Case No: 1303616/2019
& 1303598/2019

EMPLOYMENT TRIBUNALS

Claimant: Mrs Yazmeen Azfal

Respondent: South And City College Birmingham

Heard at: **Midlands West Employment Tribunal**

On: **26th June 2023**

Before: **EJ Murdin (sitting alone)**

Representation

Claimant: Mr Wilson (Counsel)
Respondent: Mr Jarvis (Counsel)

JUDGMENT

1. Save as is set out below, the Respondent's applications dated 14th September 2022 for a strike out of the claims, for a deposit order, and for costs are refused.

2. The Claimant is refused permission to pursue the allegations contained in paragraphs 4.2.1 and 4.2.2 of the Re-Amended Particulars of Claim.

3. Permission to the Respondent to file and serve addendum statements by no later than 4pm 19th September 2023.

4. All subsequent hearings, including the final hearing, are to be by way of CVP.

5. The matter be relisted for a further CMPH with a time estimate of 1 hour via CVP to ensure that the matter is ready for trial.

WRITTEN REASONS

6. By way of an application dated 14th September 2022, which can be found at page 302 of the bundle, the Respondent applies to strike out the claim pursuant to Rule 37 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Chronology

7. This claim has a lengthy history. By way of an ET1 received on 26th May 2019, the Claimant brought a number of claims against South & City College Birmingham, which included claims for discrimination on the grounds of sex, disability and religion or belief, as well as claims for unpaid holiday pay and arrears of wages.

8. Those claims were resisted by way of an ET3 received on 28th October 2019, in which it was averred, inter alia, that:

   (i) the claims were unparticularised;
   (ii) alternatively, the claims were denied.

9. There has been a number of preliminary hearings and other noteworthy Tribunal interaction with the parties as follows:

   (i) on **4th December 2019**, EJ Perry required the Claimant to provide further and better particulars of her claims;

   (ii) on **8th January 2020**, at the request of the Claimant, EJ Butler postponed the hearing that had been listed for 9th January 2020 to 29th May 2020, to enable the Claimant to obtain legal representation;

(iii) on **29th May 2020,** EJ Richardson conducted a preliminary hearing, at which it was recorded that:

(a) the Claimant had not complied with the Order of EJ Perry;
(b) the Claimant did not have a legal representative, despite having previously appointed 2 separate sets of advisors;
(c) the Respondent sought an Unless Order in respect of the Order of EJ Perry;
(d) EJ Richardson explained to the Claimant that an ongoing failure to comply with Directions risked her claims being struck out;

Thereafter, the hearing was adjourned to allow the Claimant to comply with the Respondent's request, and the Tribunal's Order.

(iv) on **5th August 2020,** EJ Richardson again conducted a preliminary hearing. The Claimant was assisted by her sister, but had not managed to comply with either previous Tribunal Order.

(v) on **30th September 2020** EJ Algazy KC listed the matter for a final hearing lasting 20 days. The Claimant had complied with some of the previous directions, and a List of Issues was consequently produced. The final hearing was due to begin on 11th October 2021.

(vi) on **11th December 2020**, EJ Battisby varied the dates of some directions.

(vii) on **a date which cannot be deciphered**, the Claimant issued a second Claim, which was defended by an undated Response which can be found at p112 of the Bundle.

(viii) on **12th May 2021,** EJ Broughton ordered that the 2 claims should be consolidated.

(ix) on **30th July 2021,** EJ Meichen undertook a 4th preliminary hearing, a hearing which had initially been listed for ADR. He made directions "to get the case back on track."

(x) on **28th September 2021,** EJ Lloyd made further, updated directions.

(xi) on **11th – 18th October 2021**, EJ Gaskell & members began the final hearing. After 6 days, the matter was adjourned part-heard as the Claimant was unwell, with a listing to recommence on 8th February 2022.

(xii) on **3rd February 2022,** EJ Gaskell postponed that relisted hearing, following the submission by the Claimant of a medical report indicating that she would remain unfit to attend Tribunal for a period of 3 months.

(xiii) on **25th March 2022,** EJ Gaskell conducted the 6th preliminary hearing. The part-heard final hearing was relisted for January 2023.

(xiv) on **7th June 2022,** EJ Gaskell conducted a 7th preliminary hearing, at which Mr Horan of Counsel represented the Claimant. He informed the Tribunal that the Claimant would be making an application to amend her Claim Form and witness statement.

(xv) on **13th September 2022**, and again on **22nd September 2022,** EJ Gaskell refused the Claimant's requests to adjourn the hearing listed on 23rd September 2022.

(xvi) on **23rd September 2022,** EJ Gaskell listed the matter for an open preliminary hearing to determine the Respondent's application for a strike out of the claim. The matter had been listed to determine the

Claimant's applications to amend her claim form and her witness statement; however, the Claimant had not complied with the directions in that regard due to her ill-health. The timetable was amended to allow the Claimant to make those applications.

(xvii) on **21st November 2022**, EJ Gaskell refused the Claimant's application for a postponement of the open preliminary hearing.

(xviii) on **22nd November 2022,** EJ Hindmarch relisted the final hearing, and made further directions following the 9th preliminary hearing.

(xix) on **18th January 2023,** EJ Perry refused the Claimant's application for an adjournement

(xix) on **24th January 2023,** EJ Flood & 2 members adjourned the relisted final hearing, which had been due to start on that date.

10. The matter came before me on 26th June 2023 to determine the Respondent's applications for a strike out of the claims, alternatively deposit Orders and a costs Order.

The parties' positions

11. The Respondent, by way of a skeleton argument dated 24th May 2023 made the following helpful points, which I have summarised:

(i) A fair trial is no longer possible; some of Claimant's case is so old that the Respondent can only address it by examination of documents, if at all; the Respondent has lost almost all of its witnesses, and the Claimant may be unfit to proceed.

(ii) Several of the Claimant's claims remain incomprehensible.

(iii) The Claimant has caused significant wasted costs by her approach.

12. The Respondent reminded me of the tests set out in Rule 37, Rule 39, and Rules 75-79, and relied upon the authorities set out in the skeleton argument. I have read and considered those authorities.

13. The Respondent also reminded me that there was an issue in respect of 2 allegations said to have been reintroduced in the Re-Amended Particulars of Claim at p376 – 383, namely the allegations at 4.2.1 and 4.2.2. Those allegations are objected to by the Respondent, on the basis that they were potentially out of time, and/or in breach of the Order dated 22nd November 2022.

14. In oral submissions, the Respondent accepted that many of the delays had been caused by the Claimant's significant ill-health. The Respondent further accepted that the medical evidence showed the Claimant was now well enough to proceed. The issue in respect of the cost of the delays was not just the cause, which is accepted to be the Claimant's illness, but rather the lateness of the applications for adjournments, and consequent lost preparation time.

15. The application for a deposit Order was withdrawn save in respect of the claims for unlawful deductions, and various minor pleading points.

16. In response, the Claimant relied on their skeleton argument, which it was accepted was served late, through no fault of the Claimant. The Claimant relied on the authority of *Malik v Birmingham City Council (2019) UKEAT/0027/19/BA*, which it was agreed set out the correct approach to determinations of this kind.

17. It is accepted by the Claimant that the allegations at 4.2.1 and 4.2.2 do not appear in the Amended Particulars of Claim, and are therefore beyond the scope of the Order of EJ Hindmarsh. Given that acceptance, and the valid objections raised by the Respondent, I refuse the Claimant permission to pursue the allegations contained in paragraphs 4.2.1 and 4.2.2 of the Re-

Amended Particulars of Claim. I also note that the allegation of failing to make reasonable adjustments contained at paragraph 2.1.1 of the Amended Particulars of Claim, and relating back to 2014, is withdrawn.

18. However, and with those exceptions, I agree with the Claimant that the remainder of the Re-Amended Particulars of Claim falls within the parameters of the Order of EJ Hindmarsh dated 22nd November 2022. I have carefully compared the Amended Particulars of Claim and the Re-amended Particulars of Claim, and have concluded that, with the exceptions of the above allegations, the Re-Amended Particulars of Claim contains clarifications and/or corrections of the Amended Particulars of Claim and therefore shall be allowed to stand.

19. In respect of the applications for strike-out and/or deposit Orders, the Claimant helpfully reminded that of the dicta in *Malik* that:

At paragraph 41 Choudhury J stated:

"In Mechkarov, it was said that the proper approach to be taken in a strike out application in a discrimination case is 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."

20. The Claimant submits that it cannot be realistically said that there are no reasonable prospects of success for the purposes of s37 or little reasonable

prospect of success for the purposes of s39. I need to consider the entirety of the evidence rather than simply the pleadings.

21. Furthermore, and in respect of s37(b) and/or 37(c), the Claimant submits that the vast majority of delays have been caused by the Claimant's significant ill-health and her status as a litigant-in-person for much of this litigation. The matter is much clearer than it previously was, it is almost trial-ready, and the medical evidence is that the Claimant will be able to attend, albeit with some reasonable adjustments.

22. The Claimant relies on the same arguments to seek to defend the application for costs.

Conclusion

23. I agree with the Claimant that a great deal of progress has been made in this litigation. It is now in a manageable state, and is almost ready for trial. I have to take care to look at the litigation as it now is, rather than reach a conclusion based on how the claim has previously been presented.

24. It seems to me that, based upon the Re-Amended Particulars of Claim (subject to my remarks at paragraph 15 above) and the evidence in support, the criteria within Rule 37(a) are not made out. I have reminded myself of the test in *Malik* set out above, in particular: taking the Claimant's case at its highest, avoiding determinations of fact without hearing oral evidence, and only striking out a discrimination claim in the clearest case.

25. To my mind, this is not a case where prospects are sufficiently low so as to meet that test. The Re-Amended Particulars of Claim sets out comprehensible claims, which are capable of being supported by the evidence, when taken at its height. It will of course, be a matter for the Tribunal hearing the trial to determine whether the allegations are made out,

but the Respondent's application for strike out pursuant to Rule 37(a) is therefore refused.

26. Furthermore, and in respect of the application under Rule 37(b), I reject the assertion that the Claimant has conducted these proceedings in a manner which has been scandalous, unreasonable or vexatious. Whilst the history of this litigation has been lengthy and troubled, that fact reflects the difficulties endured by a Claimant, who has at times been acting in person, and has been significantly unwell. It is right that applications for adjournments could and should have been made earlier than they were. However, that criticism is made with the benefit of hindsight, and reflects an understanding of legal proceedings which the Claimant does not share. The Respondent's application for strike out pursuant to Rule 37(b) is refused.

27. Furthermore, and in respect of the application under Rule 37(c), that application is also rejected for the reasons stated above in paragraph 25 of this judgment. Whilst it is clear that there have been breaches, I am satisfied that those breaches have been caused by a combination of the Claimant's ill-health and her difficulties as a sometime litigant-in-person.

28. In respect of the application under Rule 37(d), namely that this litigation has not been actively pursued, I reject that application. Whilst it is clear that the Claimant has struggled at times, for understandable reasons, it is also clear from the very many hearings, and the paperwork that has been generated by these proceedings, that they have been pursued with the vigour required to satisfy the test.

29. The Respondent concentrated most of their fire within their application on the test under Rule 37(e). Whilst it was helpfully and fairly conceded during submissions that the medical evidence now supported the Claimant being able to attend a final hearing (subject to certain reasonable adjustments), the Respondent relied on its own difficulties in respect of witnesses.

30. The Respondent has submitted a list of witnesses at paragraph 25 of its skeleton argument who, for various reasons, are no longer available. They now wish to rely on 2 witnesses, whose unavailability is unclear. They are

also disadvantaged as the Claimant's statement has only just been served, and is substantial.

31. To my mind, the balance between the parties is best struck in the following ways:

    (a) giving the Respondent permission to file and serve updated statements;
    (b) allowing the hearing to take place via CVP, which would both ease the Respondent's difficulties in securing witness attendance and ease some of the Claimant's concerns.

    Whilst those adjustments do not fully alleviate the Respondent's concerns as to their witnesses who have died or are untraceable, I have concluded that those adjustments will allow a fair trial to take place, by ensuring that the Respondent has the greatest chance of presenting evidence with which to rebut the claims.

32. In respect of the Respondent's application for a deposit Order, which was significantly reduced in scope to encompass only the claims for unlawful deductions, and various minor pleading points, I reject that application.

33. For the reasons stated above, I do not consider that the claim for unlawful deductions and/or the other minor aspects of the Re-Amended Particulars of Claim has little reasonable prospect of success for the purposes of Rule 39. The claim is set out in a straightforward manner at paragraph 2.4 of the Re-Amended Particulars of Claim, and is dealt with in the Schedule and Counter-Schedule of Loss. The dates and period over which it is alleged that there was a failure to pay the Claimant the amounts legally due to her

as wages were set out at Annex B to the Case Management Orders made by EJ Algazy QC on 30th September 2020.

34. It will be a matter for the Tribunal at trial to determine the overall merits of the claim, but I am satisfied that it has sufficient prospect of success not to require a deposit Order. Furthermore, and in rejecting that application, I also take into account the Claimant's ill-health and the fact that she has at times, represented herself.

35. The final application by the Respondent is for costs under Rule 76. In particular, the Respondent helpfully clarified that this application related to the applications for adjournments, which the Respondent says could have been made earlier. The Claimant relied on the same arguments as set out above in respect of the Respondent's applications for a strike out and/or deposit Order.

36. I have reminded myself of the tests set out in Rule 76, and on balance have determined that the application is refused. Whilst there has been some significant delay in this matter, and hearings have been adjourned, some at the last moment, I cannot ignore the fact that the Claimant, as I have stated above, has suffered with a significant illness, which has directly impacted on her ability to pursue this claim. It is also relevant that she has represented herself for long periods of this litigation. Those, to my mind, are the 2 determinative factors, in my refusing this application for costs.

37. The final determination for the Tribunal to make relates to the Claimant's request for reasonable adjustments in respect of future hearings. I have already acceded to her request for hearings to be via CVP, and I also agree that an increased number of breaks should be allowed. Neither of those requests was opposed.

38. The Claimant's final request, which is opposed, is to have sight of the Respondent's questions in cross-examination in advance. She says this

would assist her in reducing her anxiety, whereas the Respondent avers that, even if it were possible, which is not conceded, it would significantly prejudice the Respondent, as the Claimant would effectively be able to prepare her answers in advance.

39. I agree with the Respondent. Whilst the Tribunal has an obligation, and indeed a desire, to ensure that attendance at Tribunal, and in particular the giving of evidence is as painless an experience as is reasonably practicable, particular where witnesses have illnesses which necessitate reasonable adjustments, that obligation must be balanced by the requirement for both parties to be on an equal footing, and for there to be a fair trial.

40. In my view, the prior provision of questions to be used in cross-examination would significantly prejudice the Respondent in a number of ways: firstly, by unfairly restricting their cross-examination, which is not always easy to predict, and can frequently change direction according to witnesses' replies to questions; secondly, by affording the Claimant a significant advantage in comparison to the Respondent's witnesses, in that she would be able to prepare her answers to the questions.

41. For those reasons, whilst I am content for future hearings to be via CVP with additional breaks, I refuse the Claimant's request to be provided with the questions to be used in cross-examination in advance.

42. Given the complexity and history of this matter, I have made 2 further directions: firstly, that the Respondent has permission to respond to the Claimant's witness statement; secondly, I have listed the matter for a further PCMH, to ensure that the matter is entirely trial-ready, and to allow the parties to raise any further preliminary issues at that stage. That should ensure that there are no further delays, and no further adjournments.

Employment Judge Murdin

23rd August 2023

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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