



THE EMPLOYMENT TRIBUNALS

Claimant Mr D McMahon

Respondents (1) Romano Dawson Limited t/a Ted Staffing
(2) Philip Morris Limited

Heard at Newcastle upon Tyne Hearing Centre (via CVP video link)

On 14 August 2023

Before Employment Judge Langridge

Representation:

Claimant In person

Respondents (1) Ms E Evans-Jarvis, Solicitor
(2) Mr C MacNaughton, Solicitor

JUDGMENT

Rule 37 Employment Tribunal Rules of Procedure 2013

- (1) The claimant's claims against the 1st respondent are struck out on the grounds that they have no reasonable prospect of success and for non-compliance with Tribunal orders.
- (2) The claimant's claims against the 2nd respondent are struck out on the grounds that they have no reasonable prospect of success and for non-compliance with Tribunal orders.

REASONS

1. The claimant brought claims under the above case numbers against the agency which hired him to provide services (the 1st respondent) and the agency's client (the 2nd respondent). The claims arose from the same facts and were directed to be heard together. The primary claim was for disability discrimination, based on the termination of his contract with the 1st respondent after approximately two months, during most of which time the claimant was absent on sick leave. He had periods of sickness caused twice by Covid-19 and once by a mouth infection.
2. The disabilities on which the claimant relies are facial tumours (relating to glands) and a bad back which occasionally means he is unable to work for a week or two. The respondents do not concede that the claimant is a disabled person within the meaning of section 6 Equality Act 2010, and the provision of both medical records and disability impact statement was an important preliminary stage which needed to be progressed.
3. The claimant has not alleged that his sickness absences were for disability-related reasons, but claimed that both respondents knew about his conditions and that this was the reason for his dismissal. Initially the claimant brought a holiday pay claim, the basis for which was not set out, and he withdrew this at a private preliminary hearing before Judge Jeram on 20 March 2023. The only remaining claim was for non-payment of statutory sick pay, the factual and legal basis for which was not set out. Today the claimant acknowledged that it was probably not for the Tribunal to deal with this, though he was not willing to withdraw it.
4. The purpose of today's public preliminary hearing was to deal with an application by both respondents to strike out the claims under Rule 37(1)(a) (no reasonable prospect of success) and/or Rule 37(1)(c) (non compliance with Tribunal orders). The 1st respondent applied originally to strike out the claims on 4 May 2023, at a time when the claimant had not complied with the case management orders made at the 20 March preliminary hearing. The claimant was ordered to provide a schedule of loss by 14 April, and by the same date medical information and GP records relating to his medical conditions.
5. The claimant has made no attempt to comply with those orders. No disability impact statement has been supplied, explaining how the medical conditions qualify as disabilities, for example by reference to their impact on his day to day activities. Although the claimant asserts that he has had his GP records for some time, none have been produced to either of the respondents.
6. Before the 20 March hearing the claimant wrote to the Tribunal saying he was having difficulty with his laptop and needed more time to produce his medical records in paper form. At today's hearing he claimed that the 1st respondent's representative had not complied with a direction from the Tribunal to supply him with a postal address. However, when extending his time to comply with the order, by a letter dated 13 June, the Tribunal explained to the claimant that the respondents' postal addresses were stated on their Responses to the claim. By that same letter the claimant was given until 16 June to comply with the orders for production of his his medical records, but did not do so. The 1st respondent

therefore wrote on 21 June to renew its application to strike out the claims, and the 2nd respondent then wrote to confirm it was adopting that same application on the same grounds.

7. Two months have elapsed since the Tribunal's letter of 13 June and as at today's hearing the claimant has still taken no steps to provide his medical records, or to write to the parties or the Tribunal explaining that he was having any difficulty. This was particularly surprising given that he understood from the application made as long ago as 4 May that his claims were potentially going to be struck out, meaning he would be unable to pursue them any further.
8. The respondents made their submissions on the applications, after which the claimant was given the opportunity to reply. In doing so, he was unable to provide any explanation to the Tribunal about why he had not complied. His only point was to repeatedly criticise the 1st respondent's representatives for not communicating a postal address to him. He was unable to explain why he had not dealt with the Tribunal's 13 June letter directing him to where he could find that information.
9. In the course of the claimant's submissions I took some care to explore some of the key legal and factual issues in the claim with him, and to invite him to identify the basis on which his claims have been made. We discussed the fact that disability is in dispute, as is the respondent's knowledge of any disability. I pointed out that the definition of disability is a legal one. I outlined that he would be expected to bring evidence of primary facts supporting his discrimination claim, if he was to persuade the Tribunal that the reason for dismissal related to disability. When asked why the claimant felt his dismissal was because of disability, he confirmed what he had told EJ Jeram on 20 March that he "did not know" why his contract was terminated and he was just told that he was no longer required. He suggested that a message sent via WhatsApp from the 1st respondent told him it was the 2nd respondent who no longer required his services. This was denied by both respondents today, neither of whom has seen any such WhatsApp message. It was striking that the claimant, even when invited to do so, was again unable to assist the Tribunal by identifying any primary facts on which he relies. At the 20 March hearing EJ Jeram had already explained some of the difficulties with the claimant's case, and nearly five months later no further clarification was forthcoming.
10. The claimant has not taken on board any of the comments made by EJ Jeram about the weaknesses in his case. It was explained to him then that the Tribunal does not conduct an inquiry into the merits of a case but requires a claimant to produce evidence. During today's hearing, despite the importance of identifying evidence of primary facts being explained again, the claimant was unable to point to any such evidence. On 20 March he had insisted that he had evidence to support his case, but did not identify then or today what that evidence was, and he has taken no steps to produce it.
11. On the face of the pleaded case, the discussions at the two preliminary hearings, and the few documents presented today, it seems that at its best the claimant's discrimination case is that he does not know why his contract was terminated, except that he "assumed" that the 2nd respondent knew about his disability and instructed the 1st respondent to dismiss him. However, he did not dispute that he

had no contractual or other relationship with the 2nd respondent, and could point to no evidence which, if explored at a full hearing, would support his arguments.

12. Rule 37(1)(a) of the Tribunal Rules of Procedure 2013 permits a Tribunal to strike out a claim which has no reasonable prospect of success. Obstacles in this case include the claimant's status as a disabled person within the meaning of section 6 Equality Act 2010, whether either of the respondents had knowledge of this (which had not been asserted previously), and the fact that the claimant's several sickness absences at the beginning of his short employment were not disability-related. The respondents have also pleaded – without any dispute from the claimant – that when he applied for the job he completed paperwork stating that he had no underlying health issues.
13. Rule 37(1)(c) allows a Tribunal to strike out a claim for non-compliance with orders. This is not a step to be taken lightly, as it is often possible to rectify problems by making further orders such as extending time, in order to progress the claim. Here, the claimant has made no effort whatsoever to provide his medical information, even though he says he has possession of his GP records. Even if it is correct that he did not know how to send them to the correct postal address, the Tribunal made that clear to him in its letter of 13 June. It was still not done in the face of the strike out applications made on 4 May and renewed on 21 June. I do not accept that this is a true or justified explanation in any event. The claimant told me today that he had done an internet search about striking out claims and read some information about the 1st respondent's representatives. He was perfectly capable of looking up their address online, and gave no explanation at all for not checking the responses (forms ET3) as directed by the Tribunal two months ago.
14. In reaching today's decision I was mindful of the importance of not conducting a mini trial on issues of fact, and considered the guidance in some key authorities on striking out, especially in the case of discrimination claims. I considered N Glamorgan NHS Trust v Ezsias [2007] IRLR 603 and Mechkarov v Citibank 2016 ICR 1121, as well as some more general principles on striking out set out in Cox v Adecco UKEAT/0339/19/AT. I also took into account the overriding objective, which requires fairness between the parties and a proportionate approach to the claims.
15. I have considered whether the position might be rectified by making further orders, but I have come to the conclusion that this would be fruitless. The claimant has demonstrated no intention of providing his medical or other evidence. I am not confident that he would rectify the position after several months of failing to do so. Underpinning this non-compliance is a discrimination claim which appears to have no merit whatsoever.
16. Following Ezsias, I accept that a Tribunal should not be quick to strike out discrimination claims which generally need to be decided on their merits based on evidence at a final hearing. In this case, however, the claimant has put forward not a single cogent proposition that I can see needs to be resolved through evidence in the future. His answers to my questions today were not focused on the need to identify any factual or legal basis for his claims, but instead he deflected the arguments by criticising the 1st respondent's conduct as an excuse for his own non-compliance. I note also that the claimant brought claims for holiday pay and

statutory sick pay which had no proper factual or legal basis. He has simply not addressed his mind to any aspects of the merits of his claim.

17. Taking account the decision in Citibank, I accept that a strike out order can be draconian in discrimination cases, and only in the clearest circumstances should one be made. Without conducting a mini trial, I believe that there are no issues of fact apparent today which warrant this case going forward to a full hearing to be resolved on oral or documentary evidence.
18. In Cox it was made clear that if a case has no reasonable prospects of success it should be struck out. The Tribunal's time and resources should not be spent dealing with hopeless cases, nor should the respondents to be put to that trouble and expense. The EAT said that a Tribunal should consider in reasonable detail what the claims and issues are and I believe that I carried out this exercise today, by reference to the pleadings, the other documents provided to me and the discussions with the parties.
19. In the case of the 1st respondent, relying on the first and second grounds together or separately, I am satisfied that the claims should be struck out.
20. For the same reasons I conclude that the claims against the 2nd respondent should be struck out, with the additional feature that this claim was always hopeless because the claimant had no contractual or other employment relationship with the 2nd respondent.

SE Langridge
Employment Judge SE Langridge

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 15 August 2023**

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