



EMPLOYMENT TRIBUNALS

Claimant Donna Harding
Represented by in person

Respondents St George's University Hospitals NHS
Foundation Trust
Represented by Ms E Misra KC (counsel)

Before: **Employment Judge Cheetham KC**

REASONS

1. Following a hearing on 4 April 2023, this claim was struck out as having no reasonable prospects of success. The judgment was signed on 6 April 2023, but not sent out to the parties until 26 June 2023. Within 14 days of receipt of that judgment, the Claimant sought these written reasons.
2. Before setting out the reasons that were given orally at the hearing, there are four points to make.
 - (i) The Claimant has brought 2 claims: no. 2301827/2020 and no. 2301035/2021. It is the second claim that has been struck out. The first claim is listed for an 8 day hearing due to commence on 11 September and is unaffected by this Judgment. The two claims have not been consolidated.
 - (ii) By an email dated 7 July 2023, the Claimant raised a number of questions about the judgment and what she says she was told by the Judge and asked for these questions to be answered in the written reasons. The Tribunal cannot enter into correspondence about a judgment and these Reasons are simply a written record of the reasons given orally at the end of the hearing.
 - (iii) The Claimant has also applied separately for the hearing in the first claim to be adjourned, but that will be dealt with separately.

- (iv) There is also an outstanding costs application by the Respondent in respect of this judgment, which will also be dealt with separately.
3. By a letter dated 28 February 2022, the Tribunal notified the Claimant that it was considering striking out case no. 2301035/2021. The reason for this was stated as follows: *"It has no reasonable prospect of success because you remain employed and your claim relates to dismissal and redundancy pay."*
 4. **Findings of fact.** The Claimant began working for the Respondent as an Employee Relations Adviser on a fixed term basis on 18 April 2017 and was subsequently made a permanent employee.
 5. The Respondent underwent a business restructuring exercise of its HR Service Delivery/Workforce teams in May 2020 and, in June 2020, it was confirmed to the Claimant that her role, which was then a band 7 Senior ER Adviser, would be disestablished and that the Respondent would seek alternative employment for her.
 6. Meanwhile, the Claimant had brought her first claim to the Tribunal on 6 May 2020, complaining of direct race discrimination and victimisation and a failure to make reasonable adjustments (i.e. claim no. 2301827/2020).
 7. The Claimant was offered a band 6 HR Advisor role in the new structure, which came with a year's pay protection, after which time her salary would drop to a band 6. The Claimant was unhappy with this and raised an internal grievance. On 28 August 2020, she stated that the band 6 role was not what she considered to be suitable alternative employment and that she would *"work to the new terms and conditions 'under protest'"*.
 8. There is no need to set out the discussions and correspondence that led, on 27 May 2021, to the Claimant being formally dismissed with effect from 22 July 2021 and offered immediate re-employment from 23 July 2021. She then continued to work for the Respondent up until September 2021, when she left to take up a role with another NHS organisation. Her continuous employment with the Respondent was therefore not broken.
 9. Meanwhile, the Claimant had presented her second claim to the Tribunal on 16 March 2021, which is a claim for unfair dismissal and a redundancy payment.
 10. **Submissions.** Counsel for the Respondent, Ms Misra KC, pointed out that the Claimant was employed by the Respondent when she presented this second claim and was not under notice of dismissal at that time either. She submitted that neither a claim for unfair dismissal brought under Employment Rights Act 1996 s.94, nor a claim for a redundancy payment under s.135 is sustainable unless there has been a dismissal.

11. Ms Misra noted that in her ET1, the Claimant considered that her employment was continuing at the time of presentation of her second claim (see box 5.1), but nonetheless believed that she had been dismissed.
12. For completeness, counsel submitted that **Hogg v Dover College** [1990] ICR 39 is authority for the proposition that a direct dismissal for the purposes of s.95(1)(a) of the 1996 Act can occur where an employer unilaterally imposes different terms of employment on an employee which means that the old or existing contract is effectively withdrawn. That is a matter of fact and degree in every case, but it does not apply here, where:
 - (i) the context is a business reorganisation and redundancy consultation;
 - (ii) the Respondent cannot be (and has not been) described as withdrawing the Claimant's contract;
 - (iii) the Claimant was offered pay protection for a year; and
 - (iv) she continued to work in the band 6 role and remained in role up until the termination of her employment in September 2021 following her resignation.
13. Accordingly, Ms Misra submitted, the claims for unfair dismissal (however put) and for a redundancy payment are fundamentally misconceived and ought to be struck out as having no reasonable prospects of success. She referred to the useful summary of the legal principles summarised by HHJ Tayler in **Cox v Adecco Group** [2021] ICR 1307 (EAT).
14. The Claimant submitted that her dismissal occurred before March 2021 and that it could arise – as in this case – where an employee is demoted or their work changed significantly. She said that, actually, her dismissal occurred in “real terms” in June 2020, when the status of her role was diminished and she provided a list of reasons why she felt she had been unfairly treated. However, in her submissions, she was unable to refute the fundamental difficulty in her claim, which is that she was employed at the date she claimed unfair dismissal.
15. **The law.** In *Cox*, the EAT summarised the guidance from a number of authorities as follows:
 - (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 especial 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.

16. **Conclusions.** Without any doubt at all, as at the date when this claim was submitted to the Tribunal, the Claimant remained in employment. She had not been dismissed, either through redundancy or otherwise and she had not resigned.
17. The Claimant refers to changes in the level of her work and to her demotion, but this is not a case where she can claim dismissal as a result of unilateral imposition of different terms, such that her old contract was withdrawn. It was a business reorganisation and the Respondent did not withdraw her contract. Instead it offered her pay protection and she continued to work in the band 6 role. In the absence of any dismissal, her claim for unfair dismissal and a redundancy payment has no prospect of success and must be struck out.
18. For the avoidance of doubt, this does not affect the first claim. The two claims have not been consolidated and, as this second claim will now be struck out, the issues in this second claim will not be heard in the hearing of case no. 2301827/2020.

Employment Judge S Cheetham KC
Dated: 01 August 2023