



EMPLOYMENT TRIBUNALS

Claimant: Miss Abi Harris

Respondent: Lawson (Whetstone) Limited

Heard at: Watford

On: 28 June 2023

Before: Employment Judge Bansal (sitting alone)

Representation

Claimant: Miss A Marquarite-Robinson (Counsel)

Respondent: Mr L Wilson (Counsel)

PRELIMINARY HEARING RESERVED JUDGMENT

1. The respondent's application to strike out the claimant's claim under rule 37 of the Employment Tribunals (Constitution & Rules of Procedure) Regs 2013 and/or for a deposit order is refused.

REASONS

Introduction

1. By a Notice of Hearing dated 29 April 2023 this hearing was listed as a public preliminary hearing to determine the respondent's application made on 3 November 2022 that the claimant's claims be struck out on the grounds that the claims have no reasonable prospects of success pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 and/or in the alternative the claimant be ordered to pay a deposit as the claims have little reasonable prospects of success pursuant to r39(1) of the Employment Tribunal Rules of Procedure 2013.

Background

2. The claimant was employed by the respondent as a Credit Analyst from 2 September 2019 until 1 October 2021. Early conciliation started on 21 September 2021 and an Early Conciliation Certificate was issued on 22 September 2021. A Claim Form (ET1) was presented on 22 September 2021. The claimant brought claims for constructive unfair dismissal; direct discrimination on the grounds of her religion; harassment related to her religion, and victimisation. The respondent submitted its response on 29 November 2021, defending the claims.
3. For the purposes of the discrimination and harassment complaints the claimant relies on the protected characteristic of her Jewish religion.
4. By letter dated 12 March 2022 Employment Judge Laidler ordered the claimant to provide further particulars of the direct discrimination claim by 28 March 2022. The claimant served these particulars on 25 March 2022.
5. At a telephone Case Management Preliminary Hearing held on 1 September 2022, Employment Judge Eeley clarified the claims and comprehensively formulated an agreed list of issues, which required some additional information from the claimant. The additional information required the claimant to confirm some of the dates to the pleaded incidents to the constructive unfair dismissal complaint; and in respect of the discrimination harassment and victimisation complaints details of any of other comparator employees to be relied upon. This information was ordered to be provided by 6 October 2022. In addition, further case management orders were issued and a final hearing listed for 17-26 June 2024. (p27-37)
6. Further, the Case Management Order provided that if the respondent intends to make an application to strike out the claims on the basis they have no reasonable prospects of success and/or for a deposit order, such application must be made to the tribunal by no later than 3 November 2022.(p28)
7. In compliance with the order, the claimant submitted the additional particulars on 5 October 2022, in the form of a document entitled "further information" with some email attachments. In the document, the claimant stated, "Unfortunately, I do not have the exact dates when this all occurred. When I left Lawsons I did not have access to my emails. *All the dates and evidence were on my work emails and Nicola Jones would have had copies from the meetings we had.*" The main content of the document referred to background information and a repetition of some of the incidents relied upon. (p38-51)
8. On 3 November 2022, the respondent's representative made an application for an order to strike out the claims on the basis they had no reasonable prospect of success or in the alternative for a deposit order, as the claimant had failed to provide the ordered particulars. In the application it is stated, ".. *The claimant*

does not set out any incidents of discrimination or any alleged protected acts, and she does not give any dates upon which any incidents are said to have occurred. The claimant has not identified any facts whatsoever from which a tribunal could decide, in the absence of any other explanation” that a breach of the Equality Act 2010 has occurred and the Respondent is in the same position as when it submitted its response to the claimant’s claim in that it does not know what claims it is facing. (p52) In response to this application, on 6 January 2023, Employment Judge Eeley issued a strike out warning notice, giving the claimant an opportunity to make any representations by 20 January 2023.

9. On 19 January 2023, the claimant submitted a response to the strike out warning. This response did not address the issue of the strike out but contained a further account of the background to the incidents referred to in her claim. In response, by email dated 6 February the respondent representative repeated the application for strike out without a further hearing, stating, “ The Claimant gives no reasons at all why her claim should not be struck out, nor does she request a hearing to determine the matter. Her response is no more than a list of complaints by the Claimant about her line Manager, none of which indicate any prima facie case of discrimination. The only mention of the Claimant’s religion is in the final paragraph where the Claimant states that the only difference between herself and her colleagues were religion, but she does give any facts whatsoever that may infer that the reason for any difference in treatment was religion....” Further it stated that the respondents two principle witnesses, namely Mr Yates and Nicola Jones had left the business, which meant that the parties would not be on an equal footing. The claimant opposed the representations by email on 8 February 2023.
10. In consequence to the above mentioned correspondence and representations Employment Judge Eeley directed the issue be determined at this Preliminary Hearing.

Preliminary Hearing

11. The claimant was in attendance and was accompanied by her father, and was represented by Miss Marquarite-Robinson of Counsel. The respondent was represented by Mr L Wilson of Counsel, and was accompanied by Mrs Alison Berry (Director of Group HR)
12. I was presented with a bundle of documents of 72 pages prepared by the respondent solicitors. This bundle contained copies of the pleadings; tribunal orders and tribunal correspondence. In addition the claimant provided a witness statement, which rehearsed the background facts; the complaints as pleaded, and the claimant’s financial information. This statement was served on the respondent Counsel, and the Tribunal at the start of the hearing. Counsel for the claimant confirmed this statement had been prepared for this hearing, but that the claimant would not be called to give evidence. Mr Wilson’s position was that the statement was not relevant to this application and should be disregarded. I reviewed the statement and agreed with Mr Wilson, although I considered the

details about the claimant's earnings will be relevant should I consider making a deposit order.

13. I did not hear oral evidence from the claimant or any one for the respondent. Each Counsel made their representations and legal submissions accordingly.

Respondent's application and submissions

14. In support of the contention the claim had no reasonable prospects of success, Mr Wilson made the following points
- (a) in respect of the discrimination, harassment and victimisation complaints, these were directed at the claimant's Line Manager, My Yates, and not the respondent;
 - (b) the complaints of discrimination and harassment were general allegations of mistreatment based on a held belief that it was because she was Jewish. These allegations lacked merit as there was insufficient information to show that any mistreatment was related to her religion, and that overall on her pleaded case the claimant would not be able to establish a prima facie case;
 - (c) in respect of the unfair constructive dismissal claim, the alleged breaches/conduct relied upon also lacked merit and even if proven would not amount repudiatory conduct on part of the respondent;
 - (d) the claimant has not identified and particularised the protected acts being relied upon. Accordingly, the victimisation complaint cannot proceed and must be dismissed.
15. In support of the contention, there has been non-compliance, Mr Wilson pointed out that, despite three attempts to do so, the claimant had still not provided the information identified at the Case Management Preliminary Hearing held on 1 September 2022.
16. Mr Wilson, also informed the tribunal that the respondent's two principle witnesses Mr Yates (the alleged perpetrator) and Nicola Jones, had left the respondent's employment, and left without leaving any contact details. Mr Wilson was unable to confirm the dates of their leaving. The respondent is now concerned that without their evidence they will be at a disadvantage and questioned if a fair hearing was possible.

Claimant submissions

17. At the start of her submissions, Miss Marquarite-Robinson informed the tribunal the claimant had decided not to proceed with the victimisation complaint, and she was instructed to withdraw this complaint. Accordingly, I confirmed a withdrawal judgment would be issued.

18. Miss Marquarite-Robinson opposed the application and made the following points;
- (a) the claimant is a litigant in person, and has tried to provide the requested information; and is aware she should have sought assistance;
 - (b) there has not been non-compliance. The claimant has provided the information which may not be in the form required by the respondent or to their satisfaction. The claimant is not able to confirm specific dates for the reason explained in her response dated 5 October 2022 (para 7 above), however she has set out the required details about the incidents relied upon, which is sufficient for the respondent to know the issues and case it is required to defend and prepare for at the final hearing.
 - (c) this claim is fact sensitive and there is a dispute on facts. It is rare to find evidence of discrimination, however, the claimant has clearly set out incidents of difference in treatment which upon examination by a tribunal may lead it to draw adverse inferences.
 - (d) the claim does have merit and cannot said not to have reasonable prospect of success. A tribunal should be mindful to dismiss the claim without first hearing oral evidence of the witnesses.
 - (e) the unfair constructive dismissal complaint is fact sensitive and if the stated breaches are proven, they are sufficient to amount to a fundamental breach of the implied term of trust and confidence.
19. Accordingly, Miss Marquarite-Robinson submitted the application to strike out should be dismissed but if the tribunal is minded to make any order it should be limited to a deposit order.

The legal framework

20. In my deliberations I gave consideration to the legal framework and relevant case law as set out below;
21. Rule 37(1) of the Employment Tribunal (Rules of Procedure) 2013 provides that at any stage of the proceedings, either on its own motion 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 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 either party has been scandalous, unreasonable or vexatious.
22. Rule 37(2) provides 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. Rule 39 provides where at a preliminary hearing, the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (the paying party) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
24. Rule 39(2) requires a Tribunal to make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
25. Under Rule 39(3), the Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
26. Under Rule 39(4), if the paying party fails to pay the deposit by the date specified, the specific allegation or argument to which the deposit order relates shall be struck out.
27. Rule 2 sets out the overriding objective which is to enable Employment Tribunals to deal with cases fairly and justly, which includes ensuring that the parties are on an equal footing.
28. The well-known case of **Anyanwu v South Bank Students Union 2001 IRLR 305** underlined the importance of not striking out claims for an abuse of process except in the most obvious of cases. Discrimination cases are generally fact sensitive and their proper determination is always vital in a plural society.
29. In the case of **Mechkarov v Citibank NA (2016) ICR 121**, the guidance given was that: "(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."
30. Further in a more recent case, the EAT gave guidance in **Cox v Adecco Group UK Limited 2001 ICR 1307** in relation to strike out applications against litigants in person. This case identified the following principles;
 - (1) No-one gains by truly hopeless cases being pursued to a hearing;
 - (2) Strike out is not prohibited in discrimination or whistleblowing cases; but special care must be taken in such cases as it is very rarely appropriate;
 - (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be

appropriate;

- (4) The Claimant's case must ordinarily be taken at its highest;
 - (5) It is necessary to consider, in reasonable detail, what the claims 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;
 - (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;
 - (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;
 - (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;
 - (9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.
31. The guidance from the EAT in *Hasan v Tesco Stores* UKEAT/0098/16 is that the tribunal must undertake a two stage exercise when considering whether to strike out a claim. Firstly, it must consider whether any of the grounds in Rule 37(10) have been made out. If it finds that a ground is made out it must then decide whether to exercise its discretion to strike out a claim.
32. When considering making a deposit order, the case of **Wright v Nipponkoi Insurance Europe Limited** UKEAT/0113/14 is helpful. In this case it was held that, when making deposit orders employment tribunals should stand back and look at the total sum awarded and consider the question of proportionality before finalising the orders made. It was noted in that case that the employment judge did not make the maximum awards that he could have done, but made orders which gave rise to a total sum that seemed proportionate when taking account of the number of allegations to which the orders related and the claimant's means. This was a proportionate view on the totality of the award

and a conclusion that was entirely open to the employment judge as an exercise of his discretion.

Discussion and decision

33. In my deliberation I have taken into account the relevant case law and guidance which requires a cautious approach to striking out claims of discrimination at a preliminary hearing; the submissions made by the parties, and the documents referred to in the bundle.
34. I refuse the respondent's application, as I am not persuaded that the claimant's claim have little or no reasonable prospects of success. I do not make any deposit order either. I have come to this decision based on the reasons set out below;
- (a) Firstly, I do not accept that there has been non-compliance on part of the claimant. I have taken into account the claimant is a litigant in person. She has done her best to provide the dates of the incidents. In her response sent on 5 October 2022, she made it abundantly clear that she could not confirm the dates of the incident as she had no written record and that this information and evidence would be in the work emails which the respondent should have access to. If these emails are still accessible, this information should form part of disclosure process from which the dates should become known.
 - (b) As part of discrimination and harassment complaints, the claimant was required to confirm details of any other employees who were not criticised for her language. At the Preliminary Hearing the claimant had already identified a named comparator and also relied on a hypothetical comparator. I accept the claimant has not expressly stated in her response that she is not able to confirm the required details, which was additional information to the complaint which is already adequately pleaded.
 - (c) Contrary to the assertion made in the respondent representatives correspondence to the tribunal of 3 November 2022 that the respondent "does not know what claims it is facing" (Para 8 above), I am satisfied the respondent does have sufficient details of the complaints as these were discussed and agreed by Employment Judge Eeley at the Preliminary Hearing on 1 September 2022. The complaints were comprehensively detailed in the agreed List of Issues, which were incorporated in the Case Management Order sent to the parties on 11 September 2022.
 - (d) This claim is fact sensitive and there is a dispute on the central facts and whether the claimant was treated differently or subjected to the treatment as alleged. I accept that it is not enough for a claimant to point merely to a difference in treatment, or to rely on bare allegations of discrimination or

harassment. This requires careful analysis and determination by a tribunal once it has heard evidence from the witnesses.

- (e) In considering whether the claimant has made out a prima facie case, it is unusual to find evidence of discrimination. It is therefore necessary to hear all the evidence and allow the tribunal to draw inferences, if appropriate.

- 35. Finally, I consider it necessary to comment on the respondent's point that without the evidence of Mr Yates and Nicole Jones a fair trial is not possible. That may well be the case. However, it cannot be ignored that the respondent first had notice of this claim in a grievance letter sent on 17 September 2021, and then by a Claim Form sent to the respondent in early November 2021. Further, the claimant's claim was discussed in detail at the Preliminary Hearing on 1 September 2022, by which date the respondent was fully aware of the substance of the complaints. Therefore, before the two witnesses left (assuming they left after 1 September 2022) the respondent should have taken appropriate steps to obtain their witness statements and/or their contact details.

- 36. The parties are reminded to comply with the case management orders and that the services of ACAS is available for assistance in any settlement discussions.

Employment Judge Bansal

Date 31 July 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
2 August 2023

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FOR THE TRIBUNAL OFFICE