



EMPLOYMENT TRIBUNALS

Claimant: Ms J Roberts
Respondent: Arriva London North Ltd T/a Arriva London
Heard at: Watford ET
On: 19 June 2023
Before: Regional Employment Judge Foxwell

Appearances

For the claimant: In person
For the respondent: Ms Mosley-Ford (in-house paralegal)

PRELIMINARY HEARING JUDGMENT

The respondent's application for the claim to be struck out is dismissed.

REASONS

Introduction

1. The claimant Ms Julia Roberts was employed by the respondent, the well-known bus company, between 2007 and 14 October 2020 when she was dismissed. The claimant was employed as a bus driver but also undertook trade union and health and safety representative roles.
2. Having gone through early conciliation, on 11 January 2021 the claimant presented a variety of complaints to the Employment Tribunal. She was represented at that time by Mr John Neckles of the PTSC Union. Mr Neckles included claims of disability discrimination, race discrimination, detrimental treatment and automatically unfair dismissal on health and safety grounds, as well as "ordinary" unfair dismissal. The discrimination claims were ones of harassment, victimisation, direct discrimination, discrimination arising from disability and failure to make reasonable adjustments.

3. These claims were the subject of case management at a hearing before Employment Judge Buchanan on 8 June 2022. The claimant withdrew her claims of race discrimination and of detriment on health and safety grounds at this hearing.
4. Judge Buchanan attempted to clarify the issues in the case but found it necessary to make an order for further information in relation to some of the claims. This was contained in an “unless order”, that is an order which, if not complied with, would mean the claims to which it related would be automatically struck out. The claimant’s claim of “ordinary” unfair dismissal was not subject to the unless order.
5. Following this hearing the claimant withdrew her complaint of direct disability discrimination.
6. The claimant did not comply with the unless order.
7. The case next came before the Tribunal on 8 November 2022, when it was heard by Employment Judge Gordon-Walker. For the reasons she gave at the time, Judge Gordon-Walker granted the claimant relief against sanction in respect of those aspects of her claim which had been automatically struck out but made the claimant’s claims of harassment, victimisation and automatic unfair dismissal subject to deposit orders. The deposits were not paid so those aspects of the claimant’s claims were subsequently dismissed.
8. That meant that all that remained in the claim was the complaint of “ordinary” unfair dismissal and claims of discrimination arising from disability (section 15 of the Equality Act 2010) and failure to make reasonable adjustments (sections 20 and 21).
9. The respondent concedes that at all times material to her claim the claimant was a disabled person within the statutory definition because of a back condition.
10. These remaining claims were due to be heard at a trial over three days commencing on 19 June 2023. Shortly before this hearing, the Tribunal sent out its usual questionnaire to the parties asking them to confirm that the case was ready for hearing. In the absence of a satisfactory response from the claimant’s representative, I issued a strike out warning on the basis that the claim was not actively pursued and/or that the claimant had failed to comply with the Tribunal’s order. A Legal Officer sent this to the claimant directly by email on 8 June 2023 and followed it up with a further email on 14 June 2023. The claimant replied asking that the case not be struck out.
11. In light of this exchange of correspondence, Employment Judge Quill postponed the Final Hearing but listed this Public Preliminary Hearing instead to decide whether the case should be struck out because it has not

been actively pursued, or because orders have not been complied with or that a fair trial is no longer possible.

The issues in the case

12. At the beginning of the hearing, I asked the claimant what her case was about.
13. The claimant told me that she has a chronic back condition due to slipped discs. She has required surgery more than once with the first procedure in early 2022. She was frank in saying that she could no longer drive a bus because of her condition.
14. The claimant said that it was unfair to dismiss her on ill health grounds, despite having been off work for more than a year at the date of her dismissal, as there was other work available which she could have done. She identified this as carrying out health and safety inspections of buses (something which was of particular importance during the pandemic) and continuing with her trade union and health and safety representative duties.
15. It appeared to me, therefore, that there were legally and factually straightforward claims of ordinary unfair dismissal, discrimination arising from disability (where the issue was likely to be justification turning on the same evidence as the unfair dismissal claim), and failure to make reasonable adjustments where the relevant provision, criterion or practices was likely to be being able to drive a bus.
16. There are evidential issues about whether and when the claimant would have been sufficiently fit to do the alternative work she describes and whether or not the respondent had enough of a requirement for it.

The parties' submissions

17. I asked the claimant to explain why she had failed to comply with the Tribunal's orders for preparation for the final hearing. She told me that she had entrusted these matters to her representative but he had failed to carry them out and had failed to keep in contact with her about them. For example, she said, she only received copies of the deposit orders made in November 2022 from her representative in April 2023 by which time the payment date had passed. The Tribunal had sent these orders to the parties in December 2022.
18. Ms Mosley-Ford contended that the claim should be struck out because it has not been actively pursued and, she suggested, a fair hearing is, or may become, no longer possible.
19. Ms Mosley-Ford said, and I accept, that the only step the claimant has taken is to provide a schedule of loss. I have seen this and it can be best described as a generic and optimistic document. The claimant has not

disclosed any documents (unlike the respondent) and witness statements have not been exchanged.

20. As far as the question of a fair trial is concerned, she argued that if the case is permitted to proceed it is possible that there will be further changes to it and with the passing months and years witnesses' memories will fade. She acknowledged however, that the respondent's witnesses, the dismissing and appeal officer, remain as employees and that the documents underlying the dismissal process are available.

Conclusion

21. My power to strike out a claim is contained in rule 37 of the Employment Tribunals Rules of Procedure which says as follows:

37 (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).

It is well-established that striking out a claim is a draconian step not to be taken lightly. This is because, once a case is struck out, that party's opportunity to receive a judicial determination on the underlying merits of the claim ends.

22. In my judgment this case is a classic example of the difficulties which raise when a representative over-complicates their client's initial claim rather than focussing on what it is really about: whether it was unfair and discriminatory to dismiss this disabled claimant notwithstanding that she had been absent from work for more than a year and was no longer able to safely drive a bus.
23. I am satisfied that there has been a significant failure on the claimant's side to comply with the Tribunal's orders. I am also satisfied from what I have heard that those failures lie principally with the claimant's representative and not with her. I say principally because there is some force in Ms Mosley-Ford's submission that Ms Roberts's role as a trade union representative suggests some knowledge and, possibly, experience of Employment Tribunal processes. Ultimately, however, the claimant had a representative

and it appears that he failed to keep her informed of the progress of this litigation or to take sufficient steps to protect her interests in the litigation. I referred the parties in this context to the recent decision of the Court of Appeal in *Phipps v Priory Education Services Limited* [2023] EWCA Civ 652.

24. I do not think that this is one of those cases where there was a deliberate and abusive breach of orders.
25. The test that I have applied in the circumstances of this case therefore is whether a fair trial of the issues set out above remains possible. The Tribunal's Rules are not intended to place barriers in front of parties, but parties are required to conduct their litigation proportionately so I have paid full regard to the additional expense and inconvenience caused to the respondent by the claimant's failures in this case in reaching my conclusion.
26. For all of that, I am satisfied that a fair hearing is still possible, particularly having regard to the limited and much more realistic types of claim remaining before the Tribunal. As far as the evidence for a final hearing is concerned, the respondent retains its witnesses and documents and the claimant has confirmed that it will just be her and, she hopes, the union representative who accompanied her at the grievance and dismissal meetings to give evidence on her side.
27. I am not therefore going to strike out the claim, notwithstanding the failure of the claimant to be adequately prepared for the full merits hearing today.
28. I have relisted the final hearing and made case management orders in respect of it and these are set out in a separate document.

GEORGE FOXWELL

Regional Employment Judge Foxwell

Date: ...22 June 2023.....

Sent to the parties on: 25 June 2023

GDJ
For the Tribunal Office