



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Katherine Raymond

v Hightown Housing Association Ltd

RECORD OF A PUBLIC PRELIMINARY HEARING

Heard at: Watford (in public) **On:** 27 July 2023
Before: Employment Judge Alliott (siting alone)

Appearances

For the Claimant: In person (assisted by Mr Harold Oybonwan, a friend)

For the Respondent: Mr Thomas Westwell (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The respondent's application for strike out orders is dismissed.
2. The claimant's claims under s.44(1)(A) Employment Rights Act 1996 (detriment for leaving or not returning to a place of work in circumstances of danger etc) have little reasonable prospect of success and a deposit order is made in relation to them.

REASONS

1. I ordered this preliminary hearing on 15 May 2023 to consider the respondent's application for a strike out order, a deposit order and the issue of disability.
2. Unfortunately there was not time to deal with the disability issue and consequently that remains to be dealt with at the full merits hearing in May 2024.

The law

3. Rule 37 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations provides that:

“Striking out

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 ... has no reasonable prospect of success;...”

4. Rule 39 of the ET Rules provides as follows:

“Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) 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.

(2) The Tribunal shall 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.

(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.”

Strike out

5. A strike out application must be considered in two stages: The first is to assess whether the specified ground has been established, namely in this case whether the claimant's claim has no reasonable prospect of success; and, if so, the second stage requires the employment tribunal to determine as a matter of discretion whether to strike out the claim: see Hasan v Tesco Stores UK EAT/0098/16.

6. In the well-known case Anyanwu v Southbank Student Union [2001] ICR 391 Lord Steyn stated:-

“Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.”

7. In that and subsequent cases it has been held that it is only in the clearest cases that a strike out order in a discrimination claim is warranted.

8. Particular caution regarding strike out should be exercised where the claimant's first language is not English. In this case that is applicable.

9. Mr Westwell has cited to me the case of Ahir v British Airways [2017] EWCA Civ 1393 indicating, in summary, that there is no absolute bar to a strike out order in discrimination cases and there may be exceptional circumstances where it is warranted.

Deposit order

10. Mr Westwell has cited to me the case of Hemdan v Ishmail [2017] IRLR 228 for the propositions that:
 - 10.1 While the test is “less rigorous” than the test for strike-out nevertheless “there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence”.
 - 10.2 The purpose of a deposit order is “to avoid the opposing party incurring costs, time and anxiety in dealing with a point on its merits that has little reasonable prospect of success”.
11. Once the tribunal concludes that the test is satisfied, it has a discretion whether to make the order. The power is to be exercised “in accordance with the overriding objective, having regard to all the circumstances of the particular case”.
12. I am entitled to look at all the circumstances.

The section 44(1)(A) ERA claim

13. Section 44(1)(A) of the Employment Rights Act 1996 provides, so far as relevant:

“44 Health and safety cases.

 - (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—
 - (a) In circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or
 - (b) In circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.
 - (2) For the purposes of subsection (1A)(b) whether steps which a worker took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.”
14. The claimant’s section 44 claim has arisen as follows:-
 - 14.1 In the first and second claim various facts and matters are alleged and a bare assertion that they amount to a breach of s.44 of the Employment Rights Act is made. None of the facts and matters pleaded in the claim forms appear to relate to circumstances of

danger that are serious and imminent and a refusal of the claimant to return to work.

15. Because of this at the preliminary hearing before Employment Judge Shaw on 9 September 2022 the claimant was required to provide further information of this claim. Employment Judge Shaw stated:-

“Section 44 of the ERA 1996

... the claimant confirmed that she was making a claim that she was subjected to detriment under section 44(1A) of the Employment Rights Act 1996. She has to give further information about that claim and is respectfully invited to consider it very carefully;”

16. The claimant provided the further information in the form of a Scott Schedule. The section 44 claim is contained in section 4. In my judgment the further information does not correctly articulate the potential claim that the claimant is seeking to advance. In discussion with the claimant it would appear that she is contending that the circumstances of danger that were serious and imminent were the respondent inviting the claimant to attend grievance hearings which would aggravate her known depression. She states that she declined to do so and as a result suffered various detriments as set out in the list of issues in section 8.
17. In the consideration of the strike out application I take the claimant’s claim at its highest. It is accepted that the claimant was invited to attend grievance hearings. At its highest, I have to accept that the claimant’s attendance would aggravate her known depression. At its highest, I have to accept that the claimant did refuse to attend and whether or not she was subjected to detriment as a result will be a matter of evidence. Consequently, I cannot conclude that she has no reasonable prospects of success.
18. I now turn to consider whether she has little reasonable prospect of success. In my judgment the claimant does have little reasonable prospect of success in establishing that being invited to attend a grievance hearing constituted circumstances of danger which she reasonably believed to be serious and imminent. Further, in my judgment she has little reasonable prospect of successfully establishing that any such belief was reasonable. Further, in my judgment, she stands little reasonable prospect of establishing a causal link between her refusal to attend grievance meetings and the detriments that she is contending for. In particular, the detriments she is contending for constitute factual allegations in her other claims.
19. Consequently I have concluded that the claimant has little reasonable prospect of succeeding on her section 44 claims and, in the exercise of my discretion, I consider it to be just and equitable to make a deposit order.

The claimant’s means

**Case Numbers: 3314692/2021, 3314701/2021
3301210/2022 and 3304868/2023**

20. The claimant is currently a full-time student and receives student finance three times a year in the sum of £4,530.24, ie £13,590 per annum or £1,132.50 per month.
21. The claimant's most significant outgoings are £279 per month on her car and £53 per month on her mobile. The car has in fact broken down but she still has to pay the finance on it. Those two items reduce her disposable monthly income to £800.50.
22. The claimant pays £830 in rent but receives Universal Credit in the sum of £670 towards that. The claimant's eldest child contributes £150 towards her rent and consequently the claimant does not really have any housing expenses.
23. Obviously the claimant has utility bills and needs to live. I have no doubt that the claimant's residual monthly income is taken up with basic essential expenditure.
24. Nevertheless, in my judgment the claimant should be able to make saving of approximately £10 per week for five weeks. The claimant will have at least six weeks in order to save up for the deposit.
25. In my judgment the claimant can afford £50 and it is not a sum that it is impossible for her to raise. Accordingly the deposit order will be in the sum of £50.

Case Management discussion

26. On 27 April 2023 the claimant issued a fourth claim, number 3304868/2023. A significant amount of time today has been spent on defining the issues in that claim so that they can be included in the list of issues on the other three claims. Both parties agree that the fourth claim should be consolidated with the other three claims and heard at the same time in May 2024.
27. When discussing the reasonable adjustments claim I expressed a preliminary view that the alleged PCPs in 3.2.2 and 3.2.4 of the current list of issues did not appear to be to me to be PCPs. In the light of that observation the claimant withdrew them as PCPs and consequently I direct that they be removed from the list of issues.
28. The following case management orders were made.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

Consolidation

29. Case number 3304868/2023 is consolidated with and to be heard at the same time as case numbers 3314692/2021, 3314701/2021 and 3301210/2022.

Finalised list of issues

30. The respondent is to finalise the list of issues and send a copy to the claimant and the tribunal by **4pm, 24 August 2023**.

Amended response

31. The respondent has permission to file and serve an amended response in light of the list of issues as now defined in the fourth claim. Any such amended response is to be sent to the claimant and the tribunal by **4pm, 24 August 2023**.

Updated schedule of loss

32. The claimant is to provide to the respondent by **4pm, 24 August 2023** an updated and correctly calculated schedule of loss. This should set out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant's complaints and how the amounts have been calculated.
33. If any part of the claimant's claim relates to dismissal and includes a claim for earnings lost because of dismissal, the Schedule of Loss must include the following information: whether the claimant has obtained alternative employment and if so when and what; how much money the claimant has earned since dismissal and how it was earned; full details of social security benefits received as a result of dismissal.

Other matters

34. The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
35. Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
36. The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
37. **Public access to employment tribunal decisions**
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.
38. **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal**

offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

39. Under rule 6, if any of the above orders 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.

Employment Judge Alliot

Date: 11 August 2023.....

Sent to the parties on: .15 August 2023..

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For the Tribunal Office