the 2017 Cricket World Cup a Mr Alan Davies shouted at Mr Oakshott in a degrading manner because he was watching the cricket, everybody else was watching the cricket as well;
 - 7.2. That between 2017 and May 2021 Mr Alan Davies put Mr Oakshott and only Mr Oakshott, on the Marshalling role;
 - 7.3. In 2019, Mr Adrian Leveridge shouted at Mr Oakshott for turning on the radio, and
 - 7.4. That in August 2021, Mr Rob Angria put Mr Oakshott, upon his return to work after his second heart attack, alone on the role of Marshalling.

The Law

8. Employment Tribunals Rules of Procedure, rule 37 provides that:
- (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;...*
9. The appropriate approach to strike out applications in discrimination cases stems from the case of Anyanwu v Southbank Student Union 2001 ICR 391. In broad, general terms, that case was authority for the proposition that discrimination cases should be heard and not struck out.
10. In the case of ABN Amro Management Services (1) and Royal Bank of Scotland (2) v Mr Hogben 2009 UKEAT 026609 the then President, Mr Justice Underhill at paragraph 13 referred to Anyanwu as not being controversial. He pointed out that in Anyanwu, Lord Hope said that “*in an appropriate case a claim for discrimination can and should be struck out if the tribunal can be satisfied it has no reasonable prospects of success*”.
11. In Morgan v Royal Mencap Society [2016] IRLR 428 the President of the EAT, (as she then was) Mrs Justice Simler, reminded us that the threshold is high, (paragraph 13). However, she acknowledged at paragraph 14 that there are cases where, if one takes the claimant’s case at its highest, it cannot succeed on the legal basis on which it is advanced and in those circumstances, it will be appropriate to strike out.
12. The decision whether to strike out is a matter of judicial discretion. In exercising discretion, a Tribunal should have regard to the overriding objective. Rule 2 sets out the Overriding Objective as follows:
- The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

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.

13. In exercising discretion, one must also balance the relative prejudice to the parties.

Discussion and Conclusion

14. The last of the harassment allegations relied upon is in August 2021, if we assume that was at the end of August, then a complaint about those events should have been made (if they themselves are part of a continuing act) by the end of November 2021. Mr Oakshott did not begin Early Conciliation until 11 August 2022, some nine months after time had expired.
15. Aside from the harassment complaint, the substantive element of Mr Oakshott's disability discrimination claim is that his dismissal amounted to unfavourable treatment arising from his absences, caused by his disabilities.
16. There appears to be no discernible link between the harassment allegation and the decision to dismiss, none was pointed to by Mr Marsh.
17. It appears to be common ground that there were periods of absence which led to the application of the Absence Management Policy.
18. It is not clear to me how the matters complained of in the harassment claim relate to Mr Oakshott's disability in any event.
19. Even taking Mr Oakshott's case at its highest, I find there is no reasonable prospect of his persuading an Employment Tribunal at trial that the incidents of alleged harassment complained of constitute part of a continuing course of conduct that culminated in his dismissal.
20. When asked why it would be just and equitable to extend time, Mr Marsh referred to psychological bullying and harassment of Mr Oakshott, which of course was the very subject matter of our discussion. He also referred to Mr Oakshott not being allowed to partake in activities, not being allowed to apply for promotion and that the same were an ongoing issue. These were not matters that had arisen during the process of identifying the issues.
21. The lapse of time since August 2021 will have some impact on cogency of evidence. Events dating back to 2017 all the more so. That may cause some prejudice to the Respondent.

22. In terms of prejudice to Mr Oakshott if I strike out the harassment claim; he retains the complaints of unfair dismissal and disability related discrimination in connection with his dismissal. From our discussions today, those are clearly the main thrust of his complaint. That ameliorates any prejudice to him if his harassment complaint is struck out.
23. I acknowledge that the reason put forward by Mr Oakshott through Mr Marsh for not complaining of discrimination in 2021 was fear of retribution (to summarise his point) but on balance the conclusion I reach is that there would be no reasonable prospect of persuading the Tribunal at trial that it is just and equitable to extend time.
24. I therefore strike out the Claimant's claim of harassment related to disability.

Case Management

25. Because a Judgment has to be published on the Tribunal's website and be available to the public to inspect, the convention is that it is not appropriate to deal with case management in the same Hearing Summary. Comments on the List of Issues and case management matters will therefore appear in a separate Hearing Summary.

Public access to employment tribunal decisions

The parties should note that all judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

President's guidance

The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

Other matters

(a) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(b) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance

with rule 74-84.

(c) You may apply under rule 29 for this Order to be varied, suspended or set aside.

Dated: 31 May 2023

Employment Judge M Warren

ORDERS SENT TO THE PARTIES ON

5/6/2023

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FOR THE TRIBUNAL OFFICE